



**Yator v Kiptoo & another (Environment & Land Case 98 of 2018)
[2024] KEELC 13827 (KLR) (16 December 2024) (Judgment)**

Neutral citation: [2024] KEELC 13827 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE 98 OF 2018
EO OBAGA, J
DECEMBER 16, 2024**

BETWEEN

CHEBET YATOR PLAINTIFF

AND

DESPER JOSEPH KIPTOO 1ST DEFENDANT

KIBIWOT KURIASES 2ND DEFENDANT

JUDGMENT

1. In his Complaint dated 15th July, 1996 and filed in the High Court on 16th July, 1996 the Plaintiff averred that he has at all times been the registered owner of a piece of land known as Lelan/kibiego/57 comprising 14.4Ha (the suit property herein). He alleged that on 2nd July, 1996 the Defendants invaded his land and subdivided it among themselves. That they cut down his trees, fenced off portions thereof with the intention of building houses and prepared shambas. The Plaintiff asserted that the Defendants' intention was to move and settle on his land and to damage it, hence this claim for a permanent injunction to stop their trespass. He prayed for judgment against the Defendants and for the following orders:-
 - a. A permanent injunction do issue to stop the Defendants from interfering with land parcel No. Lelan/Kibiego/57.
 - b. An order of declaration that the Defendants are trespassers on land parcel No. Lelan/Kibiego/57.
 - c. General damages for damage of private property.
 - d. Costs of this suit plus interest.
2. The Defendants filed a joint Amended Defence dated 10th September, 2013 where they denied all the averments in the Complaint. They instead averred that the Plaintiff, who is their uncle and brother, caused



himself to be registered as trustee for himself and the Defendants in what was their ancestral land. They claimed that the land was acquired by virtue of lineage of their patriarch, the late Kuriases Yator, and they each have a claim as his descendants. They alleged that they had been on the suit land from time immemorial and the 1996 subdivision was merely to confirm their individual acreages, including the Plaintiff's. They therefore denied the allegation that they had recently come into the land.

3. The Defendants also included a counterclaim where they averred that the Land Certificate issued to the Plaintiff in 1996 was a holding document awaiting subdivision between the heirs of the late Kuriases Yator. This was done in 1996, resulting in title Nos. 151, 152, 153 and 154 each measuring 3.6Ha in the names of Kiptoo Kuriases, Kibiwot Kuriases, Murkomen Kuriases and Chebet Yator, and which the Defendants wish to enforce. They expounded that their claim was mainly for a declaration that the registration of the Plaintiff over their ancestral land was as a trustee for himself and on their behalf. They also averred that they were seeking a dissolution of the said trusteeship and a revocation of the of the registration of the Plaintiff as proprietor, and further, a rectification of the land register to reflect all the four parties and their respective acreages. The defendants prayed for judgment against the Plaintiff for:-
 - a. Declaration that the Plaintiff holds Land Certificate No. Lelan/Kabiego/57 in trust for himself and the Defendants.
 - b. Orders revoking the registration of the Plaintiff as sole proprietor to suit land.
 - c. Rectification of register and substitution of the Plaintiff as sole proprietor with the registration of each of the four parties as proprietors of 3.6Acres as per paragraph 9 above.
 - d. Costs.
4. The Plaintiff filed a Reply to the Defence and Defence to Counterclaim dated 30th August, 2004 where he termed the subdivision of the land in 1996 unlawful and fraudulent and set out the particulars of fraud. He sought a declaration to that effect and asked that the subdivision be cancelled. The Plaintiff averred that he lawfully acquired the land in 1958 from Tambach County Council and it has never been family land. He claimed that the family land belonging to their father, the late Cheserek Kuriases, is in Tirap Division of what was Marakwet District. He alleged that none of the Defendants have ever resided on the suit property, save the 2nd Defendant's son who entered the land forcefully in 1996, and further, that no one had been interred on the land. He asserted that he is the absolute and indefeasible owner of the land by way of first registration from 11th September, 1970, and any claim by the Defendants is time barred by virtue of Section 7 of the [Limitation of Actions Act](#).
5. In the Defence to Counterclaim, the Plaintiff denied the existence of any trust since the family land existed somewhere else, hence the register cannot be altered per Section 143(1) of the repealed Registered [Land Act](#) (RLA). He claimed that the Defence and Counterclaim disclosed no reasonable defence or cause of action and prayed for judgement against the Defendants and that the Counterclaim be dismissed with costs.
6. The original 1st Defendant, Kiptoo Kuriases, died and was substituted with Desper Kiptoo Kuriases, the administrator of his estate. He filed an amended Defence and Counterclaim reiterating the averments in the joint Defence dated 30th August, 2004.
7. In his Reply to the Amended Defence and Defence to Counterclaim dated 11th November, 2013 the Plaintiff denied all the allegations in the Defendants' Statement of Defence and Counterclaim. He averred that he demarcated his land in 1959 when the 2nd Defendant was in Kamolokon forest, where he was evicted in 1988. The 2nd Defendant then sought refuge on the Plaintiff's land but he left in 1989.



