



**M'Mboroki v M'Mboroki (Environment & Land Case 20 of 2020)  
[2023] KEELC 16483 (KLR) (22 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 16483 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT & LAND CASE 20 OF 2020**

**CK NZILI, J**

**MARCH 22, 2023**

**BETWEEN**

**PATRICK MURIUKI M'MBOROKI ..... PLAINTIFF**

**AND**

**GERRARD MARANGU M'MBOROKI ..... DEFENDANT**

**JUDGMENT**

1. Before the court is an originating summons dated 6.7.2020, in which the plaintiff seeks to be declared entitled to a half share of LR No Nkuene/Ukuu/844, a resultant subdivision of LR No Nkuene/Ukuu/246, on an account of customary trust.
2. The plaintiff averred that his late father before he passed on subdivided LR No Nkuene/Ukuu/246 into three portions in favor of each of his three sons out of which the plaintiff was to acquire LR No 842, the defendant LR No 843 and their late brother Jotham Mbaya M'Mboroki LR No 844, which process was entrusted upon the defendant to effect with the relevant land offices. The plaintiff averred that his father and brother eventually passed on in 2001 and 2022 respectively.
3. The plaintiff averred that after the two passed on, he together with his family started occupying half of the deceased's parcel LR No 844 as of right while the defendant occupied the other half until 2008, when the defendant allegedly forcibly chased them from the said land. The plaintiff averred that he visited the lands office only to establish that the defendant had illegally and unprocedurally registered the land on 20.1.1999 under his name contrary to and in breach of the existing trust and or clear directions from his late father.
4. Therefore, he prayed for the court to declare the defendant as holding half share of the land in trust for him, a declaration that the defendant should transfer the share to his name and a permanent injunction barring and restraining the defendant, his agents, servants or employees from in any way whatsoever interfering with exclusive possession and enjoyment of the suit land.



5. The defendant opposed the suit through a replying affidavit 17.8.2020, a list of witness statements, a list of exhibits dated 16.11.2021 and a preliminary objection dated 13.1.2021; It was the defendant's contention that his late father had two wives, the 1<sup>st</sup> house comprising three sons living in a separate piece of land, while the 2<sup>nd</sup> house comprising of the plaintiff, himself and their late brother Mbaya, occupying the suit land. He admitted that during his lifetime, their late father had subdivided, transferred and registered LR No Nkuene/Ukuu/246 into LR No's 842, 843 & 844 in 1998 whereof the plaintiff acquired LR No 842 and gave the remaining portions to him.
6. The defendant averred that after his father passed on in 2001, the plaintiff allegedly moved into the suit land and destroyed the timber structure belonging to his late brother together with his father's house following which he made a report to both the police, the area chief and eventually lodged a court case for malicious damage.
7. The defendant denied that he allowed the plaintiff to utilize the alleged half-share of the suit land nor did he chase him away since all the developments thereon belonged to him. Further, the defendant admitted that the plaintiff had sued him at the Meru District Land Dispute Tribunal (LDT), whose decision he appealed against at the East Province Land Dispute Tribunal Committee, which decision was set aside. He denied any alleged customary trust or the intention by their late father to own the land in trust for the plaintiff alleged issued by his late father, more so given that he was the one taking care of his elderly father and his late brother, before their death including exclusively meeting their hospital, mortuary and burial expenses.
8. Through directions issued on 6.12.2021, the defendant was directed to file a valuation report in support of the preliminary objection dated 13.1.2021, on account of pecuniary jurisdiction. None was filed by 7.2.2021. The court therefore in limine dismissed the preliminary objection and directed that the matter to proceed for hearing, following compliance with Order 11 Civil Procedure Rules by the filing of parties paginated bundle of documents dated 9.2.2022 and 15.2.2022 respectively.
9. At the trial, the plaintiff as PW 1 adopted his supporting affidavit sworn on 6.7.2020, a witness statement and a further affidavit dated 20.12.2021, as his evidence-in-chief. Similarly, PW 1 produced a copy of the certificate of an official search for LR No Nkuene/Ukuu/844 as P. Exh No (1), a copy of LDT proceedings as P. Exh No (2), a copy of the judgment in Eastern Province Appeal Committee award as P. Exh No (3) and lastly a copy of a demand letter as P. Exh No (4) respectively.
10. In cross-examination, PW 1 said that the initial ancestral land namely LR No 246 was voluntarily shared out among the three sons by his late father during his lifetime. PW 1 clarified that neither himself nor the late Mbaya Jotham objected to the said subdivisions or transfer from his late father as per the authority given to the defendant at the time to oversee the process. PW 1 however termed the ultimate result, which he came to establish in 2008, as unjust or inequitable or improper since it was in variance with his late father's instructions. Further, PW 1 admitted that he was not aware if his late father left anything in writing for the land to be held in trust of him by the defendant for his late brother. PW 1 denied occupying on the land forcibly or having been charged or sued for malicious damage to the suit land. He however, admitted that at the time the subdivisions and the transfers were affected, his late father was in good frame of mind. PW 1 also said that it was the defendant who was mandated by his late father to oversee the process but instead unfairly enriched himself by acquiring more shares of the land contrary to the instructions and for no basis.
11. PW 1 told the court that due to this, he appealed to the Land Disputes Tribunal and eventually moved to court. He admitted being unfairly charged and convicted in Nkubu law courts for forcible detainer despite his overriding rights on the suit land. PW 1 clarified that the late Jotham Mbaya used to live on the suit land as well as his late father until they passed on. PW 1 termed the exclusive registration



