



**Njiru v Muirungi & 4 others (Environment & Land Case  
28 of 2020) [2023] KEELC 17506 (KLR) (17 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17506 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT & LAND CASE 28 OF 2020**

**CK NZILI, J**

**MAY 17, 2023**

**BETWEEN**

**PATRICK KATHURIMA NJIRU ..... PLAINTIFF**

**AND**

**RICHARD KIRIINYA MUIRUNGI ..... 1<sup>ST</sup> DEFENDANT**

**DORIS KATHAMBI MURIUNGI ..... 2<sup>ND</sup> DEFENDANT**

**PETER MARETE ..... 3<sup>RD</sup> DEFENDANT**

**FAITH MUTHONI NJIRU ..... 4<sup>TH</sup> DEFENDANT**

**LAND REGISTRAR, MERU DISTRICT LAND REGISTRY .... 5<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. By an amended plaint dated 24.8.2020, the plaintiff, as the registered owner of LR No's Nyaki/ Mulathankari/3702, 3703 and 4742, (hereinafter the suit land), sued the defendants for interfering with his quiet possession and occupation of the suit premises on the basis that they formed part of the estate of his late father. The plaintiff averred that his late grandfather had sold and transferred the parcels of land to him, whereafter he built residential and rental houses.
2. The plaintiff averred that when his grandfather passed on, the 1<sup>st</sup> – 4<sup>th</sup> defendants, driven by malice, registered a restriction with the assistance of the 5<sup>th</sup> defendant, threatened his tenants to vacate the suit lands, issued threats to evict and or demolish his permanent structures, took over the parcels and have refused or ignored to keep away from them, hence infringing on his right to own possession and occupy the suit land. The plaintiff prayed that the court grants him; -a permanent injunction against the 1<sup>st</sup> - 4<sup>th</sup> defendants from interfering with his plots of land, a permanent injunction against the 5<sup>th</sup> defendant from registering a caution, inhibition or restrictions on his titles to the suit premises and for general damages for trespass, distress and illegal entries to the title registers. A list of witnesses' statements and



documents dated 5.8.2020, a supplementary list of records dated 25.8.2020 and a supplementary list of witnesses dated 8.3.2021 were filed and formed part of the plaintiff's paginated bundle of documents dated 9.3.2021.

3. The 1<sup>st</sup> - 4<sup>th</sup> defendants by a statement of defence and counterclaim dated 22.9.2020, termed the alleged transfers and registration of the suit lands into the plaintiff's name as fraudulent and the titles held by him illegal or fraudulently procured. The 1-4<sup>th</sup> defendant averred that the plaintiff only lived on the suit parcels of land as a caregiver to their late father, who, together with their late mother, had, with their financial support, effected all the developments on the suit lands.
4. Further, the 1<sup>st</sup> – 4<sup>th</sup> defendants admitted occupation of the suit land since birth, during their upbringing before and after the death of their father. They denied the alleged demands that the tenants living therein vacate the houses. Further, the 1<sup>st</sup> – 4<sup>th</sup> defendants admitted registering caution against the titles with the 5<sup>th</sup> defendant after suspecting the plaintiff's manipulation of their father in the registrations. They claimed that the titles held by the plaintiff lacked the protection of the law. In particular, the 1<sup>st</sup> – 4<sup>th</sup> defendants denied the particulars of malafides, fraud and illegality on their part as alleged in the amended plaint.
5. By way of a counterclaim, the 1<sup>st</sup> – 4<sup>th</sup> defendants averred that the plaintiff came to stay on the suit lands upon their request and consent as a caregiver to the deceased, whose health deteriorated after their late mother passed on. The plaintiffs in the counterclaim averred that when their father passed on 15.7.2020, the defendant caused a commotion and purported to deny them access to the suit parcels of land during the funeral arrangements, which the police intervened for the funeral and burial arrangements to proceed.
6. The plaintiffs averred that after the burial, they discovered that the defendants had, during the time that their father was sick, fraudulently and illegally manipulated, unduly influenced, taken undue advantage of his situation and age, and or obtained transfers or registration of the suit lands to his name.
7. Due to the foregoing, the plaintiffs in the counterclaim averred that they were born, brought up and remain in the occupation of the family house. They termed the transfers and registration of the suit lands in the defendant's name as subject to their overriding beneficial interests, which the defendant had purported to breach or deny them. They sought the cancellation of the title to L.R. No. Nyaki/Mulathankari/3702, 3703 and 4742 and the parcels to revert to their father's estate; in the alternative, a declaration that the defendant in the counterclaim held titles to the parcels of land in trust for them, which should be transferred to them. Further, the plaintiffs pray for a permanent injunction stopping the defendant from interfering with their occupation and use of the suit land. The defence and counterclaim were supported by a list of witnesses and statements, a list of documents dated 22.2.2021 and a further list of witnesses' statements dated 24.6.2022.
8. The 5<sup>th</sup> defendant opposed the suit by a defence dated 1.3.2021, accompanied by a list of witness statements and documents dated 11.3.2021. The 5<sup>th</sup> defendant denied knowledge of the occurrences set out in paragraphs 7-19 of the plaint and, in particular the alleged malafides and illegality. The 5<sup>th</sup> defendant denied issuance of receipt of a notice to sue whose absence rendered the suit incompetent. It termed the suit as frivolous, vexatious, an abuse of the court process, unfounded and disclosing no known cause of action.
9. By a reply to the defence and defence to the counterclaim dated 7.10.2019 and filed on 9.10.2020, the plaintiff denied its contents regarding occupation. He averred that he had been living on the suit lands since birth. He denied the alleged commotion during the funeral arrangements. The plaintiff averred that the 1<sup>st</sup> – 4<sup>th</sup> defendants had waited until their father passed on and claimed to be the rightful owners



and or take possession of the suit parcels of land The plaintiff averred that the suit lands had been purchased by his late grandfather, who had all the rights during his lifetime to dispose off the same as he wished, which land could not be termed as family land.

