



**Kimanzi v Kangalya (Environment and Land Appeal 12 of 2021)
[2023] KEELC 16946 (KLR) (20 April 2023) (Judgment)**

Neutral citation: [2023] KEELC 16946 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITUI
ENVIRONMENT AND LAND APPEAL 12 OF 2021**

LG KIMANI, J

APRIL 20, 2023

BETWEEN

JOSHUA JOSIAH KIMANZI APPELLANT

AND

JACOB NELSON KANGALYA RESPONDENT

(Being an Appeal from the Judgment and order of the Learned Senior Resident Magistrate A.S Lesootia, sitting in Kitui PMCC NO. 301 OF 2012 and dated 30.08.2016)

JUDGMENT

1. This is an appeal from the Judgment of the Learned Senior Resident Magistrate A.S Lesootia, dated 30th August 2016 in Kitui PMCC NO.301 of 2012 through the Memorandum of Appeal dated 29th September 2016. The Appellant sets out the following grounds:
 - a. That the Learned Resident Magistrate erred and misdirected himself on the law and the facts when he relied on a non-existent customary law Trust and which trust had not been proved, a decision that was wrong in principle and the law.
 - b. That the Learned Resident Magistrate erred and misdirected himself on the law and the facts when he failed to consider that the land in issue was registered under the Registered [Land Act](#) Chapter 300 Laws of Kenya and that the same had been lawfully transferred to the Appellant by his late father and therefore was not subject to considerations based on succession laws.
 - c. That the Learned Resident Magistrate erred and misdirected himself on the law and the facts when he failed to appreciate that Land Parcel Number Kyangwithya/Tungutu/874 was owned by the Appellant in absolute proprietorship and as such, registration had extinguished all other rights of third parties.



2. By a plaint dated 2nd October 2012 and amended on 28th January 2012, the Appellant claimed that he was the registered proprietor of Land Parcel Number Kyangwithya/Tungutu/874 having inherited the same from his late father, Nason Kang'alya Nyange. He claimed that on or about August 2012, the Respondent, who is his nephew, encroached onto the suit land without any colour of right by renovating an old shop and creating a farm by planting an assortment of food crops with a view to claiming the land. The Appellant prayed for orders of permanent injunction and an order of eviction of the Respondent from the suit land.
3. In his defence, the Respondent contended that he had always been in actual possession and occupation of the suit land during and after the lifetime of the original proprietor Nason Kang'alya Nyange (deceased). He claimed that before his death, the deceased had given him the suit property to own and possess as a grandson and that the plaintiff obtained transfer of the land to his name secretly and fraudulently with a view to disinherit him. The defendant further claimed that the plaintiff's title was subject to the overriding interests of occupation, possession and rights of the defendant under Section 28 (b) of the Land Registration Act No. 3 of 2012.

Evidence at the trial court

4. The Plaintiff testified during the trial and called two witnesses his brother Charles Kiteme Kangalia and his sister Rachel Simon. He stated that his father had three sons, William Kang'atia (deceased), John and himself and that he gave each a portion of land and that the portion given to him was the suit land parcel Kyangwithya/Tungutu/874. He exhibited a copy of his title deed and certificate of official search.
5. He claimed that the Respondent had encroached on the said land. Upon cross-examination, the Appellant confirmed that the Respondent and his elder brother were his sister Grace's sons born before she got married but they declined to follow their mother when she got married. The Appellant denied that the defendant and his brother lived on the land but confirmed that they had lived at their grand father's house but no longer lived on the said land. He denied ever being in a meeting where a will was prepared by their late father. The Appellant confirmed that his father transferred his parcels of land to his sons during his lifetime.
6. The Appellant's witnesses testified that the suit land was given to the Appellant as an inheritance by their father and that the Respondent had trespassed on the land.
7. During the Defence hearing, the Respondent testified and called four witnesses namely Agnes Kamene Kilonzi, his uncle William's widow, Joseph Nyange, his brother, Samson Maanzi Nyange, brother to the deceased Nason Kang'alya Nyange, Geoffrey Kilonzo, his cousin and Son to William and Agnes. The Respondent testified that he was brought up by his deceased grandfather who treated them as his children. He stated that his late grandfather shared his estate to his three sons Joshua, the Appellant herein, John and William (deceased) and that he gave him and his brother a parcel of land at Unyaa No. 8784. He stated that his grandfather called elders and some relatives and a record of the meeting and all properties distributed was kept and was given to one Charles Kang'alya alia John. That his late grandfather executed transfers and they were told to wait for title deeds but that he later learned that the Plaintiff had transferred the land given to him to himself using his grandfather who had gone senile due to cerebral malaria and old age. He testified that the Appellant now has three parcels of land and wanted to evict them from the land their grandfather left them. He stated that the shop on the suit land had been abandoned and that he started cultivating the land in the year 2012.
8. DW 2 Agnes Kamene Kilonzi stated that the deceased gave the suit land to the Respondent and she was present during the meeting when the properties were distributed and she signed a record of the proceedings. DW 3 Joseph Nyange stated that the suit land was given to him and his brother the