- of the land in favour of the defendant as illegal, unjust, unilateral and unprocedural. PW 1 said that the defendant unjustly abused the responsibility bestowed upon him to equally subdivide and register the land under their names.
12. Kieni Mwanu & Joseph Mbaabu M'Rukaria testified as PW 2 and PW 3. PW 2 as a neighbour and a member of the Abongiri clan panel of elders, told the court that the dispute herein was determined and a decision made that the land be shared among the two sons. He also confirmed that the plaintiff was chased away from the suit land by the defendant in 2008. PW 2 insisted that the clan fairly reached a verdict the suit land should be equally shared between the plaintiff and the defendant in absence of the late Mbaya. PW 3 on his part echoed the evidence of PW2 on equity and fairness, in line with the Ameru customary rites since the land was ancestral in nature.
  13. Peter G. Mwongera testified as PW 4. As a step-brother to the parties herein but from a different mother, that their late father was a pauper sole under the care of the defendant as alleged, to form a basis why the defendant was justified in acquiring more land than his siblings. His evidence was that the defendant was bestowed with the authority of overseeing the subdivisions and transfer by their late father, for all the beneficiaries of LR No 246, including the late Jotham Mbaya who at the time was a drug and substance addict with no family. PW4 said that the defendant being the most educated and trusted son abused his authority or responsibility in acquiring more land, including a share which ought to have gone to the late Jotham Mbaya. PW 4 confirmed testifying before the land dispute tribunal whose award was that the land be shared among the two brothers. PW 4 clarified that their deceased brother did not demand for a share of the land from their late father since the same was already known.
  14. Similarly, PW 4 said that it was not possible for their late father to have shared out land to all his children except the late Jotham Mbaya. His testimony was that the intention of their late father of sharing out the parcel into three portions and not two was because he believed that the defendant would effect the changes to the land in favour of all his three sons.
  15. Additionally, PW 4 said that it was not necessary for his late father to issue the instructions in writing or to call for a meeting to announce his intentions on the individual shares since at the time, there was no dispute over any share or entitlement to each of his sons. PW 4 said that the defendant unfortunately, secretly, selfishly and or unlawfully diverted the suit land to himself to the detriment of the plaintiff and in total disregard to the initial intention.
  16. DW 1 adopted his replying affidavit dated 17.8.2020 and a witness statement dated 16.11.2021 as his evidence in chief. He produced a copy of a title deed for LR No Nkuene/Ukuu/844 as D. Exh No (1), an authority to transact a bank account belonging to his late father as D. Exh No (2), hospital receipts as D. Exh No (3) (a-d), a list of contributions for the funeral of his late brother as D. Exh No (4), bonds to attend court as D. Exh No (5) (a-f) and a green card for LR No Nkuene/Ukuu/422 as D. Exh No (6).
  17. DW 1 testified that his late father's LR. No 246 was lawfully subdivided into three portions among them LR. No 844 which was transferred to him as a gift by his late father with no intended trust in favour of the plaintiff or the late Jotham Mbaya. DW 1 admitted that his late father never specifically stated that the late Jotham Mbaya was not entitled to any share of his ancestral land. Similarly, DW 1 admitted that though legally, and morally, the late Mbaya was entitled to a share of his father's land, unfortunately, he left no heirs to his estate by the time he passed on and was buried on LR No 844, where he previously used to live. DW 1 acknowledged that his late father trusted him to an extent of giving him D. Exh No (1) to operate his bank account where proceeds from his coffee farm would be deposited.