The Plaintiff averred that trouble with his brothers started in 1990 when they invaded his land and then filed Eldoret SPMCC No. 9 of 1990. He purports that the Defendants, in cahoots with the area chief, subdivided his land in 1996. He averred that none of the Defendants has ever settled in his land to date save for the occasional disturbances. In response to the Counterclaim, the Plaintiff denied the allegation therein claiming instead that he has never held his title in trust for anyone save for himself. The Plaintiff averred that the only declaration to be sought is to confirm ownership of the title and that it is vested in him alone and no one else. Further, that there was and will never be a trusteeship to be dissolved.

Hearing and Evidence:

8. The hearing of this suit commenced on 28th March, 2023 with the Plaintiff testifying under oath as PW1. He adopted his two witness statements dated 18th July, 2018 and 20th March, 2023 as his evidence-in-chief, and produced the documents in his list of documents dated 18th July, 2018 as his exhibits marked PEXB 1, 2, 3 and 4 respectively. He also produced the documents in his second list of documents as PEXB 5, 6, 7, 8 and 9 respectively.
9. In summary, what is stated in the two witness statements is that Kiptoo Kuriases and Kibiwot Kuriases are his brothers. He got his land a long time ago, before he even got married. He became the registered proprietor of the land and has had possession since 1970 to date. That he got his title deed at the Land Registrar's office in Eldoret, since there was no Land Registry in Iten at the time. He stated that he lives on the suit land with his wife and children. That while Kiptoo Kuriases is deceased, the 2nd Defendant moved out of the land in 1996. PW1 stated that his father, Cheserek Yator died in 1954 before the acquisition of the suit land. He denied stealing any livestock from any of the Defendants.
10. PW1 denied being served with Eldoret SPMCC No. 9 of 1990, and stated that he came to know of it after he had filed this suit. It is his case that he never consented to the subdivision, neither did he attend any LCB to obtain consent for the subdivision or transfer, and the alleged portions arising out of the subdivisions do not exist. According to him, the Defendants are trespassers on the suit land and are not entitled to it. He stated that the suit land is not family land, but his own private land. He stated that no one has been buried on the land. He concluded by stating that there was no determination/declaration in Eldoret CMC No. 9 of 1990 to subdivide the land or register it in the name of his brothers.
11. On cross examination, PW1 testified that he purchased his land alone and he denied any relation to the Defendants or to Cheserek. He testified that his father died before maumau and he did not leave any land behind. He testified that he did not know the verdict of the court and neither was he aware where the trespassers went after the court verdict. PW1 testified that he was not aware that his brothers had sued him. He also denied knowledge of any verdict by Boaz Olao or any decision by Judge Ochieng. He said that his advocate informed him that the court found the land was his. PW1 refuted the allegation that surveyors went to subdivide his land or that his parcel is now known as No. 154 after subdivision. He however never went to court to oppose the alleged subdivision.
12. PW1 testified that he had no order of court authorising him to evict the Defendants from the land. Even though he could not recall when he evicted the Defendants from the land, he testified that he did not remove them during the pendency of this suit. He admitted that all those he had sued were not on the land. PW1 disputed that he had been given the land because he was the son of Cheserek Yator. He also denied that he was given the land because he was the only one at home.
13. On re-examination, he testified that his father's name is Yator Chebet so he did not know Cheserek. He did not inherit land from his father. He testified that he had never been sued or served with a decision of the court to subdivide his land. He testified that he was unaware that his land was subdivided,



