



**Oyoo & 7 others v Oyoo & 6 others (Environmental and Land Originating Summons 37 of 2020) [2024] KEELC 7008 (KLR) (24 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 7008 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 37 OF 2020  
SO OKONG'O, J  
OCTOBER 24, 2024**

**BETWEEN**

- THOMAS OCHELE OYOO ..... 1<sup>ST</sup> APPLICANT**
- KEPHAS OKINYI OYOO ..... 2<sup>ND</sup> APPLICANT**
- SAMSON ODOYO OYOO ..... 3<sup>RD</sup> APPLICANT**
- LABAN OMBECH OYOO ..... 4<sup>TH</sup> APPLICANT**
- MARTIN OMONDI OYOO ..... 5<sup>TH</sup> APPLICANT**
- NASHON OKWAMA OYOO ..... 6<sup>TH</sup> APPLICANT**
- STEVEN OJWANG OYOO ..... 7<sup>TH</sup> APPLICANT**
- JAELE AUMA OYOO ..... 8<sup>TH</sup> APPLICANT**

**AND**

- ROBERT OLANG OYOO ..... 1<sup>ST</sup> RESPONDENT**
- JERIM OTIENO OYOO ..... 2<sup>ND</sup> RESPONDENT**
- CLAUDIUS MATENGO OYOO ..... 3<sup>RD</sup> RESPONDENT**
- CALEB OCHIENG OYOO ..... 4<sup>TH</sup> RESPONDENT**
- ELLY OKOTH OYOO ..... 5<sup>TH</sup> RESPONDENT**
- GLADIS MIGEGE OYOO ..... 6<sup>TH</sup> RESPONDENT**
- JOYCE ATIENO OYOO ..... 7<sup>TH</sup> RESPONDENT**



## JUDGMENT

1. The Applicants instituted this suit by way of Originating Summons dated 20<sup>th</sup> May 2020. The Applicants claimed to be in adverse possession of all those parcels of land known as Kisumu/Kabodho West/ 2266, 2273, 2282, 2265 and 1227 (hereinafter together referred to as “the suit properties” and individually as Plot Nos. 2266, 2273, 2282, 2265 and 1227 respectively). In the alternative, the Applicants claimed that the said parcels of land were being held by the registered owners thereof in trust for them. In their Originating Summons, the Applicants sought the following orders;
  1. A declaration that the Applicants have acquired an interest by way of adverse possession in the suit properties and are entitled to the suit properties or the subsequent subdivisions thereof if any.
  2. In the alternative, a declaration that the suit properties were held in trust for the family and therefore the Applicants were entitled to inherit a portion of the suit properties.
  3. An order that both the Applicants and the Respondents be registered as the owners of the suit properties,
  4. The costs of the application.
2. The Originating Summons application was based on the grounds that the Applicants were the sons of Jeconia Oyoo Andere (deceased) (hereinafter referred to only as “the deceased” where the context so permits) who had two wives with whom he had 15 sons and 3 daughters. That all the deceased’s children were adults and had families of their own. That the suit properties were family land, the deceased having inherited the same from his forefathers.
3. The Applicants averred that a mistake occurred during land demarcation and the Respondents were taking advantage of the same to disinherit the Applicants who were their brothers. The Applicants averred that the Respondents connived and started subdividing and sharing the suit properties among themselves. The Applicants averred that they had had uninterrupted occupation of the suit properties for over 50 years and had even buried their kinsmen on the properties. The Applicants averred that the Respondents had illegally transferred the suit properties into their names and were even sharing the same amongst themselves without taking out valid letters of administration in respect of the estate of the deceased and/or involving all the beneficiaries of the deceased’s estate.
4. The Application was supported by the affidavit of the 1<sup>st</sup> Applicant, Thomas Ochele Oyoo sworn on 20<sup>th</sup> May 2020. He stated that he was the son of the deceased who died on 12<sup>th</sup> October 2016 aged 92 years and left behind two widows, 15 sons and 3 daughters. That the deceased was the owner of the suit properties some of which he kept for himself while others he gave to his children and widows.
5. The 1<sup>st</sup> Applicant stated that the Respondents had commenced the illegal subdivision and sharing of the suit properties without taking out grant of letters of administration in respect of the estate of the deceased and also considering the interest of the Applicants. The 1<sup>st</sup> Applicant stated that the purported subdivision and subsequent sharing of the suit properties were tainted with fraud, misrepresentation and illegality and were aimed at defeating the interest of the Applicants and denying them their rights over the suit properties.
6. The Respondents filed a response to the Originating Summons on 12<sup>th</sup> June 2020. The Respondents averred that the subdivisions complained of by the Applicants were being undertaken by the registered