18. Further, DW 1 told the court that the sole intention his late father subdivided the land into three portions was to enable him acquire a large share, even though the suit land remained under the occupation of their late father and late brother until they passed on in 2001 and 2002 respectively. He could however not explain the rationale behind the three subdivisions of the land into the same size, yet in his view, his late father had no bias against any of his sons. DW 1 confirmed that he paid no consideration to his late father to acquire more land than the rest of his siblings.
19. DW 1 also admitted that all his siblings equally took care of his late father and late brother, to the extent of meeting the expenses of the hospitalization and burial costs after their brother was taken ill and passed on in 2002. In cross-examination, DW 1 said that all the subdivisions and transfer forms to the land were initiated and signed by his late father with no objections from neither the plaintiff nor his late brother.
20. DW 2 was Kimathi Muketha, a neighbor to the parties and one of the witnesses at the Land Dispute Tribunal. His evidence was that defendant's late father had sole discretion to share out his ancestral land among his sons as it pleased him. DW 3 was Mwebia M'Muga, a neighbor to the parties. He confirmed that the suit land was part of the ancestral land belonging to the late M'Mboroki, a friend of his. He confirmed that the late Mbaya was buried at his late father's land, the suit land herein.
21. At the close of the hearing, parties were directed to and did file written submissions dated 14.2.2023 and 2.3.2023 respectively. The plaintiff submitted that it was not in dispute that the late M'Mboroki M'Ibutu was the owner of LR. No Nkuene/Ukuu/246 which he subdivided into three portions among his sons belonging to the 2<sup>nd</sup> house among them, the suit land whereof the late Mbaya and himself were buried. Therefore, the plaintiff submitted that the three portions were part of the family or ancestral land and that registration in the name of the defendant was intended to be in trust for him going by the decision of the Land Dispute Tribunal which was in line with customary law and Section 28 (b) of the [Land Registration Act](#). Reliance was placed on the ingredients of customary trust as held in [Isaack Kiebia v Isaaya Theuri](#) (2018) eKLR. Further, the plaintiff submitted that the intention of their late father was clear in dividing the initial land into three portions which was corroborated by PW 2, PW 4 and the LDT decision unlike the defendant's testimony, who relied on DW 2 and DW 3 non-clan members not privy to the affairs of the family of the late M'Mboroki M'Ibutu.
22. Further, the plaintiff submitted that the defendant, though trusted by his late father, took undue advantage of that trust and unjustly enriched himself out of the ancestral land. As to whether the portion allocated to the defendant was a gift *inter vivos* to own absolutely, the plaintiff submitted that the defendant failed to state as such before the LDT hence his evidence herein was contradictory and should be taken as an afterthought. Reliance was placed on [Ishmael Kegode Havi & another v Dan Amena Atinga](#) (2022) eKLR.
23. On his part, the defendant submitted that under Section 107 of the [Evidence Act](#), the burden to prove customary trust rested on the plaintiff as held in [Salesio M'Itonga v M'Arithi M'Athara & 3 others](#) (2015) eKLR. The defendant further submitted that the plaintiff relied on the LDT proceedings to prove customary trust yet the said proceedings and the award was null and void *ab initio*, for want of jurisdiction, with no probative value as held in [Republic v Karisa Chengo & 2 others](#) (2017) eKLR, [Joseph Karobia Gicheru v Michael Gachoki Gicheru](#) (2013) eKLR, [Adero & another v Ulinzi Sacco Society Ltd](#) (2002) eKLR, [KPA v Modern Holdings Ltd \(E.A\) Ltd](#) (2017) eKLR, [Wachira Wambugu & 2 others v District Land Dispute Tribunal Othaya & 3 others](#) (2013) eKLR, [Mwangi & another v Mwangi](#) (1986) KLR 328 & [Mukanga v Mbui](#) (2004) 2 KLR 256.