- and further, that there are no titles issued in respect of the alleged subdivision. He added that the Defendants do not live on his land, and that their children live in Emaron. He testified that he bought his land in 1958, but then went ahead to state that he got his land after the process of adjudication, and those who were dissatisfied were given 90 days to Appeal.
14. PW2 was Charles Chebet, the Plaintiff's son, he also testified under oath. He told this court that he knew the Defendants. He testified that he resides on his father's land while the Defendants do not reside thereon. In addition, he adopted his witness statement dated 18th July, 2018 as his evidence in chief. It is stated in his witness statement that sometime in 1996, the late Kiptoo Kuriases and his four sons together with Kibiwot Kuriases accompanied by Surveyors invaded the suit property. He stated that they forcefully subdivided the land in his father's absence.
 15. PW2 was cross-examined by Mr. Ngigi Mbugua and he testified that Kiptoo Kuriases, Murkomen Kuriases and Kibiwot Kuriases are his father's brothers. He testified that he was born in 1975 but he knew how the suit property was obtained. That the register of the land was opened in 1970. He said that he did not know Cheserek Yator, and neither did he know the name of his grandfather. He reiterated that the Defendants came to the suit property in the company of a surveyor to subdivide the land, at the time, his father was not around. He testified that the trespassers attempted to put up structures that they didn't occupy. He was not aware of the case filed in 1990, he however told this court that his father had an advocate but he did not know if the advocate was coming to court or not. When the witness was shown the land certificate, he testified that he did not know if his father ever obtained a title deed. He testified that he was not aware why they never obtained a title deed.
 16. On re-examination, PW2 testified that he was born 5 years after his father was registered as owner of the land. He testified that the trespassers came to the land in 1980 and attempted to put up structures in the absence of his father. He testified that the trespassers were not on the land before the filing of this suit and that they have no houses on the land. He admitted that he did not know the difference between a land certificate and a title deed.
 17. Richard Maiyo Chebet, also a son of the Plaintiff testified as PW3. His testimony was that his father had a case with Kenya Forest Services and the original title was given in that case, but he could not tell if it was collected. He produced the documents in the further list of documents as PEXB 10, 11, 12, 13 and 14. He also adopted his witness statement dated 12th June, 2018 as his evidence-in-chief, where he stated that in 1996 about 10 people including the four sons of Kiptoo Kuriases came to their land. That he later realised they had been accompanied by surveyors and they subdivided the land against their will. His father was not home and when he returned and learnt what had happened, he filed this suit which prompted the sons of Kiptoo Kuriases to leave the land. He also stated that the Defendants have not been on their land since then to date.
 18. Under cross-examination, PW3 testified that he was born in 1972 and so did not know how the suit property was acquired. He denied being related to the Defendants, but said that his grandfather was called Kuriases and he had 4 children being Murkomen, Kiptoo, Chebet Yator and Kibiwott. He admitted that the Defendants were the Plaintiff's brothers. He told the court that Kibiwot and Kiptoo have never stayed on the suit property. He testified that he was not aware of a court order that the Defendants be allowed to stay on the suit property as they were before. PW3 was re-examined and he testified that his grandfather Kuryases Kiptoo had no land. That the Defendants and their children have never stayed on the suit land, and reiterated that he had not seen any order directing that the Defendants stay on the land.
 19. On their part, the Defendants called James Kipkiror Kiptoo who testified on oath as DW1. He testified that the Plaintiff is his uncle and one of the sons of his grandfather, Cheserek Yator. According to



him, it is not true that the suit property always belonged to the Plaintiff. He testified that they were on the land until 2021 when he was forcefully evicted. He further testified that the land measures 36 Acres and they were using it for farming and grazing their animals jointly. He testified that the land was subdivided on 7th July, 1996 and each of the 4 parties got their parcels ranging from No. 151 to 154. DW1 then produced the documents filed on 20th June, 2023 as DEXB 1-23 respectively.