10. The plaintiff denied the alleged fraud, illegality and or misrepresentation since the 1<sup>st</sup> plaintiff to the counterclaim was well aware of the same and had unsuccessfully sought to stop the process during the lifetime of the deceased through Meru ELC Case No. 243 of 2017, in which suit the deceased swore an affidavit confirming that he had freely and willingly transferred the suit lands to him out of his caregiver services. He denied exerting any undue pressure, or influence and taking advantage of his closeness or the situation of the deceased to acquire the titles.
11. Additionally, the plaintiff averred that the suit lands were not ancestral, the defendants never contributed to their acquisition, the deceased had no intention to have the 1<sup>st</sup> – 4<sup>th</sup> defendants as beneficiaries of the land and lastly that the decision to transfer parcels of land had been confirmed under oath by the deceased. That he was an absolute owner of the suit lands, which was not subject to any alleged overriding rights. He termed the reliefs sought in the counterclaim as frivolous, vexatious and an abuse of the court process lacking a basis in law, logic and unsustainable.
12. Following a court order dated 18.8.2020, the Deputy Registrar of the court conducted a scene visit and filed a report dated 16.10.2020. The court gave directions on 19.10.2021 and with concurrence with the parties, this matter proceeded from where it has reached from the predecessor to this court.
13. The plaintiff testified as PW 1. He adopted his witness and supplementary statements dated 5.8.2020 and 23.2.2021 as his evidence in chief. Reiterating in its entirety the contents of the amended plaint and defence to the counterclaim, PW 1 termed the transfers and registration of the suit lands as regular, legal and procedural since his late grandfather was of sound mind and disposition at the time of the transfers, a fact which the defendants knew about due to Meru ELC No. 243 of 2017, in which the 1<sup>st</sup> defendant had unsuccessfully challenged.
14. PW 1 told the court that the deceased had filed an affidavit and a witness statement confirming that he freely and willfully transferred the suit properties to him on account of taking care of him, while the 1<sup>st</sup> – 4<sup>th</sup> defendants had abandoned him. He termed the alleged constructive trust as misleading, far-fetched and made without basis. In support of his claim, the plaintiff produced copies of title deeds for LR Nyaki/Mulathankari/3702, 3703, Kithoka/4742 as P. Exh No's. 1, 2 & 3, photographs showing his developments as P. Exh No. (4), a copy of the agreement showing that the deceased had bought the original land in 1965 as P. Exh No. 5 (a), its translation as P. Exh No. (6) (which lacked a certificate), applications for registration as P. Exh No. (7), a land certificate for L.R. No. Nyaki/Mulathankari/615 as P. Exh No. (8), the replying affidavits were filed on 5.9.2015 by the deceased. P. Exh No. (9), a statement of defence in ELC No. 243 of 2017 as P. Exh No. (10), a witness statement by the deceased in the suit as P. Exh No. (11), a sketch map as P. Exh No. (13), official searches for L.R. No's. 1443, 3702, 3703 as P. Exh No's. 13, 14 & 15, title deed for 1443 as P. Exh No. (13), a log book as P. Exh No. (14), medical receipts as P. Exh No. (15), pleadings in 243/2017 as P. Exh No. (16) and lastly, green cards for L.R. No's 3703, 3702 & 4742 as P. Exh No. 17-20, appearing in the PW1 paginated bundle of documents on pages 10, 37 and 38-104.
15. In cross-examination, PW 1 admitted that the suit parcels of land had resulted from the subdivision of LR No. Nyaki/Mulathankari/615, whose acreage was approximately 4 acres, was initially owned by the deceased. He admitted that the 1<sup>st</sup> – 4<sup>th</sup> defendants were brought up and lived in the residential house, appearing on page 24 of his bundle.