- owners of the suit properties. The Respondents averred that a suit that was brought against them by the deceased over the suit properties was dismissed and the deceased advised to discuss the issue with registered owners of the said properties. The Respondents averred that the Applicants were all living on the Respondents' mother's homestead and not on the parcels of land registered in the names of the Respondents and as such their adverse possession claim against the Respondents was unsustainable.
7. The hearing of the suit commenced on 11<sup>th</sup> October 2022. Thomas Ochele Oyoo (PW1) testified that he was born in 1966 and was about 56 years old. He adopted his affidavit in support of the Originating Summons and witness statement as his evidence in chief. He also produced the documents attached to his further list of documents dated 4<sup>th</sup> September 2020 as a bundle as P.Exh.1. On cross-examination, PW1 stated that he had been born and was a young man when adjudication was taking place. He stated that he heard that there was a parcel of land that was registered in his name during land adjudication. He stated that the land said to have been registered in his name was all along being used by his cousin, one, Onditi Marita. He stated that the land was sold to Onditi Marita.
  8. The Plaintiff's next witness was the 2<sup>nd</sup> Applicant, CEPHAS OKINYI OYOO(PW2). PW2 adopted his witness statement as his evidence in chief. On examination by the court, PW2 stated that he was born in 1974 after land adjudication and registration had taken place. He stated that no land was registered in his name. He stated that the 7<sup>th</sup> Respondent, Joyce Atieno Oyoo was his mother and that during land adjudication in 1968, his mother had only one son (PW1) and two daughters. He stated that they had sued their mother because she did not protest when their father was giving a larger portion of land to his first house. He stated that they wanted the title in her name cancelled so that the distribution of family land could be undertaken afresh.
  9. The Plaintiff's next witness was the 5<sup>th</sup> Applicant, MARTIN OMONDI OYOO(PW3) who adopted PW1's evidence as he had not recorded a witness statement. He stated that he was born in 1982 and was the 3<sup>rd</sup> last born in his mother's house. He stated that he had nothing to add to the evidence given by his brothers.
  10. On cross examination by the 1<sup>st</sup> Respondent, PW3 stated that the 1<sup>st</sup> Respondent cheated and defrauded their father to have the land that was registered in his name. PW3 stated that the land that was registered in the name of their mother was 8km away from the homestead which they all occupied which was on Kisumu/Kabodho West/2266. He stated that his deceased father went to court when he realised that the distribution of the family land was not done fairly. He stated that the deceased filed case No. 170 of 2002 whose outcome he was not aware of. He stated that the cancellation of titles they were seeking would inconvenience all of them but he believed it was the right thing to do. He stated that he was not aware that PW1 had been asked by their deceased father to move to Kisumu/Kabodho West/2273. He stated that if he was allowed to move to that parcel of land he would do so.
  11. In examination by the court, PW3 stated that they were 10 in their house, 7 boys and 3 daughters and the other house had 8 children all boys. He stated that the Applicants wanted family land divided equally between the two houses.
  12. The Applicants' next witness was DANIEL AYUMBA AWUOR(PW4). PW4 told the court that he was 84 years old and lived in West Kabodho, Nyakach. He adopted two witness statements that he had recorded as his evidence in chief. On cross-examination by the 1<sup>st</sup> Respondent, he stated that he knew the parcels of land that the deceased, Jeconia Oyoo sold to Onditi Marita and Joram Oredo. He stated that the said parcels of land were sold by the deceased before land adjudication and registration to enable him educate his children. He stated that he was a member of the Land Adjudication Committee. On cross-examination by the 2<sup>nd</sup> Respondent, he stated that the land adjudication and registration took



place in 1974 and that he did not know how the deceased Jeconia Oyoo shared out his land amongst the members of his family.