Respondent by their grandfather who had brought them up. DW 4, Samson Maanzi Nyange, uncle to the Appellant also gave evidence that the deceased gave the suit land which borders his land to the Respondent. Upon cross-examination, he stated that he was informed of the agreement by the deceased himself and did not actually see the agreement.

9. DW 5, Geoffrey Kilonzo stated to the court that the Appellant is his uncle and that the Respondent is his cousin. He also stated that the suit land belongs to the Respondent as distributed by their deceased grandfather before he died. He also stated to the court that the defendant was using the land when the deceased was alive.
10. In the judgment of the Trial Court, the learned trial Magistrate found that it was not in dispute that the Respondent and his younger brother had been living with their deceased grandfather in his house even after their mother got married. In the trial courts view the deceased distributed his land to his three sons and the defendant's mother, by virtue of being the deceased child; she was entitled to a portion of the land and by extension, the Respondent. The Learned Magistrate found that under section 28 of the [Land Registration Act](#) the suit land was subject to overriding interests by custom and dismissed the case, finding that the Appellant had not proven his case on a balance of probabilities.

The Appellants' Submissions

11. Counsel for the Appellant filed written submissions and stated that the question of how a trust is created is a question of fact to be proved by evidence. He relied on the holding in *Mumo vs Makau* (2002) EA 170. Counsel submitted that the Appellant's father subdivided his land to his three sons during a family meeting and that the Respondent who is a son to his sister had land where his mother was married. On the finding of the Trial Court on the existence of a trust based on the fact that the Defendant lived with his grandfather, the appellant questioned why the other brothers or sisters did not lay claim to the suit land while they all stay with their grandfather. Counsel also contended that no written will or such oral will reduced into writing had been produced to indicate that there were intentions to give the suit land to the Respondent.
12. The Appellant stated that the learned magistrate erred in assuming that this was a succession proceeding stating that the Respondent's mother was entitled to a portion of the land and by extension the Respondent.
13. Further, Counsel for the Appellant submitted that it is never the duty of the court to presume a trust and relied on the case of *Juletabi African Adventure Limited & another vs Christopher Michael Lockley* (2017) eKLR. He also relied on the cases of *Isack Kieba M'inanga vs Isaaya Theuri M'Lintari & Another* SCoK No.10 of 2015 where the Supreme Court of Kenya held that each case has to be determined on its merits and quality of evidence. He also relied on *Mbui Mukangu v Gerald Mutwiri Mbui* CA 281 of 2000 where the court held that for one to establish a claim in customary trust, one has to prove that they are in actual physical possession or occupation of the parcel of land.
14. It is the Appellant's submission that the Respondent did not adduce any evidence that the grandfather had the intention to register the land in his name but for some intervening circumstance while relying on the holding in the case of *Alice Wairimu Macharia vs Kirigo Philip Macharia* (2019) eKLR that the legal burden to prove that the existence of a trust rests with the one who is asserting that right under customary law and that the Respondent did not discharge that burden. They further relied on the case of *Njenga Chogera vs Maria Wanjira Kimani & 2 others* (2005) eKLR.
15. The Appellant submitted that the evidence on record, particularly the evidence of PW 3 demonstrated to the required standard of proof that the suit land was not ancestral land and that the intention of the Appellant's father was to transfer to the Appellant as the indefeasible proprietor.



16. The Appellant further submitted that Section 26 of the *Land Registration Act* provides that the certificate of title is prima facie evidence of absolute and indefeasible title unless there was proven fraud or misrepresentation or whether the title was acquired illegally, unprocedurally or through a corrupt scheme. Counsel submitted that the Respondent failed to demonstrate that the Appellant had acquired title fraudulently, illegally, unprocedurally or through a corrupt scheme.
17. The Appellant prays that the appeal be allowed and the judgment and orders of the subordinate court be reversed and/or set aside and the appellants claim in the lower court be allowed together with the costs of this appeal.