20. In addition to his oral testimony, DW1 adopted his witness statement filed in court on 24th July, 2023 in which he stated that the land belonged to his late grandfather and they lived together until his Uncle Murkomen's death in 1982. He testified that this was when the Plaintiff started harassing the other family members, stealing their livestock and claiming ownership of the land. As a result, the three remaining brothers pursued subdivision of the land vide Eldoret land Case No. 9 of 1990. In that case, the land was declared family property to be divided equally among the 4 of them, which was done and resulted into Parcel No. 151-154. He stated that the brothers went before the LCB for purposes of the subdivision. He stated that they learnt that the Plaintiff had gone to court in 2018 seeking a declaration that his brothers were trespassers. That the family continued to live on the land until 1997 when the Plaintiff evicted Kibiwott Kuriases's family. In 2000, the plaintiff evicted Desper Kiptoo's family and destroyed their property
21. DW1 testified that in 2001, the Plaintiff again invaded his portion, destroyed his fence, his house, household properties and crops. He stated that the Plaintiff's action were contrary to the injunction issued by the court pending determination of this suit. He testified that his grandfather had other properties that were divided properly between the 4 brothers, but the Plaintiff is intent on claiming the suit land as his own property. He added that he buried his triplets on his father's portion of the suit land, and other family members have also been buried there. He prayed that the court uphold the ruling in Eldoret SPMCC No. 9 of 1990.
22. On cross-examination DW1 testified that he appeared before the Land Registrar in Iten as directed in the judgment in SPMCC No. 9 of 1990, who referred them to the LCB. He clarified that it is the District Land Surveyor who went to the land during the survey process, and that there was no force used. He was not aware whether mutation forms were registered, but that the Plaintiff came to court before the survey forms were registered. He testified that there is no land in the name of Cheserek Yator. He explained that they were forcefully evicted from the land and are now residing with friends. He refuted the allegations that they have not been on the suit property since 1996. According to him, the courts have ruled that the suit property belongs to all of them, and not to the Plaintiff only. He testified that mediation failed because the Plaintiff insisted that the land was his. He also denied that they were trespassers. He said that they had paid survey fees of KShs. 5,000/- and KShs. 4,000/- for registration of the mutations. He told the court that they were evicted from the land on 2nd June, 2021.
23. When he was re-examined, DW1 testified that he was the last person to be evicted from the suit property even though the Plaintiff had no orders to evict them. He asserted that it is the Plaintiff and his sons who evicted them.
24. The last witness, Robert Kimaiyo Murkomen, testified under oath as DW2. He is a son of Murkomen Yator, the Plaintiff who is one of the sons of Cheserek Yator, is his uncle. He adopted his witness statement as his evidence-in-chief. In his witness statement filed on 24th July, 2023 he testified that the suit property was family land and they lived happily during his father's lifetime. After his father's death in 1982, the Plaintiff started harassing them by stealing their livestock and they had to flee to the forest to protect their property. He testified that they returned in 1990 when the court ordered that the land be subdivided, but the Plaintiff resumed his harassment, destruction and threats and they left in 1998. He asked for orders revoking the Plaintiff's title and issuance of separate titles per the ruling in Eldoret SPM No. 9 of 1990.



25. On cross-examination, DW2 testified that he was born in 1971 and that he is aware the Plaintiff had a title which was obtained before he was born. He admitted that they are not staying on the suit property as they were chased away by the Plaintiff, and that his father was also chased away by the Plaintiff. He testified that the suit property was private land. When he was re-examined, DW2 testified that they were on the suit property until 1996 when they were chased away. Further, that they were not shown any court order during the eviction.
26. This marked the close of the case. The court issued directions that parties were to file their written submissions.
- Submissions:
- Plaintiff's Submissions
27. In the Plaintiff's submissions dated 12th April, 2024 Counsel started by laying out the factual background and giving a summary of the evidence. Counsel then submitted that the Plaintiff had proved that he is vested with ownership under section 24 of the Land registration Act (LRA), is entitled to the rights of such registration under Section 25(1) thereof, which rights cannot be defeated except as provided under Section 26 of the Act. Counsel argued that the decision of the court in Eldoret SPMCC No. 9 of 1990 did not grant the reliefs sought in the Plaint as alleged. It was submitted that a certificate of title can only be cancelled or revoked under the provisions of Section 79 and 80 of the LRA by order of the court. The cases of Republic vs Kisumu District Lands Office & Another (2010) eKLR and Super Nova Properties Limited & Another vs District Land Registrar Mombasa & 2 Others; Kenya Anti-Corruption Commission & 2 Others (interested Parties) (2018) eKLR were cited. Counsel pointed out that there had been no court order issued directing the cancellation of the title.
28. Counsel also submitted that the Defendants' actions amount to trespass, which is actionable per se. The Plaintiff sought a declaration to that effect as well as an order of permanent injunction, general damages, costs and interest. Counsel relied on Park Towers Ltd vs John Mithamo Njika & 7 Others (2014) eKLR and Philip Aluchio vs Crispinus Ngayo (2014) eKLR among other cases. Citing Sections 107(1), 109 and 112 of the Evidence Act, Counsel asserted that the Plaintiff had proved his case on a balance of probabilities as defined in Kanyungu Njogu vs Daniel Kimani Maingi (2000) eKLR. It was also submitted that going by Section 7 of the Civil Procedure Act, the Defendants' counterclaim is res judicata for being based on the judgement in Eldoret SPMCC No. 9 of 1990. Counsel also cited Section 4(4) of the Limitation of Actions Act which bars execution of a judgment after 12 years, arguing that by virtue of that and Section 2(2)(3) thereof, the Defendant's suit is time barred. In addition, that although the Defendants were claiming under Cheserek Yator, they are not the personal representatives of his estate.
29. On whether the land was subject of a trust, Counsel cited Isack Kieba M'inanga vs Isaaya Theuri M'Lintari & Another (2018) eKLR, where the supreme court stated the requirements of a customary trust, and argued that the Defendants had failed to prove the said requirements. Counsel added that the Plaintiff has no obligations as a trustee because he was not designated as such. He submitted that a trust is a question of fact to be proved by evidence and cannot be implied by the court, and the onus is on the person claiming the existence of the trust. Counsel relied on Kanyi vs Muthiora (1984) KLR 712, Njenga Chogera vs Maria Wanjira Kimani & 2 Others (2005) eKLR, Peter Ndungu Njenga vs Sophia Watiri Ndungu (2000) eKLR, Juletabi African Adventure Limited & Another vs Christopher Michael Lockley (2017) eKLR and Justus Maina Mukuru vs Jane Waithira Mwangi (2018) eKLR.
30. On costs, Counsel submitted that the court has discretion to award costs under Section 27 of the Civil Procedure Act. He prayed that the Plaintiff's claim be allowed as prayed in the Plaint and the