16. Regarding the scene visit report, PW 1 confirmed that the 2<sup>nd</sup> and 4<sup>th</sup> defendants used the houses referred to at the scene visit report. He insisted that the land was not ancestral but had been bought by his grandfather in 1965 as per P. Exh No. 5(a), though he could not reconcile the size indicated therein as 1.5 acres as opposed to the 4 acres claimed in his earlier evidence. In answer to a question about the witness statement of Martin Mworira, who is a stepbrother to his grandfather, and a neighbour, Naomi Mwita, indicating that the suit lands were ancestral land inherited from the late Elijah M'Twamwari. PW 1 insisted the land was exclusively bought by the deceased. However, he admitted that parcel L.R No. 3742 was ancestral land since it was a share his late grandfather acquired from the late Elijah M'Twamwari. PW 1 acknowledged that no physical boundaries existed even after the subdivisions. His evidence was that one required a land surveyor to establish on which parcel(s) of land the houses in the suit lands fell.
17. PW 1 also acknowledged that the 1<sup>st</sup> defendant's homestead was on the suit premises. PW 1 told the court that he had obtained a land control board consent before the subdivisions were effected, even though he did not avail a copy before the court. Similarly, PW 1 admitted that he was unaware if any mutation form was prepared before the subdivisions were effected, other than the copy made in 1992. Additionally, PW 1 admitted that beacons were not erected during the subdivisions before the issuance of the title deeds. His evidence was that the deceased had effected the subdivisions, so he could not tell why the title deeds came out before the completed survey works.
18. PW1 could not confirm whether any survey works were done since no beacons were on the ground. Though the L.R. No's. 3702, 3703 and 4742 were registered in June 2018, as per the transfer forms. Further, PW 1 admitted that he lacked the land control board consent, transfer documents and the stamp duty payment forms before the court. Asked about the suspension of land control board meetings during the Covid 19 period, when he reportedly obtained land control board consents, PW 1 could not explain the circumstances of the transfers and registration. Additionally, PW1 was at pains to recollect the events due to his earlier admission that the deceased was in and out of the hospital during the said period. He denied that the transferee was in a coma for two weeks. The plaintiff confirmed that the deceased incurred a medical bill of Kshs.534,817/=, which the 1<sup>st</sup> -4<sup>th</sup> defendants settled before the burial.
19. PW 1 denied that he was busy transferring the land while the deceased was on his deathbed, even if he died five days after the transfers. Asked about the contents of the deceased affidavit dated 30.8.2017, PW 1 said that the particulars of L.R. No's. 3702 and 4742 were missing, save for L.R. No.3703. However, he confirmed that he became a registered owner of parcel L.R No. 3703, 11 days after the 2017 case was filed since there were no injunctive orders pending as of 22.8.2017. PW 1 denied that there was a rush to effect the transfers to him to defeat the court process. He denied that he was the author of the deceased replying affidavit.
20. Further, PW 1 denied that the deceased had suffered dementia since 2007 when his grandmother died. He said the deceased had been diagnosed with a heart condition in 2007. PW 1 denied that the deceased was not able to manage his affairs as of 2017. He further denied that the 1<sup>st</sup> – 4<sup>th</sup> defendants and the family brought him in 2015 to be a caregiver to the deceased due to his health condition since he had grown in the homestead all his years. PW 1 admitted that in 2015 he was partly staying at his mother's residence in Embu.
21. PW 1 admitted that his high school was in Embu though he disputed that his enrolment to Kenya Methodist University(KEMU) Meru, by the 1<sup>st</sup> defendant was to allow him to take care of the deceased with effect from 2015. His evidence was that the deceased was not sick since he could drive himself. Asked about the anomalies in the deceased affidavit regarding his grandmother's death in 2002 and



- not 2007, PW 1 said that his grandfather could not have forgotten obvious basic facts. PW 1, however, denied that this went to show that the deceased was not aware or privy to the affidavit's contents. He refuted that these glaring errors reflected that he was the sole author of the testimony and not the deceased. PW 1 denied taking advantage of the deceased and used this privileged position to access his documents and unjustly acquire land titles.
22. PW 1, however, insisted that the consideration for the transfers was because he was the caregiver between 2012 – 2017. He, however, admitted that he was not the one who had cleared the hospital bills at Karen Hospital due to the admission on page 104 of the bundle. PW 1 denied that the 1<sup>st</sup> defendant, his mother and his aunt used to visit the deceased and or send monies for his upkeep through him since his grandfather paid Kshs.1 million out of a sale of his land.
  23. PW 1 admitted that after his grandfather passed on, the 1<sup>st</sup> defendant cleared the bill of Kshs.534,817/= . Asked about his education at KEMU and financial means to care for his deceased, PW 1 said that he was in an informal employment unit he was employed by an insurance firm from 2014 – 2017, though he had no evidence before the court for his financial capacity to cater for his medical bills, or put up any developments on the suit lands. He told the court that he had no formal documents to show his income. PW 1 denied using monies sent to care for the deceased by the defendant and siblings from the USA. He admitted not knowing how the bungalow and the houses in the suit premises were erected save for the buildings on page 25 of the bundle, which he confirmed that his late grandmother had built to operate as a school. Regarding the plot on pages 26 and 27, PW 1 claimed that he made it together with the deceased though he had not produced any such building designs before the court.
  24. PW 1 denied that it was the 1<sup>st</sup> defendant who had made the developments to cater for his education. PW 1 admitted that the 1<sup>st</sup> – 4<sup>th</sup> defendants were born and brought up in Parcel No's. 3703 and 3702 and had no other share from their late father. He could not tell from which additional parcels of land they were entitled as part of their inheritance.
  25. Cross-examined by the 5<sup>th</sup> defendant, it was the plaintiff's evidence that he brought on board the 5<sup>th</sup> defendant to clarify that due process was followed in acquiring the three parcels of land. He explained that he had no direct claim against the land registrar save for the prayer to stop it from affecting restrictions on his titles.
  26. In re-examination, PW 1 refuted any assertions that the deceased was of unsound mind at the time of the transfers, for the disease he suffered from could not impede him from performing regular duties.
  27. PW 1 said that the 1<sup>st</sup> defendant had also described him as of sound mind in the plaint filed in 243/17. PW 1 denied that he was the sole author of the deceased's replying affidavit and witness statement, who had his lawyers prepare the documents. PW 1 clarified that he had a very cordial relationship with his late grandfather since childhood, who also used to own other properties apart from what he transferred to him as contained on page 59 of his bundle, some of which the 1<sup>st</sup> defendant acquired. PW 1 denied that the deceased had imposed some conditions during the transfer relating to any overriding rights in favour of the 1<sup>st</sup> – 4<sup>th</sup> defendants.
  28. Justus Arithi testified as PW 2 and adopted his witness statement dated 23.2.2021, clarifying that the transactions related to two acres. As the chairman of the meeting held on 5.8.2007, he told the court that the discussion related to the allocation of properties by the convener, the deceased among his children and grandchildren, who at the time was elderly. He was unable to state the date and venue of the meeting.
  29. Similarly, he had no minutes to that effect though he clarified that the deceased children failed to attend the meeting. PW 2 was unable to explain why the transfer took too long after their session or why the