The Respondent's Submissions

18. The Respondent submitted that this court should not interfere with the judgment of the Trial Court for the reason that the court took into account that the parties had a familial relationship and that he had possession of the land prior to the suit having inherited the same from his grandfather. He submitted that the trial court considered the legal status of the title to the suit land and found it to be subject to overriding interest as envisaged under Section 28 of the *Land Registration Act*.
19. Counsel submitted that the respondent proved by way of evidence existence of a customary trust as was found in *Mumo vs Makau (2002) IEA 170* Court of Appeal. The Respondent submitted that he successfully led evidence in the trial court that he and his sibling lived with their grandfather until his demise. They relied on the holding in the case of *Mbui Mukungu vs Gerald Mutwiri Mbui (2004) eKLR* where the court held that for one to establish a claim in customary trust, one had to prove that they are in actual possession or occupation of the land.
20. Further, the Respondent submitted that the Appellant avers that he inherited the suit property from his father Nahashon Kang'alya in doing so; he contends that it is family land by virtue of ancestry lineage and is therefore subject to customary law which recognizes trust. He stated that the Judicature CAP 8 Section 3(2) mandates all courts to be guided by African customary law in civil cases where parties are affected by it.
21. He also relied on the decision of *Isack Kieba M'inanga vs Isaaya Theuri M'Lintari & Another SCoK No.10 of 2015* where the court set out the elements that would qualify a claimant as a trustee and held that in a claim based on trust each case has to be determined on its merits and quality of evidence. Counsel submitted that it was evident that the land had been gifted to the Respondent by the grandfather and therefore the land is encumbered by customary trust. Counsel further relied on the holding in the case of *Dominic Otieno Ogonyo & 2 others vs Helida Akoth Walovi (2022) eKLR* where the court held that trusts, including customary trusts are recognized as overriding interests within the provisions of Section 28 of the *Land Registration Act*.
22. Submitting on the provisions of Section 26 of the *Land Registration Act*, the Respondent stated that the existence of title is not absolute proof of ownership, he questioned the legality of the transfer process due to the mental capacity of the deceased when the transfer was effected since he was frail and sickly. It is their submission that the Appellant wishes to benefit from an illegality. The Respondent concluded by submitting that the rights of the Respondent lie within the provision of Section 28 of the *Land Registration Act*.

Analysis and Determination

23. The Court has considered the three Grounds set out in the Memorandum of Appeal, submissions by Counsel for the Appellant and Counsel for the Respondent and the authorities cited. This being a first



appeal, it is the duty of the Court to review the evidence adduced before the trial court and satisfy itself that the decision was well-founded. In *Selle & Another vs. Associated Motor Boat Co. Ltd & Others* [1968] EA 123, this principle was enunciated thus:

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...”

Ground 1. That the Learned Resident Magistrate erred and misdirected himself on the law and the facts when he relied on a non-existent customary law Trust and which trust had not been proved, a decision that was wrong in principle and the law.

24. Certain facts in this suit are not in contention. The suit land Kyangwithya/Tungutu/874 is registered in the name of the Appellant but was initially registered in the name of Nason Kang’alya Nyange (deceased) the father to the Appellant and grandfather to the Respondent. The Appellant claims that the land was transferred to him by his late father, in his lifetime at a time when he distributed his properties to his three sons himself, John and William (deceased). The Respondent is the son to Grace, a daughter of the deceased Nason Kang’alya Nyange (deceased) and also the Appellants sister. He was born before his mother got married and was brought up by his grandparents in their home.
25. The Appellant claims that on transfer of the suit land to him, he gained absolute and indefeasible rights and he denies having been registered as trustee on behalf of the Respondent herein or anyone else as was held by the trial court. The Respondent on the other hand claims that he was brought up together with his brother by his grandparents and lived in the said grandparents’ home before and after their mother got married and she moved to her matrimonial home. He states that his grandfather while distributing his land to his sons expressly gave the suit land to him and his brother and thus registration of the land in the Appellants name was subject to trust and subsisting rights of possession and occupation as provided by the law.
26. Section 25 (1) of the [Land Registration Act](#) provides for the rights of a proprietor while subsection (2) provides for the duty and obligation placed on a proprietor and protection of the rights of a beneficiary of a trust in the following terms;
 1. The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject;
 - a. to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
 - b. to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register
 - (2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.”