counterclaim be dismissed with costs to the Plaintiff. He quoted the case of Party of Independent Candidate of Kenya & Another vs Mutula Kilonzo & 2 Others (2013) eKLR.

Defendants' Submissions;

31. The Defendants' Submissions on the other hand are dated 17th May, 2024. Counsel collapsed the issues in to one question of whether the Plaintiff was registered as trustee for himself and the Defendants. He also cited the case of Isack M'nanga Kiera vs Isaaya Theuri (Supra) for the ingredients needed to establish a customary trust. Counsel argued that from the evidence and testimonies, the Defendants had shown that they were rightly claiming a trust in the land. he asserted that the Court of Appeal had held that Section 27 and 28 of the Registered Land Act was subject to qualifications, and that customary trusts have been recognised as overriding interests thereunder. He relied on Re Estate of James Muiruri Kamau (2018) eKLR, Karisa Madumbo Mweni vs Karumbi Katsao Chengo & 2 Others where the court held that the principle of trust can be inferred from the circumstances of the case. Counsel also relied on Pius Moge Njogu vs Kirure Njogu (2015) eKLR and Mbothu & Others vs Waitimu & Others (1986) KLR 173. He urged the court to allow the registration of the subdivision done in 1996.
32. Counsel also argued that the Plaintiff's claim that he bought the land has not been backed by any evidence. He submitted that a certificate of title is proof of ownership but it can be challenged on the grounds laid out at Section 26 of the LRA. That the Plaintiff had failed to show how he purchased the land, neither had he produced documentary evidence to show that the title he holds was lawfully issued to him. Consequently, it is Counsel's submission that the Plaintiff had failed to prove his claim and thus is not entitled to the protection under Section 26 of the LRA. On the Contrary, the Defendants had proved their stake, existence and occupation of the land up to 2021 when they were evicted by the Plaintiff. Counsel prayed that the Plaintiff's case be dismissed with costs and to allow the process of subdivision to proceed so that each of the parties registered against their respective portions of the suit land.

Analysis and Determination:

33. I have considered the pleadings filed by the parties, the evidence tendered and exhibits produced before the court. I have also considered the written submissions filed in court by the Parties' advocates. The issues that lend themselves for determination are:-
 - i. Whether Plaintiff holds the property in trust for himself and the Defendants;
 - ii. Flowing from the above, what are the appropriate reliefs that should issue herein; and
 - iii. Who shall bear the costs of this suit?
 - i. Whether Plaintiff holds the property in trust for himself and the Defendants;
34. On the one hand, the Plaintiff brought this suit based on his ownership of the suit property through registration as proprietor thereof. The Defendants on the other hand have in their counterclaim claimed an interest over the suit property by virtue of a customary law trust. Thus a determination on whether or not the trust actually exists would give an indication as to what orders the court ought to issue in this suit.
35. Previously, it was debatable whether or not customary law rights, which were not indicated in the register, should be given recognition as overriding interests over land registered under the Registered Land Act, Cap. 300 (RLA, now repealed). In some instances, however, the courts recognized the existence of customary law trusts. Even then, the concept of customary law trust was only



acknowledged more in judicial precedents or judge-made law than in statutory law. There are numerous cases that spoke on the concept, a good example being *Gatimu vs Muya Gathangi* (1976) KLR 263, where Justice Madan made reference to it in by holding that:

“As regards section 126, there was no need to register the defendant ‘as trustee’. He was registered as owner as the eldest son of the family in accordance with Kikuyu custom which has the notion of trust inherent in it. Ordinarily, in pursuance of Kikuyu custom he would have transferred a half share in ‘marango’ (Land) to the plaintiff. In any event this section does not make registration ‘as trustee’ obligatory. It states a person may be described by that capacity.”

36. Referring to Section 143 (1) of the RLA, the learned judge held that the registration of the title in the name of the Plaintiff did not exclude recognition of a trust as long as it could be established. Justice Madan in the also held that:

“Parliament could not have intended to destroy this custom of one of the largest sections of people of Kenya. It would have required express legislation to enable the courts to so hold.”