13. The Applicants' last witness was NASHON OKWAMA OYOO(PW5). PW5 adopted the statement of the 1<sup>st</sup> Applicant (PW1) which was filed together with the Originating Summons on 20<sup>th</sup> May 2020 as his evidence in chief. On cross examination by the 1<sup>st</sup> Respondent, PW5 stated that they were fighting for ancestral land and equality. He stated that he was not yet born when land adjudication and registration took place. He stated that he wanted the family land distributed fairly.
14. The Respondents called the 1<sup>st</sup> Respondent, EDWARD ROBERT OLANG OYOO(DW1) as their first witness. DW1 stated that the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents were his brothers while the 6<sup>th</sup> Respondent Gladys Migege Oyoo was his mother. He adopted as part of his evidence in chief his witness statement filed in court on 12<sup>th</sup> June 2020. DW1 produced as D.Exh. 1 the bundle of documents filed by the Respondents on 12<sup>th</sup> June 2020. DW1 stated that the 1<sup>st</sup> and 9<sup>th</sup> (sic) Applicants were present when a ruling was made in the previous case that had been instituted by their deceased father. He stated that that explained why they had refused to come to court. He stated that Plot No. 2266 was registered in the names of his 4 brothers and mother. He stated that this was the homestead where his mother was hosting the Applicants. He stated that Plot No. 2273 was registered in the name of his deceased father while Plot No. 2282 was registered in the name of the 5<sup>th</sup> Respondent. He stated that Plot No. 2265 was registered in his name and that of his brothers while Plot No. 1227 was in the name of Joyce Atieno Oyoo who was the Applicants' mother. He stated that Plot No. 1227 was 5km away from the family home. He stated that the suit properties originated from land that was owned by their grandmother. He stated that it was their grandmother who distributed the land. He stated that the grandmother intended that the two houses of their father be separated and that explains why she gave the Applicants' mother land that was far away from their home. He stated that these were the first registrations that took place during land adjudication. He stated that the persons registered as owners were the first registered owners thereof. He stated that his grandmother gave his deceased father two parcels of land namely, Plot No. 2273 and Plot No. 2488. He stated that the two parcels of land were in the names of his father and the Applicants' mother, and it was the 7<sup>th</sup> Respondent who was using the same.
15. DW1 stated that the Applicants' mother was given two parcels of land which were registered in her name. These were Plot No. 1227 and another parcel of land at Mbugra whose land reference he did not know. He stated that his grandmother gave his mother's house 3 parcels of land which were all together. He stated that the Applicants' mother's house was also given 3 parcels, 2 for their mother and 1 for the 1<sup>st</sup> Applicant. He stated that his father was given 2 parcels which were still in his name. He stated that the applicants were not entitled to the reliefs sought. He stated that the intention of the Applicants was not to get land but to remain in his mother's homestead. He stated that their deceased father pleaded with the Applicants to move their mother to Plot No. 2273 which was in the name of their father but they refused. On cross-examination by the Applicants' advocate, DW1 stated that: He worked with the Ministry of Agriculture and retired 17 years ago. The land in dispute belonged to his grandmother. His grandmother was the one who shared the same. The consolidation, adjudication and registration started in 1966. His grandmother distributed the land in 1967. His grandmother died in February 1970. The 5<sup>th</sup> Respondent, Elly Okoth was born in 1968. These parcels of land in dispute were ancestral land. His grandmother did not purchase the land. His grandmother held the land in trust for his son, Jeconia Oyoo. His deceased father assisted his grandmother in the distribution of the said parcels of land. His grandmother intended to separate the two houses of his father.
16. DW1 testified further on cross-examination that his mother's house was given 3 parcels of land. He stated that Plot No. 2266 measured 3.0 Ha., Plot No. 2265 measured 3.6Ha., Plot No. 2282 measured