- convenor did not mention to them of a pending court case involving his son at the time, save to say that he said that his children (the 1<sup>st</sup> – 4<sup>th</sup> defendants) had become disrespectful to him. PW 2 was emphatic that the failure by the 1<sup>st</sup> – 4<sup>th</sup> defendants led to the deceased denying them any of his parcels of land.
30. In re-examination, PW 2 testified that the meeting happened on 5.8.2017, in the presence of the deceased's son-in-law, Washington Kabiti, who took the minutes and that the deceased was of sound mind since he was able to convene a meeting and share out precise details on his properties and the manner that he had acquired and or distributed them.
31. Richard Kiruja Muriungi, Faith Muthoni Njiru (4<sup>th</sup> defendant), Martin Mworira Amwari, Naomi K. Mwita Doris Kathambi (2<sup>nd</sup> defendant) & Peter Marete testified as DW's 1, 2, 3, 4, 5 & 6 respectively, in support of the defence and the counterclaim by the 1<sup>st</sup> – 4<sup>th</sup> defendants. They all adopted their witness statements dated 22.2.2021 and 22.6.2022 as their evidence in chief. He told the court that the 2<sup>nd</sup>, 3<sup>rd</sup> & 4<sup>th</sup> defendants were his siblings and that the plaintiff was his nephew and son to the 4<sup>th</sup> defendant. His testimony was that they were born and brought up on the family land initially L.R. No. 615, where in 1992, his late father showed him alongside the 3<sup>rd</sup> defendant where they were to put up their houses and subdivided the ground in two L.R. No. 1443 and 1444, the latter belonging to him. He told the court that the two portions had a common boundary, a fence separating the lower part, while the upper part had the family house and some rental units. DW 1 said that LR No. 1443 remained in the name of his late father to be transferred to the 3<sup>rd</sup> defendant and therefore remained the property of the 3<sup>rd</sup> defendant for all intents and purposes
32. Further DW 1 told the court that sharing the family land was restated in various family meetings, including in August 2007, after their late mother was diagnosed with breast cancer and later passed in November 2007. He said the rental units on the two parcels of land were put up by their late parents with support from the 1<sup>st</sup> – 4<sup>th</sup> defendants. DW. 1 said that when his late father was diagnosed with heart complications, it was them who took him to hospitals and would provide all the necessary financial support, including availing transport means, opening a joint bank account where he would deposit money for his use with the plaintiff giving regular updates on his health and urgent needs who would also get a token of appreciation since he had dropped out of college while he remained unemployed. The 1<sup>st</sup> defendant denied that the plaintiff was solely catering to his late father's needs, as evidenced by the payment receipts before the court.
33. In 2017, D.W. 1 told the court that he established some illegal transactions over L.R. No. 1443, but his late father told him he was unaware of such transactions. He termed the transactions clandestinely undertaken since there was no actual ground survey. Additionally, DW 1 termed the plaintiff as the architect of the pleadings in CC No.243 of 2017, since his late father was sickly, disoriented, and he may have signed documents whose contents he may not have understood. He testified that he only withdrew the case after his father assured him all was well. DW 1 also testified that after his father's death, the plaintiff hired goons who demanded they leave his compound, prompting him to call the police. They eventually buried the deceased on the 3<sup>rd</sup> defendant's portion next to where their late mother was buried. He testified that official searches were carried out after the burial only to establish the foregoing illegal transactions on 18.6.2018 and 22.8.2017 when the deceased was critically ill and not in control of his facilities. D.W. 1 said they lodged caution on 3.8.2020, only for the plaintiff to rush to court.
34. Further, it was DW 1's testimony that his late father was also a beneficiary of ancestral land LR No Nyaki/Kithoka/4185, measuring 5 acres fraudulently subdivided and transferred to the plaintiff and other third parties. He termed the subdivisions and move as fraudulent, coming when the deceased was in a coma and five days before he died.