37. Currently however, interests in land arising from customary law trusts are expressly recognized under the provisions of section 28(b) of the [Land Registration Act](#), No.3 of 2012, which provides that:-

“28. Overriding interests

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;”

38. They are also recognised under Section 5(1)(d) of the [Land Act](#) which provides that:

“5. Forms of tenure

1. There shall be the following forms of land tenure ... customary land rights, where consistent with [the Constitution](#).”

39. In the earlier case of *Njenga Chogera vs Maria Wanjira Kimani & Others* (2005) eKLR, the court of Appeal held that a customary law trust is proved by leading evidence on the history of the suit property and the relevant customary law on which the trust is founded. The Defendants therefore had to establish the existence of a trust on which their case could be hinged.

40. The Supreme Court of Kenya in the case of *Kiebia vs M’lntari & another (Civil Case 10 of 2015)* (2018) KESC 22 (KLR) (5 October 2018) discussed the requirements needed to establish the existence of a customary trust in land. The Supreme Court held that:-

“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 vs 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.”

41. The first requirement is to demonstrate that the land in question was before registration family, clan or group land. It is not in dispute that the suit property herein was registered under the Registered *Land Act*, Cap. 300 Laws of Kenya (now repealed). The register for suit property herein was opened on 11th September, 1970 in the name of the Plaintiff, and a Land Certificate was issued on 6th June, 1986. The Plaintiff has alleged throughout that he purchased the suit property alone. However, upon reading the pleadings and during the hearing of this suit, it became clear that the Plaintiff was not very forthcoming on how he acquired the suit property. He started by pleading in his Reply to Defence and Counterclaim dated 30th August, 2004 that he acquired it from the Tambach County Council.
42. When the Plaintiff was cross-examined, he testified that he purchased the suit property in 1958. He then immediately went ahead to say that he acquired the land after the process of adjudication. No agreement for sale was produced in support of the allegation that he purchased the suit property. Moreover, no document of transfer was produced to show that the land had been transferred from any third party, or the Tambach County Council to the Plaintiff. I do not believe that the Plaintiff purchased the land, I however believe the last allegation that it was obtained during adjudication of the land in the area and that was when the land was registered in the name of the Plaintiff.
43. In trying to trace the history of the suit property, I have read through the judgement of Hon. Boaz Olao SPM (as he then was) in Eldoret SPM No. 9 of 1990. He noted in the judgment that it came out at the hearing that each of the four brothers were residing on the suit property, which is the suit property herein. Each had his own portion thereon where they had established their own boma. The court noted that there was no doubt as to the truthfulness in the allegations of the Plaintiffs in that case, one of which was that the land had belonged to their deceased father prior to registration in the name of the



Plaintiff in this suit. It is also indicated in that judgment that the parties were all residing on the suit land, grazing their animals together but each had his own boma. The court also made a finding that:

“It would seem therefore that the parties have indeed divided their father’s land amongst themselves and that the only complaint by the Plaintiffs is that they are desirous of also being registered as co-owners of the land.”