- 0.7Ha., Plot No. 1227 measured 1.2Ha., Plot No. 2273 measured 0.8Ha., and Plot No. 2488 in the name of their father measured about 0.4Ha. That their grandmother had only one son and as the owner of the land she could distribute the same as she wished. The 1<sup>st</sup> Applicant was given land which he sold.
17. The Respondents' second witness was the 2<sup>nd</sup> Respondent, JERIM OTIENO OYOO(DW2). DW2 adopted his witness statement, response to the Originating Summons and replying affidavit all filed on 12<sup>th</sup> June 2020 as his evidence in chief. He stated that he was registered as a co-owner of Plot No. 2266 which was being claimed by the Applicants. On cross-examination by the Applicants' advocate, DW2 stated as follows: Plot No. 2266 was not family land. It was registered in their names during the land adjudication. It was on this parcel of land that their deceased father was living with his two wives and children. Their grandmother died 1970. The suit properties were registered in 1977. He was not aware that the particular parcel of land was registered in his name. He was not aware as to the circumstances under which the land was registered in his name. His elder brother (DW1) may have been aware of the reason. In 1977 the Applicants' mother had been married and had children. The 1<sup>st</sup> Applicant was given land which his mother and deceased father subsequently sold. Since the 1<sup>st</sup> Applicant was given land, he could not again be registered as a co-owner of his mother's land, Plot No. 1227. His deceased father was given Plot No. 2273 because he could marry a 3<sup>rd</sup> wife.
18. After the close of evidence on 22<sup>nd</sup> January 2024, the parties were directed to make closing submissions in writing and the court gave timelines for doing that. The Applicants did not file their submissions within the time that was fixed by the court even after the time was extended for them to so on 8<sup>th</sup> April 2024. It was not until 12<sup>th</sup> August 2024 about 7 months after the court gave directions on the filing of submissions that the Applicants filed their submissions without leave of the court. The Respondent filed submissions and further submissions dated 20<sup>th</sup> March 2024 and 20<sup>th</sup> September 2024 respectively.

### **Analysis and determination**

19. I have considered the pleadings, the evidence tendered and the submissions on record. The Applicants' Originating Summons has two limbs. The first limb is seeking a declaration that the Applicants have acquired the suit properties by adverse possession while the second limb which is an alternative prayer is seeking a declaration that the suit properties are held by the registered owners in trust for the Applicants. I will consider each limb of the application separately.
20. In *Gabriel Mbui v. Mukindia Maranya* [1993] eKLR the court stated that a person claiming land by adverse possession must establish on a balance of probabilities the following elements;
- a. Must make physical entry and be in actual possession or occupancy of the land for the statutory period.
  - b. The entry and occupation must be with, or maintained under, some claim or colour of right or title made in good faith by the stranger seeking to invoke the doctrine of adverse possession as against everyone else.
  - c. The occupation of the land by the intruder who pleads adverse possession must be non-permissive use, i.e. without permission from the true owner of the land occupied.
  - d. The non-permissive actual possession hostile to the current owner must be unequivocally exclusive, and with the evinced unmistakable animus possidendi, that is to say occupation with clear intention of excluding the owner as well as other people.
  - e. Acts of user by the person invoking the statute of limitation to found his title are not enough to take the soil out of the owner or his predecessors in title and to vest it in the encroacher or



squatter, unless the acts be done which are inconsistent with the owner's enjoyment of the soil for the purpose for which he intended to use it.

- f. The possession by the person seeking to prove title by adverse possession must be visible, open and notorious, giving reasonable notice to the owner and the community of the exercise of dominion over the land.
  - g. The possession must be continuous uninterrupted, and unbroken for the necessary statutory period.
  - h. The rightful owner or paper title holder against whom adverse possession is raised must have an effective right to make entry and to recover possession of the land throughout the whole of, and during, the statutory period.
  - i. The rightful owner must know that he is ousted. He must be aware that he had been dispossessed, or he must have parted and intended to part with possession.
  - j. The land, or portion of the land adversely possessed must be a definitely identified, defined or at least an identifiable portion, with a clear boundary or identification.
  - k. The absence of a plot or title number need not present any difficulty, nor should it be a bar to establishing a claim of adverse possession.
21. In *Kimani Ruchine & Another v. Swift, Rutherford Co. Ltd. & another* [1977] KLR 10 Kneller J. stated as follows at page 16:

“The Plaintiffs have to prove that they have used this land which they claim as of right, nec vi, nec clam, nec precario (no force, no secrecy, no evasion) ...The possession must be continuous. It must not be broken for any temporary purposes or by any endeavors to interrupt it or by any recurrent consideration.”

22. In *Wambugu v. Njuguna* [1983] KLR 172 the court stated as follows:

“First 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 entails acts which are inconsistent with his enjoyment of the soil and for the purpose for which he intended to use it. The *Limitation of Actions Act* (Chapter 22) on adverse possession contemplated two concepts: dispossession and discontinuance of possession. 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 for the requisite number of years.”

23. In *Githu v. Ndeete* [1984] KLR 776 it was held that:

- a. “Time ceases to run under the *Limitation of Actions Act* either when the owner takes or asserts his rights or when his right is admitted by adverse possessor. Assertion occurs when the owner takes legal proceedings or makes an effective entry into land. Giving notice to quit cannot be effective assertion of right for the purpose of stopping the running of time under the *Limitation of Actions Act*.”