24. As to whether the transfer and registration of the suit land to the defendant was a gift *inter vivos*, the defendant submitted that the same was done during the lifetime of the donor with neither a complaint nor objection from the plaintiff or his late brother.
- Regarding the aspects of fraud or forgery, the defendant relied on *Re Estate of M'Raiji Kithiano (deceased)* (2017) eKLR, which cited with approval *Re estate of the late Gideon Mantbi Nzioka (deceased)* (2015) eKLR, on the proposition that gift *inter vivos* must be complete for the same to be valid.
25. On the inference of customary trust the defendant submitted that the plaintiff failed to adduce evidence to infer any trust given that it was not unusual for the deceased parent to give out some of his son's larger shares of his land as indicated in D. Exh No 6.
26. Further, the defendant submitted that the plaintiff's claim was anchored on the assumption that the late Mbaya was entitled as a matter of right to get suit land from his father, yet the plaintiff has not filed the suit as a legal representative of his late brother's estate; Therefore, the defendant submitted that a clear intention of the deceased father to transfer the land should not be confused with the assumption by the plaintiff that the suit land was solely meant for the late Mbaya.
27. As to whether the plaintiff's evidence deviated from the pleadings on the concept of trust to alleged aspects of fraud, forgery and impropriety, the defendant submitted that parties were bound by their pleadings as held in *Raila Amollo Odinga & another v IEBC & 2 others* (2017) eKLR which cited with approval *Daniel Otieno Migore v South Nyanza Sugar Co. Ltd* (2018) eKLR on the proposition that parties should not be permitted to travel beyond their pleadings.
28. The defendant submitted that no trust has been proved against him going by the holding in *Kazungu Fondo Shutu & another v Japhet Noti Charo & another* (2021) eKLR which cited with approval *Mumo v Makau* (2002) 1 EA 170, *Muthiora v Muthiora* (1982) eKLR and *Juletabi African Venture Ltd and another Christopher M. Lockley* (2017) eKLR.
29. Additionally, the defendant submitted that this court could not sit as a probate court to make a finding that the late Mbaya by virtue of being unmarried and childless, any of his share of the suit land should be equally shared by both the plaintiff and the defendant. The defendant submitted that by any stretch of extension, such a scenario could not fit into a definition and or proof of a customary trust.
30. The court has carefully gone through the pleadings, evidence tendered, written submissions and the law. The issues calling for determination are:
- i. If the plaintiff other than on a breach of trust, has also based his claim on fraud, illegality, forgery or impropriety.
  - ii. If the plaintiff has sued out of his own right or for and on behalf of his deceased brother the late Jotham Mbaya.
  - iii. If the plaintiff has proved his claim.
  - iv. Whether the plaintiff is entitled to the reliefs sought.
31. The primary pleadings regarding this suit are the originating summons dated 6.7.2020 and the replying affidavit sworn on 17.8.2020. In the said originating summons, the plaintiff urged the court to declare him entitled to a half share of LR No Nkuene/Ukuu/844 measuring approximately 0.23 acre due to customary trust.



32. In support of the originating summons the plaintiff averred that his late father had subdivided LR No Nkuene/Ukuu/246 into three portions in favour of his three sons. The plaintiff averred that after his late brother passed on in 20.10.2002, he continued utilizing half share of the suit land, as of right while the defendant took the other half until 2008 when he was forcibly chased away only to establish that the suit land had been illegally registered under the defendant's name and a title deed issued after the death of both his late brother and the late parent.
33. At paragraphs 15, 16 and 17 of the supporting affidavit the plaintiff gave particulars of the breach of trust by the defendant on account of registration and attempts to unfairly, illegally and procedurally acquire the land through unjust enrichment, contrary to the intentions of their late father.
34. In response, the defendant admitted that the suit land was initially ancestral or family land as LR No 246, part of which was transferred to him as LR No 844 out of the 3 portions in a lawful manner in 1998 and 2002. Further, the defendant admitted that after his late father and brother passed on, the plaintiff unlawfully and without consent moved into the suit land and allegedly destroyed the houses of the two deceased relatives. Specifically, the defendant admitted that all the other siblings acquired a share out of the ancestral land of their late father except the late Mbaya. Further he said that his share was larger than the rest of them, due to his extra responsibilities of taking care of the two deceased relatives. The defendant denied any trusteeship as alleged by the plaintiff, since there was no objection raised against the registration.
35. It is trite law that parties are bound by their pleadings and issues flow from the pleadings. See *Mutinda Mule v IEBC* (2014) eKLR. In this suit, the plaintiff based his claim on trust allegedly existing hitherto the subdivisions, transfer and the registration of LR No 844. The plaintiff averred and testified that the suit land was occupied by not only their late father and brother Jotham Mbaya until they passed on in 2001 and 2002 respectively. The plaintiff sought for this court to infer a customary trust prior to, during and after the transfer and registration of the land in the name of the defendant. He alleged that the intention of his late father was that the ancestral land be shared out among all his sons to the 2<sup>nd</sup> house, which the defendant as the firstborn son as not only a trusted son but also an educated one, breached and irregularly registered the land as solely belonging to himself. The defendant denied the allegations and averred that, though the late brother and his deceased father were living on the suit land before their demise in 2001 and 2002, his late father willingly, lawfully, procedurally and regularly subdivided his land, transferred it and opted to deny the late Mbaya a portion and instead gave him a large share as a gift in due consideration of his additional responsibilities of taking care of the two during their lifetime.
36. Order 2 Rules (1), (2), (3), (4), (10) of the *Civil Procedure Rules*, defines pleadings generally and in particular, matters which must be specifically pleaded. The material facts or the particulars to be specifically stated in an action for the recovery of land, its possession, inter alia include, misrepresentation, fraud, breach of trust, undue influence, condition of mind, malice and fraudulent intention.
37. In compliance with Orders 11 and 15 of the *Civil Procedure Rules*, parties in this suit drew out issues both on fact and law for the court's determination arising out of their respective pleadings, witnesses' statements and list of documents. The same are contained in the paginated bundles at pages 44 and 40 respectively.
38. Among the issues set out by the defendant were: if the land was shared during the lifetime of the deceased; if the subdivisions and the transfers were willingly done; if it was a gift *intervivos*; if there was an intended trust and lastly; if the transfer was fraudulent. Further, the defendant in his case summary