44. While reading through the file, I came across a Supporting Affidavit sworn by the Plaintiff on 24th March, 2021 where he annexed a report of a meeting held on 14th January, 2021. The meeting was held at the Chief’s Office and was attended by 62 elders and had been convened to resolve a dispute between DW1 herein, James Kipkiror Kiptoo, and the Plaintiff. PW1 had reported that the Plaintiff’s grandchildren had cultivated the land where he lives. One of the outcomes of that meeting was that PW1 was given six (6) months to prepare and vacate the suit property. This narrative is proof enough to me that indeed the Defendants were being truthful in their allegation that they have been in occupation of the suit property until 2021 when the last of them, being DW1, left the land.
45. The Defendants have shown that they have been in possession, occupation and use of the land, and it would also seem that they have been in such occupation since their fathers’ time, who in turn were on the land living in harmony as brothers before the registration of the suit property. Their possession can be traced back to their fathers and grandfather as the case may be, to a time before registration as alleged. This satisfies the requirement that the land must have been family land before registration.
46. The second requirement is that the claimant must establish that he belongs to such family, clan, or group. The Defendants have testified that they are a brother and nephew of the Plaintiff. It has been alleged that the Plaintiff, is a brother of Murkomen Yator, Kibiwott Kuriases and Kiptoo Kuriases who were all sons of the late Cheserek Yator and they obtained possession by virtue of their kinship to their shared relative. By his own admission in his pleadings the Plaintiff admitted to being the son of the said Cheserek Yator. In his statement dated 20th March, 2023 at paragraph 2 he also stated very clearly that he is one of the sons of the late Cheserek Yator. It is interesting that the Plaintiff stated under cross-examination that his father was not Cheserek Yator, claiming instead that his father was called Yator Chebet.
47. However, the Plaintiff’s testimony must be taken with a pinch of salt since it mainly consisted of denials, he denied even facts he had pleaded to in his own pleadings. He denied any relationship to his brothers, and even denied that they had sued him. That allegation was false because it is clear that the Plaintiff was very much aware of the existence of the suit. At page 2 of the judgment in Eldoret SPMCC No. 9 of 1990, it is indicated that the Plaintiff herein filed a defence in asking for a dismissal of the suit but he refused to come to court for hearing and the hearing proceeded ex-parte. Also, PW3’s testimony was that his father had an advocate, save that he did not know whether he used to go to court.
48. The 1st Defendant, Desper Kiptoo and DW1, James Kipkiror Kiptoo, are the sons of the late Kiptoo Kuriases, who was a son of the late Cheserek Yator. DW2, Robert Kimaiyo Murkomen, testified that he was claiming as a son of the late Murkomen Yator Kuriases, also a son of the late Cheserek Yator. Notably, at the commencement of this suit, Murkomen Yator had been sued as the 2nd Defendant. He died during the pendency of this suit and his name was by consent removed from this suit. Kibiwott Kuriases, the 2nd Defendant herein, as stated by the Plaintiff’s witnesses is a son of Cheserek Yator. Going by the above analysis, I am convinced therefore that the claimants herein have established that they belong to the family of the late Cheserek Yator, as does the Plaintiff herein. It goes without saying therefore that the Defendants herein belong to the same family or group, satisfying the second requirement.



49. The relationship between the Defendants and the Plaintiff is not so remote or tenuous as to make their claim idle or adventurous, in line with the third requirement. That being the case, it follows that any of the sons of the late Cheserek Yator had a right to be registered in the place of the Plaintiff. They would have been entitled to be registered as owner or other beneficiary of the land but for some intervening circumstances. The grandsons of the late Cheserek Yator then inherit their claims from their fathers as members of the family of the late Cheserek yator. The fourth and last requirement is therefore satisfied.
50. It also appears that the Defendants are no longer in possession/occupation of the suit property the last of them having been evicted in 2021. With regards to the fact of occupation, the Supreme Court in the *Kiebia vs M'lintari & Another* (Supra) held that:-
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*. Although the Respondents herein were not in possession or actual occupation of Parcel No. Njia/Kiegoi Scheme 70, both the High Court and Court of Appeal were entitled to enquire into the circumstances of registration, to establish whether a trust was envisaged. Since the two superior courts were satisfied that indeed elements of a customary trust in favour of the Respondents pertaining to the parcel existed, we see no reason to interfere with their conclusions."
51. In the instant case, there seems to have been no previous agreement that the Plaintiff be registered as proprietor of the land. Nevertheless, it appears that even after realising that the Plaintiff had obtained registration as the proprietor of the suit land, the other family members did not object in the belief and understanding that they would all continue to use the land as a family. The registration of the Plaintiff therefore was left to stand and he remained as the caretaker of the suit premises on his own behalf and on behalf of his brothers, including their descendants being the Defendants herein and their families. That unspoken belief or understanding in itself was sufficient to result into a trust to the effect that the Plaintiff was holding the suit property in a trust as claimed by the Defendants herein. It therefore does not signify that the Defendants are not currently in occupation of the suit property. Even without being in occupation, they have established the existence of the customary trust over the suit property.
52. As to the allegation that the suit herein is *res judicata*, for starters this allegation was never raised in the pleadings or even during the hearing of the matter. It was only raised during submissions herein, yet it is trite that parties are bound by their pleadings. The court finds that cases are decided by pleadings of the parties and that submissions are not pleadings. Equally, this court cannot rely on the submission of the counsel to oust the express prayers in the orders sought. See the case of *Nzioka Ndeti Nicholas & another vs Esther Ndunge Manthi* [Suing as the Legal Representative of the Estate of Stephen Manthi Malile (Deceased) [2019] eKLR, where it was held that:
- "43. The Court of Appeal in *Avenue Car Hire & Another vs. Slipha Wanjiru Muthegu* Civil Appeal No. 302 of 1997 held that no judgement can be based on written submissions and that such a judgement is a nullity since written submissions is not a mode of receiving



evidence set out under Order 17 Rule 2 of the Civil Procedure Rules [now Order 18 rule 2 of the Civil Procedure Rules]. The same Court in Muchami Mugeni vs. Elizabeth Wanjugu Mungara & Another Civil Appeal No. 141 of 1998 found the practice of making awards on the basis of the submissions rather than the evidence deplorable.”