35. D.W. 1 said that the suit parcels of land were family land whose beneficiaries are the 1<sup>st</sup> -4<sup>th</sup> defendants. In support of the defence and counterclaim, D.W. 1 produced a copy of the medical report from the Karen Hospital as D. Exh No. (1) agreement to repay hospital bill as D. Exh No. (2), official searches for L.R. No. 3702, 3703 as P. Exh No. (3) and (4), caution dated 3.8.2020 as D. Exh No. (5), official search for L.R. No. Nyaki/Kithoka/4742 as D. Exh No. (6). He termed the land ancestral, for it was inherited from his grandfather Elijah M'Twamwari. Similarly, DW 1 said that in line with the traditions, the deceased would not have transferred to his other son everything during his lifetime. He wondered why the subdivisions occurred despite the caution, which he eventually withdrew at the instance of his late father who assured him that all was well. DW. 1 clarified that all the defendants worked outside Meru, so the plaintiff was the only one staying with the deceased. He denied that the fact that the plaintiff was a caregiver would institute the transfers, oblivious of their existing overriding rights to the land. D.W. 1 said it was unbelievable for the plaintiff to say they ran away from the deceased while paying for his services and meeting their father's medical and subsistence needs, as per the documents produced in court.
36. In cross-examination, D.W. 1 admitted that his late father bought part of the suit parcel while the rest were an inheritance from their grandfather. The 1<sup>st</sup> defendant said that his late father was sickly and disoriented at the time of the transfers though no medical documents were produced to the effect that he had no mental capacity to transfer the suit lands. It was his evidence that though he became aware of the transactions in 2017, his father had assured him that all was well until it became apparent that he was sick. He said that he had no letters of administration to represent the deceased's estate.
37. Further, DW 2 said that her matrimonial home was in Embu, and the plaintiff was her firstborn son. She denied that the plaintiff was brought up by the deceased. Her evidence was that it was only in 2015 when the family sat and agreed that the plaintiff be the caregiver of the deceased, and she then released him to go; otherwise, he was under her care before 2015 since he was unemployed at the time.
38. D.W. 2 told the court that her son had no resources to care for the deceased. She termed the transfers done without her knowledge and that of the 1<sup>st</sup> – 3<sup>rd</sup> defendants. DW. 2 said that after primary school, she took the plaintiff to a secondary school in Embu. Her testimony was that the plaintiff took advantage of the medical status of his grandfather. She termed the parcels of land as forming part of the ancestral land her late father took from their grandfather. DW. 2 said that she was privy to the meeting leading to negotiation after the suit filed by the 1<sup>st</sup> defendant, during which the deceased gave an undertaking that he was not going to dispose of the family land to third parties. She termed the transfers suspicious, after the meeting with her son since the land belonged to her two brothers, not her son.
39. DW 3 was the brother of the deceased. He confirmed that the suit parcels formed part of the land that his late brother inherited from their late father Elijah M'Twamwari, which they used to occupy, and a portion was bought to add onto it. He said that each of them acquired five acres from their late father. D.W. 3 also said that he used to visit his late brother while he was ailing and that the plaintiff only came to offer caregiving at the time the sickness worsened only to take advantage of the unstable situation of his mind and transfer land to himself; otherwise, his brother would have willingly told him about it.
40. D.W. 3 was emphatic that a grandson of the deceased could not be the sole beneficiary while the children were in existence. He said the deceased would have summoned his children before making such a drastic decision to disinherit them.



41. D.W. 4 confirmed that the deceased had told her about the land sharing among his two sons but not to the plaintiff alone since they were in a cordial relationship. She also confirmed that the suit land formed part of the land the deceased inherited from his late father.
42. D.W. 5 echoed the evidence of D.W. 1 & D.W. 2. She said that by talking to his deceased father, she formed a basis that he was not coordinating events at all, and sometimes he could walk naked. D.W. 5 said that all the children of the deceased had a stake in the family land. Though sickly, D.W. 5 admitted that the family did not see the need for a guardianship order, for they felt it was unnecessary to take him to a court or the police out of their love for him. She termed the transfers irregular and illegal since they happened when their dad was sickly and without their involvement.
43. D.W. 6 similarly associated himself with the evidence of DW 1 - DW 5 save as to add that he has lived in Dallas, Texas, since 1998. D.W. 7 testified on behalf of the 5<sup>th</sup> defendant. She produced the green card for L.R. No. 4742, 3703 and 3702 as D. Exh No's (8), (9), & (10), she gave the history of L.R. No. 4742 as with effect from 19.3.2015 to 9.7.2020, when there was a transfer to the plaintiff by the deceased. She confirmed that no entry existed showing that either the land was held in trust or belonged to one Elijah M'Twamwari before 2015. Concerning L.R. No. 3702 & 3703. D.W. 7 testified that the transfer occurred on 13.7.2017. She told the court that the transfer documents she had in her record belonged to L.R. No.4742; therefore, she could not tell the history of the original parcel of land.
44. At the close of the defence case, parties filed written submissions by 20.3.2022, restricted to five pages only.
45. The plaintiff, vide his written submissions dated 17.3.2023, submitted that the principal parties herein are members of one family who unfortunately have not amicably settled the suit resorting to court to resolve the dispute as per law and evidence, despite its very personal and emotive nature. The plaintiff identified three issues for determination,
46. On the first issue regarding whether the deceased inherited the original title parcels to found a trust in favour of the 1<sup>st</sup> – 4<sup>th</sup> defendants, he urged to find that without the letters, the relief sought to revert the land to the deceased's estate was unsustainable, guided by the case of Barnes Muema vs Francis Masuni Kyangangu (2019) eKLR.
47. On inheritance, the plaintiff submitted that the sale agreement at pages 38 & 39 of the bundle was clear evidence of the manner that the land was acquired by the deceased as the first registered owner and hence cannot fall under ancestral land as alleged by the 1<sup>st</sup> – 4<sup>th</sup> defendants, who have failed to adduce evidence to the contrary particularly going by the affidavit and witness statements by the deceased in the previous suit with the 1<sup>st</sup> defendant. He relied on the burden of proof under the Evidence Act as to the existence of such facts.
48. Regarding D.W. 4, the plaintiff submitted that the evidence was bare for lack of details of his adjacent land if he passed it to his children and the history of the original land shared in an equal portion of 5 acres with the deceased, based on Edward Kipkosgei Chemumobii & another vs Charles K. Kosgei & another (2014) eKLR, on the proposition that inheritance could not be implied by way of mere statements without cogent evidence.
49. On constructive trust, the plaintiff submitted that the material placed before the court could not sustain the counterclaim since the 1<sup>st</sup> – 4<sup>th</sup> defendants did not contribute to its acquisition or development, based on Twalib Hatayan & another vs Said Saggat Ahmed Al-Heidy & 5 others (2015) eKLR. On the probative value of the deceased's affidavit to vitiate any assertion of trust, based on Section 34 of the Evidence Act. Further, the plaintiff submitted that the 1<sup>st</sup> -4<sup>th</sup> defendants failed to lead



any evidence of an intention by the late Jonathan, for the plaintiff to hold the suit properties as trustee for the 1<sup>st</sup> – 4<sup>th</sup> defendants.