stated that he shall prove through evidence that no fraud was involved in the survey of the parent land and the eventual transfers of the suit land to him.

39. To that end, my finding is that at the hearing of the suit, the parties were each fully alive to the questions/issues raised regarding the manner, process, and circumstances of the subdivisions, transfers and registration of the suit land; the occupation and possession of the same and any rights thereof by each of the parties. Therefore, it cannot lay for the defendant to submit that the claim as framed was solely based on trust and that the plaintiff deviated from during cross examination or re-examination of witnesses to include new issues based on fraud, forgery and impropriety.
40. All these issues and material propositions were contained not only in the plaintiff's originating summons, the supporting affidavit and witness statement but also were affirmed or denied by the defendant in his replying affidavit, the witness statement and evidence before court. The defendant also reduced the propositions into his own issues for the court's determination in his paginated bundle. Therefore, the defendant is estopped in law from alleging that there was deviation from the primary pleading by the plaintiff during the hearing.
41. As regards, the capacity under which the suit was brought and whether the plaintiff was furthering his own interest or that of the estate of the late Jotham Mbaya, the plaintiff at paragraph one of the originating summons described the defendant as his brother holding LR No 844 in trust for him which land arose out of a common ancestral or family land acquired through unjust enrichment, and which was under his occupation after his late father and brother passed on. Later on, he alleged that the defendant acquired the title deed oblivious of the above pleaded overriding accrued rights or interests.
42. In *Law Society of Kenya v Commissioner of Lands and others* HCC No 464/2000, the court said that *locus standi* signified the right to be heard and that a person must have sufficiency of interest to sustain the standing to sue in a court of law. The plaintiff here in alleged that he was a beneficiary of a customary trust. Order 37 (a) & (g) of the *Civil Procedure Rules* provides that in any question affecting *inter alia* a person claiming to be a legatee, a heir or *cestui que* trust, such a person can file a suit for the determination of those questions.
43. The plaintiff hinged his claim on overriding interests under Section 28 of the *Land Registration Act*. The court in *Mbui Mukangu v Gerald Mutwiri Mbui* (2004) eKLR, held that customary trusts were equitable rights binding on the land.
44. Further, the plaintiff herein averred that he was in possession and occupation of the suit land prior to the subdivisions, the transfers and the registration in favour of the defendant undertaking farming with the knowledge of the defendant between 2001 and 2008. See *Mbui v Mukangu* (2004) eKLR.
45. The plaintiff pleaded that the subdivisions and the transfers of the suit was subject to his overriding interests regardless of and independent of the late Jotham Mbaya. In *Peter Kim Baker and 2 others v Sidi Katana Bongo & another* (2019) eKLR the court cited with approval *Rajesh Pranjivan Chudasama v Sailesh Chudasama* (2014) eKLR, where it was held that the respondents did not require to have sought and obtained letters of administration to defend their right of occupation.
46. In this suit, the plaintiff has not pleaded anywhere in his pleadings that he was advancing the claim for and on behalf of the estate of his deceased brother. He merely pleaded his own individual interest and rights based on customary trust and which the defendant as his brother has failed to respect and or uphold contrary to the intention of their late father. He did not, therefore, require any letters of administration to file, prosecute or advance his claim based on customary trust as provided under Order 37 of the *Civil Procedure Rules* as read together with Section 28 of the *Land Registration Act*. See *Joshua Kamoing v Simon Barchok and 2 others* (2016) eKLR.