27. The Appellant relied on the protection availed to the holder of a certificate of title under section 26 of [Land Registration Act](#) which provides that the Certificate of title is to be taken by courts as prima facie evidence of proprietorship; and that ownership is absolute and indefeasible.

The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except-

- a. on the ground of fraud or misrepresentation to which the person is proved to be a party; or
 - b. where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
28. The Appellant challenged the trial courts finding that he held the land under a trust which he claims was non-existent and had not been proved. The Respondent on the other hand supports the finding of the trial court that the title deed issued to the Appellant did not confer on him absolute and indefeasible ownership of the land but the same was subject to overriding interests as conferred under Section 28 of the [Land Registration Act](#) No.3 of 2012 and that the Appellant held the land subject to the Respondents beneficial interests. The said section provides that:

“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) spousal rights over matrimonial property;
 - (b) trusts including customary trusts.”
29. On the question of whether a customary law trust existed in the circumstances of this case Counsel for the Appellant and the Respondent relied on the Court of Appeal decision in *Phillicery Nduku Mumo v Nzuki Makau* [2002] eKLR.

“On our own consideration of the evidence on record we agree with the learned judge that Customary Law trust had been proved. It is trite that trust is a question of fact and has to be proved by evidence. This Court said so in *Wambugi v Kimani* [1992] 2 KAR 58.”

30. The Supreme Court of Kenya examined the elements to be considered for a claimant to qualify as a trustee in the case of *Isack M'inanga Kiebia v Isaaya Theuri M'lintari & another* [2018] eKLR and stated as follows;

“Each case has to be determined on its own merits and quality of evidence. It is not every claim of a right to land that will qualify as a customary trust. In this regard, we agree with the High Court in *Kiarie v. Kinuthia*, that what is essential is the nature of the holding of the land and intention of the parties. If the said holding is for the benefit of other members of the family, then a customary trust would be presumed to have been created in favour of such other members, whether or not they are in possession or actual occupation of the land. Some of the elements that would qualify a claimant as a trustee are:



1. The land in question was before registration, family, clan or group land
2. The claimant belongs to such family, clan, or group
3. The relationship of the claimant to such family, clan or group is not so remote or tenuous as to make his/her claim idle or adventurous.
4. The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances.
5. The claim is directed against the registered proprietor who is a member of the family, clan or group.

31. . The pleadings filed and evidence adduced at the trial show that Appellant obtained title to the suit land by virtue of his being a son of the previous registered owner and in his own words “having inherited the same from his father Nason Kang’alya Nyange.” It is not in dispute that the deceased held the suit land as absolute proprietor. However, at the time of transfer of the land he is said to have distributed his estate to the persons he considered as his heirs. It is the courts view that at the point of distribution of his properties the deceased considered all the land he held as being held for the benefit of members of his family as his heirs and the Appellant and the Respondent were members of the deceased’s family.
32. The question for determination is what rights and interests the Appellant held upon transfer of the title from the deceased to himself. It is thus necessary to determine what transpired at the time when the deceased distributed his properties and his will regard to the suit land, the intention of the deceased was when he distributed his properties.
33. There is conflicting evidence of when and what transpired when the deceased distributed his properties. The Appellant denies attending a meeting where the deceased prepared a will and states that he was unaware of any written will by the deceased or whether he expressed any wishes with regard to the Respondent concerning the suit land. He further denied that the deceased transferred the land when he was unwell and he states that the land was legally transferred to him during the lifetime of the deceased. The evidence PW 3 Rachel Simon the Appellants sister, mentioned that their father called a family meeting where the Respondents mother was not invited and the father distributed his land to his sons. The Appellant’s witnesses all stated that the deceased’s daughters did not get any land since they were all married. The Appellant stated that the Respondent and his brother were not given any land by their grandfather.
34. The evidence of defence witnesses tells a different story where the deceased gave the suit land to the Respondent and his brother. DW2 Agnes Kamene a sister-in-law of the Appellant confirmed that the deceased distributed his land during a family meeting which she attended and which she described in details. She stated that she signed the record of the meeting where the Respondent was given the suit land. She further testified that a record of the meeting was kept by PW2 Charles Kiteme but he did not produce the said record in court. She stated that Deceased said that the Respondent had taken care of him when he was ill and that at the time of the meeting the deceased was ill. She further confirmed that her husband William (deceased) was given land as well as his brothers and she later learned that the land given to the Respondent and his brother was registered in the name of the Appellant. DW 4 Samson Maanzi Nyange, a brother to the deceased, confirmed that he had been invited for the meeting where the deceased was to distribute his land but he did not attend due to illness but that the deceased confirmed to him that he gave the suit land to the Respondent and his brother. Further, the Respondent and his brother Joseph Nyange DW 3 confirmed that their grandfather had informed them that he had given them the land.