- b. A title by adverse possession can be acquired under the *Limitation of Actions Act* to a part of the parcel of land which the owner holds title.”
24. In *Mombasa Teachers Co-operative Savings & Credit Society Limited v. Robert Muhambi Katana & 15 others* [2018] eKLR, the Court of Appeal stated as follows:
- “ 18. Likewise, it is settled that a person seeking to acquire title to land by of adverse possession must prove non permissive or non-consensual, actual open, notorious, exclusive and adverse use/occupation of the land in question for an uninterrupted period of 12years as espoused in the Latin maxim, nec vi nec clam nec precario. See *Jandu vs. Kirplal & Another* (1975) EA 225. In other words, a party relying on the doctrine bears the burden of demonstrating that the title holder has lost his/her right to the land either by being dispossessed of it or having discontinued his possession of it for the aforementioned statutory period. See this Court’s decision in *Wambugu vs. Njuguna* [1983] KLR 173. Did the respondents discharge this burden?...
21. Even if we were to accept that the five respondents who testified had established that they had been in an open and uninterrupted occupation of the suit property in excess of 12 years after the appellant acquired title still their claim fell short. There is a further problem because none of them tendered any evidence with regard to identifiable portion(s) of the suit property which they each occupied which was essential to their claim. More so, taking into account that there were allegations that apart from the respondents over 200 people were also in occupation of the suit property. In *Wilson Kazungu Katana & 101 Others vs. Salim Abdalla Bakshwein & Another* [2015] eKLR this Court observed: -“The identification of the land in possession of an adverse possessor is an important and integral part of the process of proving adverse possession. This was so stated by this Court in the case of *Githu vs. Ndete* [1984] KLR 776. The appellants did not discharge the burden of proving and specifically identifying or even describing the portions, sizes and locations of those in their respective possession from the larger suit premises that they sought to have decreed to them.”
25. The Appellants’ claim is in respect of all those parcels of land known as Kisumu/Kabodho West/ 2266, 2273, 2282, 2265 and 1227. From the evidence on record, Plot No. 2266 measures 3.0Ha. and is registered in the names of Gladis Migege Oyoo, Jerim Otieno Oyoo, Denis Otieno Oyoo, Jacob Oyoo, and Elly Okoth Oyoo. Plot No. 2273 measures 0.8Ha. and the same is registered in the name of Jeconia Oyoo. Plot No. 2282 measures 0.7Ha. and the same is registered in the name of Elly Oyoo. Plot No. 2265 measures 3.6Ha. and the same is registered in the names of Edward Oyoo, Matengo Oyoo, Ochieng Oyoo and Okiro Oyoo. Plot No. 1227 measures 1.2 Ha. and is registered in the name of Joice Otieno Oyoo. Apart from Plot No. 2266 on which the homestead of Jeconia Oyoo, deceased is situated and which is said to be occupied by his widows who are the 6<sup>th</sup> and 7<sup>th</sup> Respondents herein and some of their children who are among the Applicants and Respondents herein, the Applicants have not told the court when they entered the other parcels of land namely; Plot Nos 2273, 2282, 2265 and 1227 and what activities they have undertaken on the said parcels of land which are inconsistent with the rights or interests of the registered owners thereof. It is also worth noting that Plot No. 2273 is registered in the name of the Applicant’s deceased father, Jeconia Oyoo who died on 12<sup>th</sup> October 2016. There is no evidence that any succession has been undertaken in respect of the estate of the deceased. The



Applicants cannot therefore claim land belonging to a deceased person by adverse possession. Even for Plot No. 2266, the evidence before the court shows that the same is occupied by most of the Applicants and the Respondents. The Applicants have not explained to the court the extent of their occupation and activities on this land. In other words, it is not clear as to what portion of this land which is also occupied by others is being claimed by the Applicants. The land is registered in the names of Gladis Migege Oyoo, Jerim Otieno Oyoo, Denis Otieno Oyoo, Jacob Oyoo, and Elly Okoth Oyoo. There is no evidence that the Applicants have dispossessed these registered owners of this land or that the registered owners have discontinued their possession of the land. It is common ground that the registered owners of Plot No. 2266 are step mother and step brothers of the Applicants and that the Applicants occupied the property as a family home. The Applicants have not persuaded me that their occupation of this property on which they were born and raised was non-permissive. Due to the foregoing, it is my finding that the Applicant's adverse possession claim over the suit properties have not been established.