47. Turning to the issue as to whether the plaintiff has proved the existence of trust and which was irregularly ignored by the defendant in registering the suit land as his, a party basing its claim on customary trust must prove the ingredients of a trust which is a matter of fact, through evidence as held in *Salesio M'Itonga v M'Arithi* (*supra*).
48. In the case of *Kambo v Mwangi* (civil appeal) 186 (KLR) (28<sup>th</sup> April 2022) (Judgment), the court cited with approval *James N. Kiarie v Geoffrey Kinuthia & another* (2012) eKLR, for the holding that occupation and or possession of the land was a necessary ingredient for a trust to be established under customary law.
49. The locus classicus on trusts is the case of *Isaack M'Inanga Kiebia v Isaya Theuri M'Lintari* (*supra*) in which the Supreme Court of Kenya set the tests for establishing a customary trust as:
- a. The land in question was before registration family, clan or group land.
  - b. The claimant belongs to such family, clan or group.
  - c. The relationship of the claimant to such family, clan or group is not so remote, or tenuous.
  - d. The claimant could have been entitled to be registered as an owner or other beneficiary but for some intervening circumstances.
  - e. The claim is directed against the registered proprietor who is a member of the family, clan or group.
50. In the light of the above threshold, can the plaintiff be said to have crossed the watermark to be entitled to the reliefs sought from this court?
51. To my mind, the answer is yes given that in the pleadings and evidence tendered, the plaintiff has met tests No's (a), (b), (c) and (e) above. The plaintiff is a blood brother to the defendant, the suit land was a subdivision of their late father's ancestral LR No 246 and lastly, the plaintiff was in occupation of the land between 2001 to 2008 with the knowledge of the defendant. The only issue remaining is test No (2), the circumstances surrounding the subdivisions, transfers and registration.
52. Section 51 of the *Evidence Act* provides that when a court has to form an opinion as to the existence of any general custom or right, the opinion as to the existence of such custom or rights of a person who would be likely to know of its existence, if it existed, are admissible, which custom or right includes customs or rights common to a considerable class of persons. As to the opinion on a relationship, the section provides that when a court has to form an opinion, the opinion expressed by the conduct of a member of the family with special means of knowledge, that evidence is admissible including the grounds of which the opinion is based.
53. Further, under Sections 60 & 61 of the *Evidence Act*, the court has the discretion to take judicial notice of certain facts including facts admitted in prior civil proceedings by parties.
54. In the case of *Ernest Kinyanjui Kimani v Muiru Gikanga & another* (1965) E.A 735, the court held that Africans and African Customary Law forms part of the law of the land, which must be accurately and definitely established by calling evidence to prove it.
55. In this suit, the plaintiff pleaded that his late father expressed his intention to share out the ancestral or family land among his three sons belonging to the 2<sup>nd</sup> house, just like he had done to the sons in the 1<sup>st</sup> house. Therefore, the plaintiff averred that it was unjust for the defendant to breach the trust, register the suit land solely in his favour and thereafter chase him away after he had continued to enjoy the portion unperturbed between 2001 and 2008. On the other hand, the defendant took the view that the