35. In the court's view the evidence on record showing that the deceased gave the suit land parcel number Kyangwithya/Tungutu/874 to the Respondent and his brother as their inheritance on the basis of being sons born of his daughter Grace, out of wedlock and who had remained behind when she got married and who had been brought up as part of their grandfather's household is overwhelming and convincing. Evaluation of the evidence adduced by the Appellant and the Respondent before the trial court in its totality shows that the deceased Nason Kang'alya Nyange intended to give and transfer to the Respondent and his brother the suit parcel of land. In my view the evidence that the Respondent and his brother did not leave with their mother Grace to her new home when she got married and that they were brought up by their grandfather in his own home and that it is their grandfather's home they considered as their home appears more credible than the narrative given by the Appellant that they left with their mother when she got married and never came back to their grandfather's home.
36. Further, the evidence of the Appellant and his witnesses that the Respondent was given land where their mother got married is not supported by any evidence; the same is also not credible since it was shown that the Respondent did not leave with their mother to the home where she got married. Indeed, PW 2 who is said to have been given the record of the meeting where distribution of the properties of the deceased failed to avail the same to the court. His evidence came across as not believable or credible for the reason that he contradicted a fact that was admitted by all the witnesses that the Respondent and his brother remained with their grandparents when their mother got married. The said witness stated that the Respondent and his brother left with their mother and were shown land where she got married.
37. It is thus the courts view that the Respondent was entitled to be registered as an owner or beneficiary of the land for the reason that the deceased had expressed the intention to give to him and his brother the suit land but for the intervening circumstances that the Appellant had the land registered in his name.
38. The Appellant argued that the Respondent moved out of the suit land and did not return and thus since he was not in possession and/or occupation of the suit land the claim of customary trust was not available to him. However, this argument was debunked in the cited case of Isack M'inanga Kiebia (supra) when the Supreme Court held that to prove a trust in land one need not be in actual physical possession and occupation of the land and stated as follows;

“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.”

39. Further the court is persuaded that the deceased gave to his sons their own parcels of land and the Appellant had the parcel reserved for the Respondent and his brother transferred into his name. The Trial Court held that the suit land was subject to overriding interest by custom as stipulated by Section 28 of the Land Registration Act No.3 of 2012 which provides that:

“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) spousal rights over matrimonial property;
- (b) trusts including customary trusts;



40. It is the Courts view that based on the evidence adduced a customary trust was shown to have existed as was held in the Court of Appeal case of *Phillicery Nduku Mumo v Nzuki Makau* [2002] eKLR (supra) relied on by Counsel for both parties.

41. The court is further of the view that the circumstances of this case can also imply the existence of a trust to avoid unjust enrichment of the Appellant at the expense and at great loss to the Respondent considering that the Respondent was brought up by his grandparents and treated as one of his own children. His own mother as a daughter of the deceased was entitled in a portion of his father's property as an inheritance. The deceased had expressed his intention to give to the Respondent the land herein but the Appellant had the same registered in his own name. The Appellant had the title deed transferred to himself instead of having the same transferred to the Respondent. The Court of Appeal case of *Twalib Hatayan & another v Said Saggah Ahmed Al-Heidy & 5 others* [2015] eKLR aptly summarizes the different types of trust that can arise as follows:

“....according to the Black's Law Dictionary, 9th Edition; a trust is defined as

“1. The right, enforceable solely in equity, to the beneficial enjoyment of property to which another holds legal title; a property interest held by one person (trustee) at the request of another (settlor) for the benefit of a third party (beneficiary).”

Ground 2: That the Learned Resident Magistrate erred and misdirected himself on the law and the facts when he failed to consider that the land in issue was registered under the Registered *Land Act* Chapter 300 Laws of Kenya and that the same had been lawfully transferred to the Appellant by his late father and therefore was not subject to considerations based on succession laws.