50. Regarding customary trust, the plaintiff submitted that a condition precedent must exist for an intergenerational duty of the proprietor to pass on the same to the children. Relying on the holding of *Kiebia vs M'Lintari* (2018) eKLR, the plaintiff submitted that a customary trust has to be strictly proved that the intended beneficiaries have an interest in that land. Going by the holding of *Kiebia* (supra), the Supreme Court of Kenya did not state that there was an automatic customary trust in favour of children even if a father inherited the land.
51. In the instant case, the plaintiff submitted that there was no proof that the land belonged to a clan before registration; it is not clear that the defendants would have been the registered owners, more so given that the deceased had other parcels of land some of which benefited the 1<sup>st</sup> defendant. The plaintiff relied on *Paul Kirinya vs Delfine Kathiri* (2019) eKLR, on the proposition that a mere allegation of family land was insufficient since all the defendant's witnesses relied on words with no other evidence.
52. As to whether he acquired the lands, the plaintiff submitted that the evidence of PW 2 and D.W. 7 confirmed that the process was lawful without any proof of any irregularity or mental infirmity of the deceased or undue influence on him. Regarding the caregiver allegations, the plaintiff submitted that the evidence of the deceased on oath stood the test of credibility. He relied on *Chelimo Maritim Kipserem vs Richard Tirop* (2013) eKLR.
53. On the lack of an application form or consent from the land control board, the plaintiff submitted that the subdivisions and transfers were made by the deceased by way of a gift, so it was illogical to expect that the plaintiff as a recipient would have the land control board consent.
54. On whether the court should issue the reliefs sought in the plaint, the plaintiff submitted that he had proved ownership, trespass, distress and wrongful caution and was entitled to general damages under Section 75 of the [Land Registration Act](#) for unlawful restriction.
55. The 1<sup>st</sup> to 4<sup>th</sup> defendants, by written submissions dated 20.3.2023, isolated two issues for the court's determination. The first was one is whether the plaintiff has proved a case against them. Going by caselaw that when a land title was under challenge, it was not enough for a party to dangle the instrument of the title without leading evidence to show that it was legally and procedurally acquired, as held in *Munyu Maina vs Hiram Gatiha Maina* (2013) eKLR, the 1<sup>st</sup> - 4<sup>th</sup> defendants that the plaintiff failed to discharge the burden of proof that he lawfully and procedurally obtained title to the suit land in the absence of documents from the land control board and mutation forms. The 1<sup>st</sup> – 4<sup>th</sup> defendants submitted that the scene visit confirmed that it was the plaintiff and not the deceased who carried out the subdivision fraudulently without the deceased knowledge and physical survey on the ground, which would have made the deceased realize the fraudulent scheme by the plaintiff. Therefore, the question is why the plaintiff was only able to avail the record for subdivisions previously done but not those of 2017. The 1<sup>st</sup> - 4<sup>th</sup> defendants submitted that the only inference or explanation was that either they do not exist or if produced, would be injurious to the plaintiff's case.
56. Moreover, the 1<sup>st</sup> - 4<sup>th</sup> defendants submitted that the plaintiff failed to produce not only the land control board consent but also the transfer forms duly signed by the deceased, which evidence would have been critical to proving that the deceased knowingly and voluntarily transferred the suit lands to him. The 1<sup>st</sup> – 4<sup>th</sup> defendants submitted that the evidence of D.W. 7 confirmed that the transfers were doubtful since the records in support of the suit properties were not available at the land's registry since sub-division and transfer of land follow clear and unmistakable processes such as the actual survey on the ground,