- circumstances surrounding the subdivisions, transfers and the registration related to a gift inter vivos with no inference of a trust in favour of the plaintiff or his late brother.
56. The court in *Re-estate of Gedion Mantbi Nzioka* (*supra*), held that a gift inter vivos was a gift between living persons granted by a deed or instructions in writing, through a delivery or by way of a resulting trust or a declaration through a registered transfer.
  57. In the case of *Mbui v Mukangu* (*supra*), customary trust was defined as a concept of intergenerational equity where the land was held by one generation for the benefit of the succeeding generation(s) and where the land was passed down from one family member to another, the presumption of trust subject to evidence was high. Further, in *Kanyi v Muthiora* (1984) KLR 712 the court said that a registration of the suit land could not extinguish rights held under the Kikuyu customary law or trusteeship. Additionally, in *Muthuita v Muthuita* 1982-1988) 1KLR 42, the court held that customary law trust could be proved by leading evidence on the history-(root)-of the suit property, the relevant law on which the trust was founded and the claimants subscribed to.
  58. Additionally, in *Peter Gitonga v Francis Maingi M'Ikiara*, Meru HCC No 146 of 2000, the court found a trust created under customary law and that to do so the circumstances surrounding the registration were looked at so as to determine the purpose of the registration. More importantly in *Juletabi* (*supra*), the court held that the law would never imply and a court should never presume a trust unless in a case of absolute necessity, in order to give effect to the intention of the parties, which intention must be clearly determined.
  59. In *Jacob Kinyua Mbui & 6 others v David Gitonga suing as the legal representative of Mberia M'Rimbera* (2020) eKLR the court cited with approval *Susan Mumbi Waititu v Mukuru Ndata and 4 others* (2007) eKLR on the proposition that a trust must be proved with cogent evidence. The court said that the process of the alienation of the original parcel had to be analyzed in order to give a clear perspective of the dispute at hand. The court found that there was evidence of use of stealth to scheme to deprive a brother of the family land which had been done in a crafty and intricate web, in a manner depicting an untrustworthy trustee of the family land.
  60. In this suit, the defendant averred that there was no intention of trust, that the process leading to subdivisions, transfers and the registration was above board and that he was an absolute owner of the suit land with no defined or intended trust. At paragraph 8 of the replying affidavit as well as the witness statement, the defendant referred to the process of the subdivisions and transfer up to the time he obtained the title deed not only lawful but also procedural.
  61. There is no doubt that the defendant obtained the title deed to the suit land on 28.11.2002. This was soon after his late father and brother had passed on. DW 1 insisted in his evidence that the subdivisions, transfers and registration of the titles occurred during the lifetime of his late father. Unfortunately, and as held in *Dr. Joseph Ngok v Justice Keiwua & 4 others* Civil Application No Nai 60 of 1997, when a title to the land was under dispute, the entire paper trail of ownership becomes an issue for determination and has to be established.
  62. The defendant in his evidence failed to produce the paper trail stated in paragraph 8 of the replying affidavit to back his assertions and rebut a presumption of a trust, which documents in my view were within his custody including the mutation forms, the land board consents for both the subdivision and transfer, transfer forms, stamp duty forms and the registration forms. It is instructive to note that Jotham Mbaya died on 20.10.2002 and in less than a month, the defendant had obtained a title deed for the suit land under his name.



63. The defendant in his statement before the land dispute tribunal at page 4 of P. Exh No (2) had stated that there were several corrections of names at the land control board meetings regarding his late father as being joint proprietors of the suit land with his two other sons. DW 1 is on record to have stated before the LDT that there was a confusion after his deceased brother allegedly started molesting his late father and destroying houses, after which he was instructed by his late father to return to the land control board and start afresh the process of the subdivisions, transfer of the initial land. As indicated above Sections 51, 60 & 61 of the *Evidence Act* mandates this court to rely on opinions on customary law. PW 2, PW 3 and PW 4's evidence was never controverted by the defendant as to the circumstances surrounding the subdivisions, transfer and registration in favour of the defendant and the intentions of their deceased father.
64. Taking judicial notice of earlier evidence of the defendant in the LDT, I am unable to believe the evidence of the defendant before this court, particularly in absence of any documentary evidence, yet he wants this court to make a finding that the process of the subdivisions, the transfer and the registration of the suit land was lawful and procedural done with no inference of any trust.
65. The circumstances surrounding the subdivisions, transfers and registration of the suit land remain suspect and were tantamount to the defendant seeking to defeat his late father's intention of defeating the accrued possessory and or occupation overriding interests or customary right by the plaintiff.
66. I proceed therefore to find a customary trust in favour of the plaintiff to the extent of half a share of the suit land. The defendant shall sign and transfer the land to the plaintiff within 2 months from the date hereof in default of which the Deputy Registrar of this court shall execute them.
67. Costs to the plaintiff.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT THIS 22ND DAY OF MARCH, 2023**

**HON. C.K. NZILI**

**ELC JUDGE**

In presence of:

C/A: John Paul

C.P Mbaabu for defendant

Karanja for the defendant