42. The plaintiff relies on rights and interests accrued by transfer and registration of land in his name under the repealed Registered *Land Act* CAP 300 since the transfer of land to himself was done where the repealed law was in force, Section 27 of the said repealed Act provides for the rights of a proprietor and specifically states that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee; The said section 27 states that;

“The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject –

- (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
- (b) unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 not to require noting on the register:

Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee.”



43. Further, at the time of registration of the title in the plaintiff's name, section 30 of Registered [Land Act](#) was in place and the same provided for overriding interests and in particular rights of person in possession under subsection (g) and stated;

“Unless the contrary is expressed in the register, all registered land shall be subject to such of the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register –

- (g) the rights of a person in possession or actual occupation of land to which he is entitled in right only of such possession or occupation, save where inquiry is made of such person and the rights are not disclosed”

44. The repealed Act thus recognized the obligation of a person as a trustee and ensured a proprietor did not hide behind registration of land and possession of a title deed but also protected persons with overriding interests in land. The Supreme Court of Kenya dealt with the issue of customary trusts finding that it was covered under Section 28 of the repealed Registered [Land Act](#) CAP 300 in Isack M'inanga Kiebia case (supra) and stated;

“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.”

45. On the challenge that the trial court treated the suit like a Succession Cause it is the courts view the question of inheritance and/or succession was introduced by the Appellant in his claim in the plaint where he stated that his ownership of the suit land arose from inheritance. The trial court cannot therefore be faulted for having considered the rights and interests of other parties who would have been entitled to inherit from the deceased while determining whether the Appellant held the land in trust for such other parties as would have been entitled to inherit from the deceased. It follows that the court does not agree with the Appellant's submission that the trial court attempted to convert the suit into a succession cause.

Ground 3) That the Learned Resident Magistrate erred and misdirected himself on the law and the facts when he failed to appreciate that Land Parcel Number Kyangwithya/Tungutu/874 was owned by the Appellant in absolute proprietorship and as such, registration had extinguished all other rights of third parties.

46. In the courts view the Appellant was under legal obligation to establish that his proprietorship of the suit land was absolute and indefeasible and that such proprietorship was not subject to trust as established under the law. In the court's view the Appellant did not discharge this obligation. On the other hand, the Respondent was able to show that the transfer of land from the deceased to the Appellant was subject to his rights. As found in the case of George Mbiti Kiebia & another v Isaya Theuri M'lintari & another [2014] eKLR that when a registered proprietor's root of title is under



challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and rebut the notion that the property is not free from any encumbrances including any and all interests which need not be noted on the register. The court observed thus:

“The evidence on record as adduced by the respondents and which was not challenged by the appellants is that the Athimba Clan had agreed that land was to be apportioned to each household and one person was to hold for the benefit of members of the family. The appellant admitted that their late brother Musa M’Lintari resided on Parcel No. 86 and was buried thereon. Why would the deceased Musa M’Lintari be living on this parcel and be buried thereon if he had no right to this parcel of land? Why should the respondents who were born on this parcel of land and who continue to live thereon have no right to the parcel?..... It is our considered view that the appellants did not rebut and dislodge the testimony of the respondents who are not only in occupation and possession of Parcel No. 86 but also claim entitlement to Parcel No. 70 pursuant to their being members of the family that owned the ancestral clan land. We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and rebut the notion that the property is not free from any encumbrances including any and all interests which need not be noted on the register. It is our considered view that the appellant did not go this extra mile that is required of him in relation to Land Parcel No. 70 and no evidence was led to rebut the respondents’ testimony. We find that a trust exists in relation to the Land Parcel No. 86 and Land Parcel No. 70.”

47. In the courts view the Appellant did not show that the root of his title conferred absolute indefeasible rights on him. He did not show that his registration was free from encumbrances, overriding interests and claims of beneficiaries of the deceased or that the said registration had extinguished all other rights of third parties. He specifically did not dislodge the Respondents claim of entitlement to the suit land as a beneficiary of the deceased.
48. The final determination of the court from the foregoing findings is that the trial court did not err in its findings and judgement and thus the appeal herein has no merit and the same is hereby dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED AT KITUI THIS 20TH DAY OF APRIL, 2023.

L. G. KIMANI

JUDGE

ENVIRONMENT AND LAND COURT, KITUI

Judgement read in open court and virtually in the presence of:

C/A Musyoki

Kilonzi for Respondent

No attendance for Appellant