26. On the alternative claim, the following is my view: The suit properties were registered under the Registered Land Act, Chapter 300 Laws of Kenya (now repealed). Whereas the registration of the Respondents as the proprietors of the suit properties conferred upon them absolute ownership of the said properties together with all the rights and privileges associated with such ownership, such rights were subject to any duty or obligation the proprietors may have as trustees. See the proviso to section 28 of the Registered Land Act. In *Kanyi v. Muthiora* [1984] KLR 712, Chesoni, Ag J.A stated as follows at page 723:

“Section 143 of the Registered Land Act did not apply as there was no question of rectification of the register but a transfer by a trustee to a beneficial owner. The registration of the suit land in the name of Kanyi under the Registered Land Act did not extinguish Nyokabi's rights under Kikuyu customary law. Kanyi was not relieved from her duty or obligation to which she was a trustee to Mathiora's land: see proviso to section 28 of the Act and *Gatimu Kinguru –vs- Muya Gathangi* [1976] KLR 253. There was overwhelming evidence of a trust in favour of Nyokabi.”

27. In *John Gitiba Buruna & Another v. Jackson Rioba Buruna, Court of Appeal at Kisumu, Civil Appeal No. 89 of 2003*, the court stated as follows:

“Although the rights of a registered proprietor of land are indefeasible under section 28 of the Registered Land act, such registration does not as the proviso to section 28 states relieve a proprietor from any duty or obligation to which he is subject as a trustee.”

28. In *Isack M'inanga Kiebia v. Isaaya Theuri M'lintari & another* [2018] eKLR, the Supreme Court stated as follows on customary trusts:

“(37) Both exponents of colonial land policy and jurisprudence, either completely disregarded, or did not fully appreciate, the nature, scope, and complexity of African land relations. Land in a traditional African setting, is always the subject of many interests and derivative rights. The content of such interests and rights is often a complex area of inquiry. Such rights could be vested in individuals or group units. The rights and interests frequently co-exist with each other. For example, the rights of members of a family do not necessarily derive from the corporate rights of the family as such, but by operation of the applicable law and customs. Besides, the enjoyment of the rights is dependent on the fulfilment of certain conditions unique to the group unit. Several rights of the members could be inferior to, or co-terminus with, or indeed



superior to the sum total of the rights of a group. Hence, customary law does not vest “ownership”, in land in the English sense, in the family, but ascribes to the family the aggregate of the rights that could be described as “ownership.” (Bennett 1995:3 and Cocker 1966: 30-33).”

29. In the same case, the court stated further as follows:

“(52) Flowing from this analysis, we now declare that a customary trust, as long as the same can be proved to subsist, upon a first registration, is one of the trusts to which a registered proprietor, is subject under the proviso to Section 28 of the Registered *Land Act*. Under this legal regime, (now repealed), the content of such a trust can take several forms. For example, it may emerge through evidence, that part of the land, now registered, was always reserved for family or clan uses, such as burials, and other traditional rites. It could also be that other parts of the land, depending on the specific group or family setting, were reserved for various future uses, such as construction of houses and other amenities by youths graduating into manhood. The categories of a customary trust are therefore not closed. It is for the court to make a determination, on the basis of evidence, as to which category of such a trust subsists as to bind the registered proprietor. 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.

[53] We also declare that, rights of a person in possession or actual occupation under Section 30(g) of the Registered *Land Act*, are customary rights. This statement of legal principle, therefore reverses the age old pronouncements to the contrary in *Obiero v. Opiyo* and *Esiroyo v. Esiroyo*. Once it is concluded, that such rights subsist, a court need not fall back upon a customary trust to accord them legal sanctity, since they are already recognized by statute as overriding interests.



[54] In the foregoing premises, it follows that we agree with the Court of Appeal’s assertion that “to prove a trust in land; one need not be in actual physical possession and occupation of the land.” A customary trust falls within the ambit of the proviso to Section 28 of the Registered *Land Act*, while the rights of a person in possession or actual occupation, are overriding interests and fall within the ambit of Section 30(g) of the Registered *Land Act*.