- preparations of mutation forms, attendance at the land control board and the signing of transfer forms. Therefore the 1<sup>st</sup> - 4<sup>th</sup> defendants submitted that the absence of the attendant documents before the land registrar, the custodian of such records, was the most unmistakable evidence of fraud committed by the plaintiff in transferring the land.
57. As to overreliance on the deceased's affidavit in Meru ELC No. 243 of 2017 to show that he had voluntarily transferred the suit land, the 1<sup>st</sup> - 4<sup>th</sup> defendants submitted that the authenticity of the affidavit and witness statement was in question as to whether the author was the deceased and or the plaintiff. The plaintiff failed to avail either the maker or the advocate who commissioned the document or administered the oath. Though the plaintiff had indicated he would call Mr. Kiautha Arithi advocate, he chose to close his case without the evidence of that witness, hence failing to prove the authenticity of the said document and, by extension, its contents more so when the affidavit had glaring errors as to critical facts in the life of the deceased.
58. On the evidence of PW 2, the 1<sup>st</sup> - 4<sup>th</sup> defendants submitted that the said evidence was worthless for lack of minutes showing who attended, its resolutions and the attempts to amend the glaring errors in court. The 1<sup>st</sup> - 4<sup>th</sup> defendants took the view that there was no dispute, that the plaintiff was a mere caregiver since the deceased had been ailing for a long time, as per the medical reports before the court, who took advantage of his fragile health to transfer the suit parcels without the deceased's knowledge and or consent. On whether the 1<sup>st</sup> - 4<sup>th</sup> defendants have proven their counterclaim, the 1<sup>st</sup> - 4<sup>th</sup> defendants submitted that they had, through evidence, pointed out the irregularities and fraud on how the suit land was subdivided and registration effected without the deceased's knowledge and consent.
59. Further, the 1<sup>st</sup> - 4<sup>th</sup> defendants urged the court to find it appropriate to invoke the doctrine of a constructive trust in this case against the plaintiff who acquired the property by wrongdoing as held in *Twalib Hatayan supra*, since they have demonstrated a subsisting right or legally protected interest in the property, tracing its origin from their grandfather which interest is clear and identifiable. Therefore the 1<sup>st</sup> - 4<sup>th</sup> defendants urged the court to find that the facts in this case, were enough for it to infer the creation of trust in their favour.
60. As to whether the 1<sup>st</sup> - 4<sup>th</sup> defendants can sue, in paragraphs 16 & 17 of the defence and counterclaim, their claim was personal; therefore, they did not require any letters of administration to lodge their claims. The 1<sup>st</sup> - 4<sup>th</sup> defendants urged the court to find that Section 25 *Land Registration Act* was subject to rights and interests, including trusts which are equitable remedies recognized under Article 10 (2) (b) of *the Constitution*, which binds the court.
61. Further, the 1<sup>st</sup> - 4<sup>th</sup> defendants submitted that since equity detests unjust enrichment, it would be inequitable for the plaintiff to have the suit parcels of land for his sole benefit, excluding them from the suit parcels of land, which has been their home for over 30 years.
62. The 1<sup>st</sup> - 4<sup>th</sup> defendants urged the court to find that they have demonstrated a discernable and legitimate interest in the suit lands being family land and the immediate beneficiaries of the deceased, unlike the plaintiff, who could not explain the root of his title to the suit lands.
63. As to whether a customary trust arises, the 1<sup>st</sup> - 4<sup>th</sup> defendants averred that whereas the issue had not been pleaded, the case was fully canvassed at the trial and as held in *Gervas Mutiso vs Thomas Maingi Muia & others (2019)*, citing with approval *Odd Job vs Mubia E. A 476*, the evidence of D.W. 3 was clear as to the origin of the land, which the plaintiff also conceded. Therefore, the court was urged to presume a customary trust as created in their favour as held in *Kiebia vs M'Lintari & others (2018) eKLR*. In conclusion, the 1<sup>st</sup> - 4<sup>th</sup> defendants urged the court to find the plaintiff's case unproven and proceed to allow their counterclaim with costs.



64. The court has carefully reviewed the pleadings, evidence tendered, written submissions and the law. The issues commending themselves for the court's determination are:
- i. If the plaintiff has pleaded and proved that he holds valid and indefeasible titles to L.R. No. Nyaki/Mulathankari/3702, 3703 & Kihitoka/4742.
  - ii. If the plaintiff has proved that he has been living peacefully and quietly, was the sole owner, developer and or beneficiary of the suit parcels of land.
  - iii. If the 1<sup>st</sup> – 4<sup>th</sup> defendants interfered with the plaintiff's quiet possession and occupation of the suit lands.
  - iv. If the plaintiff has proved malafides, threats and illegality on the part of the 1<sup>st</sup> – 4<sup>th</sup> defendants.
  - v. If the 1<sup>st</sup> – 4<sup>th</sup> defendant's entry into the remainder and claim to occupy or possess the suit lands amounted to a breach of the plaintiff's rights enshrined under Article 40 of *the Constitution*.
  - vi. If the plaintiff has proved any general damages under section 75 of the *Land Registration Act* against the 1-4<sup>th</sup> defendants.
  - vii. If the 1<sup>st</sup> – 4<sup>th</sup> defendants were justified in seeking for the 5<sup>th</sup> defendants to place a caution on the plaintiff's titles to the suit land.
  - viii. If the 1<sup>st</sup> – 4<sup>th</sup> defendants have locus standi to bring the counterclaim against the plaintiff.
  - ix. If the suit parcels of land were and remain family land whose use, occupation and possession the 1<sup>st</sup> – 4<sup>th</sup> defendants were entitled to.
  - x. If the 1<sup>st</sup> – 4<sup>th</sup> defendants have proved that the plaintiff's titles to the suit lands have no protection under the law
  - xi. If the plaintiff's titles to the suit lands are subject to 1<sup>st</sup> – 4<sup>th</sup> defendants' overriding rights.
  - xii. If the plaintiff in the primary suit breached the 1-4<sup>th</sup> defendants' overriding rights.
  - xiii. If the 1<sup>st</sup> - 4<sup>th</sup> defendants are entitled to the reliefs sought
  - xiv. What is the order as to costs?
65. In trite law, parties are bound by their pleadings, and issues flow from pleadings in an adversarial system such as Kenya. It is the parties who set the agenda by way of pleadings. The court can only determine what is pleaded, and parties have led evidence to that effect. It has been said that there is no room for any other business.
66. In this suit, the plaintiff has sued the defendants for interference with the suit premises which he claims to have acquired from his grandfather in 2017 and 2018, out of a lawful and regular transfer. This case is unique in that the plaintiff has sued his uncles, his aunt and his mother, claiming that he was born, has lived, developed, and now owns the suit parcels of land to the exclusion of the 1<sup>st</sup> – 4<sup>th</sup> defendants. His pleadings are that after his grandfather passed on, the 1<sup>st</sup> – 4<sup>th</sup> defendants, without any justification, entered the suit premises, took possession and purported to chase away his tenants. Further, the plaintiff averred that the 1<sup>st</sup> – 4<sup>th</sup> defendants lodged a caution on the suit parcels of land and started alleging that his transfers and registration were fraudulent, illegal and that he holds the titles in trust for them. The plaintiff termed the actions by the 1<sup>st</sup> – 4<sup>th</sup> defendants as malafides, illegal and amounting to trespass to what lawfully belonged to him. The plaintiff also sued the 5<sup>th</sup> defendant claiming that the cautions it registered in favour of the 1<sup>st</sup> – 4<sup>th</sup> defendants were unjustified. His prayers