53. In addition, even if the plea of res judicata had been raised properly, it would still fail since the court in its judgment did not give a reasoned determination on the issues raised. In fact, as the Plaintiff himself submitted, the court never issued the orders sought, and instead referred the matter to the Land Registrar to invoke the provisions of Section 142(1) of the RLA and see how he could assist the Defendants herein. The plea of res judicata cannot thus apply to this case.

ii. Flowing from the above, what are the appropriate reliefs that should issue herein;

54. As the title hereinabove indicates, the orders to be issued by this court must flow from the determination of the first issue herein discussed. The Plaintiff sought first and foremost, a permanent injunction restraining the Defendants from interfering with the suit property. A permanent injunction fully determines the right of the Parties before the Court and is normally meant to perpetually restrain the commission of an act by the Defendant in order for the rights of the Plaintiff to be protected. For a permanent injunction to issue, there must be compelling factors that would warrant the granting of such an order against the Defendant. No such compelling reason has been established to warrant the issuance of an order of permanent injunction. In any event, since the Defendants have an interest in the land, they cannot be restrained from use of the suit property and more so their respective portions thereon.

55. Secondly, the Plaintiff sought a declaration that the Defendants are trespassers on the land. With regards to land, the term trespass is defined under Section 3(1) of the Trespass Act as:-

“ 3. Trespass upon private land

(1)Any person who without reasonable excuse enters, is or remains upon, or erects any structure on, or cultivates or tills, or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.”

56. However, flowing from the finding that the Plaintiff holds the land in trust for himself and the Defendants, that takes the suit property from the ambit of private land. It is in fact trust land, and it follows therefore that the Defendants, being the beneficiaries of that trust have a right to be on the suit property. The declaration therefore cannot be issued as against them.

57. The Plaintiff asked for damages for damage of private property. This court is not persuaded that the Plaintiff suffered any loss. If at all the Plaintiff suffered any damage, he did not lead any evidence in that regard or quantify the same. The Plaintiff did not therefore prove that he is entitled to damages. The prayer is declined for want of proof.

58. Turning to the Defendants’ counterclaim, they sought a declaration that the Plaintiff holds the suit property in trust for himself and for them. They also sought for orders revoking the registration of the Plaintiff as sole proprietor to suit land and rectification of register to indicate the holding of the land by the 4 sons of the late Cheserek Yator. This court has already found that the Plaintiff holds the land in trust for himself and the Defendants. From the facts and testimony tendered in this court, it appears that the Defendants and their families have not been able to use the land due to interference by, and the adverse actions of, the Plaintiff and his family. The ends of justice in this case can only be met if the trust is revoked and the suit property is subdivided into equal shares and registered in the names of each of the four sons of the late Cheserek Yator or their surviving relatives.



- iii. Who shall bear the costs of this suit?
59. On the issue of costs, the general rule is that costs shall follow the event in accordance with the provisions of Section 27 of the *Civil Procedure Act* (Cap. 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. Any departure from this general rule can only be for good reasons as was explained by the Supreme Court in *Jasbir Singh Rai & Others vs Tarlochan Rai & Others* [2014] eKLR, and may include instances where the matter was a public interest litigation among other justified reasons.
60. The court has not seen or been shown any cause why it should deny the victor the costs of the suit. The fact that they are brothers or uncle and nephews does not amount to reason for denying the costs to the victor. The Court has also considered the fact that this matter has been pending in court for almost 30 years now, one can only imagine the expense to which the Defendants have been put through in defending their claim to the land. For this reason, the court will exercise its discretion and award the Defendants the costs of this suit.

Orders:

61. The upshot is that the Plaintiff's suit as set out in the Complaint lacks merit and is dismissed with costs. The Defendants Counterclaim however succeeds, and the court hereby makes the following orders:
- a. A declaration be and is hereby issued that the Plaintiff holds Land Certificate No. Lelan/Kabiego/57 in trust for himself and the Defendants.
 - b. An order be and is hereby issued revoking the registration of the Plaintiff as sole proprietor to suit land.
 - c. An order of rectification of register and substitution of the Plaintiff as sole proprietor with the registration of each of the four late Cheserek Yator's sons Kiptoo Kuriases, Kibiwott Kuriases, Murkomen Kuriases and Chebet Yator each taking 3.6 hectares.
 - d. The Plaintiff shall bear the costs of this suit.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 16TH DAY OF DECEMBER, 2024.

E. OBAGA

JUDGE

In the virtual absence of parties who had been notified of the Judgement date.

Court Assistant –Laban

E. O. OBAGA

JUDGE

16th December, 2024