[57] With the repeal of the Registered *Land Act* (Cap 300), Parliament enacted the *Land Registration Act* No. 3 of 2012. The provisions of Section 28 of the former, including the proviso thereto, were re-enacted as Section 25 of the latter; while the provisions of Section 30 of Cap 300 were re-enacted as Section 28 of the *Land Registration Act*. However, Parliament introduced two new categories of overriding interests, the first category is what are now called “spousal rights over matrimonial property”; while the second category is what are, rather curiously called “trusts including customary trusts”. Even more curious, is the fact that “the rights of a person in possession or actual occupation of land to which he is entitled in right only of such possession or occupation,” as earlier provided for under Section 30 (g) of the Registered *Land Act*, are no longer on the list of overriding interests under Section 28 of the *Land Registration Act*.

[58] What are we to make of these changes? Several interpretations are plausible. It is now clear that customary trusts, as well as all other trusts, are overriding interests. These trusts, being overriding interests, are not required to be noted in the register. However, by retaining the proviso to Section 28 of the Registered *Land Act* (now repealed), in Section 25 of the *Land Registration Act*, it can be logically assumed that certain trusts can still be noted in the register. Once so noted, such trusts, not being overriding interests, would bind the registered proprietor in terms noted on the register. The rights of a person in possession or actual occupation of land, as previously envisaged under Section 30 (g) of the Registered *Land Act*, have now been subsumed in the “customary trusts” under Section 25 (b) of the *Land Registration Act*. Thus under the latter Section, a person can prove the existence of a specific category of a customary trust, one of which can arise, although not exclusively, from the fact of rightful possession or actual occupation of the land.”

30. It is clear from the foregoing cases that the Respondents’ titles over the suit properties can be impeached on account of any duty that they owe to the Applicants as trustees. In *Mwangi Mbothu & 9 others v. Gachira Waitimu & 9 others* [1986] eKLR, the court stated that:

The law never implies, the court never presumes a trust but in case of absolute necessity. The court will not imply a trust save in order to give effect to the intention of the parties. The intention of the parties to create trust must be clearly determined before a trust will be implied.”

31. The burden was upon the Applicants to establish that the Respondents held the suit properties in trust for them. It is common ground that the Respondents were the first registered owners of the suit properties (save for Plot No. 2273 registered in the name of the deceased, Jeconia Oyoo). It is common ground that when the suit properties were demarcated and recorded in the names of the Respondents during land adjudication and consolidation, from the Applicants’ mother’s house, only



the 1<sup>st</sup> Applicant had been born and was around with his mother, the 7<sup>th</sup> Respondent. No reasonable explanation has been given by the Applicants as to why the Respondents could have been registered as owners of the suit properties to hold in trust for the 2<sup>nd</sup> to 8<sup>th</sup> Applicants who had not been born while their mother and father were alive and present. Since the Applicants' father, Jeconia Oyoo deceased and the Applicants' mother, the 7<sup>th</sup> Respondent were present during the land adjudication and consolidation exercise and had land registered in their names, I am not persuaded that the 6<sup>th</sup> Respondent and her children, the 1<sup>st</sup> to the 5<sup>th</sup> Respondents who belonged to a different house of Jeconia Oyoo deceased could have been registered as the owners of their respective parcels of land to hold for the Applicants who were from another house and many of whom had not been born. If there was to be any trust, it could only have been in respect of Plot No. 1227 which was registered in the name of the Applicants' mother, the 7<sup>th</sup> Respondent who has not contested such trust. And even for the 7<sup>th</sup> Respondent, the trust could only be in favour of the 1<sup>st</sup> Applicant who had already been born at the time of land adjudication. There was no evidence tendered before the court showing that there was a dispute between the Applicants and their mother warranting a suit against her for a declaration of existence of a trust in relation to the land in question.

32. I am not satisfied from the totality of the evidence placed before the court that the Applicants have proved the existence of a trust relationship between them and the Respondents in relation to the suit properties.

### **Conclusion**

33. In conclusion, I find no merit in the Applicants' Originating Summons dated 20<sup>th</sup> May 2020. The same is dismissed with costs to the Respondents.

**DELIVERED AND DATED AT KISUMU ON THIS 24<sup>TH</sup> DAY OF OCTOBER 2024**

**S. OKONG'O**

**JUDGE**

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Owuor for the Applicants

The Respondents present in person

Ms. J.Omondi-Court Assistant