- are for a permanent injunction against the 1<sup>st</sup> – 4<sup>th</sup> defendants stopping them from interfering with his quiet possession and enjoyment of the suit premises, permanent injunction directed at the 5<sup>th</sup> defendant to remove the restrictions and general damages for wrongful caution, distress and trespass.
67. In their defence and counterclaim, the 1<sup>st</sup> – 4<sup>th</sup> defendants averred that the alleged transfer and registration of the suit lands were irregular, illegal and unprocedural since they were procured out of undue influence, taking advantage of the fragility and long sickness of their deceased father, the plaintiff's proximity to the deceased as a caregiver, misrepresenting facts to the deceased and the 5<sup>th</sup> defendant, which the deceased had no knowledge of and or had not consented to; for using incomplete documents to procure the title deeds and ignoring or being unmindful of their existing rights and interests flowing from them being the immediate beneficiaries of the deceased; for ignoring their occupation and possessory rights arising out of their actual and constructive occupation of the suit lands with consent and approval of the deceased.
68. Additionally, the 1<sup>st</sup> – 4<sup>th</sup> defendants averred that the suit lands was acquired by the deceased from their late grandfather and therefore formed part of family and ancestral land available to them under intergenerational equity. Consequently, the 1<sup>st</sup> – 4<sup>th</sup> defendants sought declaratory orders that the title deeds held by the plaintiff were acquired unprocedural, illegally and through undue influence, misrepresentation and false pretences; declaration that they are held by the plaintiff on account of both constructive and customary trust. They also sought a permanent injunction stopping the plaintiff in the primary suit from interfering with their user rights and land occupation.
69. In reply to the defence and defence to the counterclaim, the plaintiff averred that the suit parcels of land did not form part of the ancestral land since they were bought by the deceased in 1965, and therefore, no ancestral or family rights could accrue to the 1<sup>st</sup> – 4<sup>th</sup> defendants account of customary trust. Further, the plaintiff averred that the 1<sup>st</sup> – 4<sup>th</sup> defendants never participated in acquiring or improving the suit land; hence there could have been no constructive trust intended or envisaged at the time that the deceased became the registered owner and up to the time that he voluntarily and willingly transferred him the suit parcels, merely he took care of him during his old age and ill-health, when he most needed assistance, while the 1<sup>st</sup> – 4<sup>th</sup> defendants had abandoned him. He termed the 1<sup>st</sup> – 4<sup>th</sup> defendants as only coming to stake a claim on the suit parcels after the deceased's death, yet the 1<sup>st</sup> defendant was aware of the transfers in 2017 and abandoned a claim then, only to revive it in July 2020. The plaintiff denied any existence of either a constructive or a customary trust.
70. It is trite law that when a title deed is under attack, every step and paper trail towards its acquisition becomes an issue and that he who alleges legality in the manner the title deed was acquired must be prepared to demonstrate that there was complete or substantial compliance with both procedural and substantive law towards the acquisition of the said title deed.
71. In this suit, the plaintiff has pleaded that he was born and brought up on the suit lands. He denied that his entry to the suit parcels of land was in 2015, with the concurrence of the 1<sup>st</sup> – 4<sup>th</sup> defendants, to be a caregiver to his ailing grandfather. He averred that he caused developments on the suit parcels of land, and out of his cordial relationship with his late grandfather, he willingly and voluntarily transferred three parcels of land to him in 2017 & 2018. He pleaded and testified that there was no fraud, misrepresentation, undue influence, illegality, or unprocedural means in acquiring and registering the three title deeds under his name. He urged the court to find the title deed unimpeachable and eject the 1<sup>st</sup> – 4<sup>th</sup> defendants from the suit lands.
72. To sustain his claim, the plaintiff produced copies of a title deeds for L.R. No's. 3702, 3703 and 4742 issued to him as proof of ownership to the three parcels as P. Exh No's. (1), (2) & (3). He produced P. Exh No. (4) a photograph showing his developments on the suit parcel. To demonstrate the history



- of the land, PW 1 produced a sale agreement dated 17.4.1965 as P. Exh No. (5) (a). Despite a promise to avail of an English translation accompanied by a certificate of translation from Kimeru to English, none was produced when the plaintiff closed his case. Therefore, P. Exh No. 5 (a) remains a strange document before this court, for it is in a language that this court does not understand. It was not produced by either the maker or a witness to it. Subsequently, I find the document irrelevant and of no probative value.
73. Similarly, as regards an acknowledgement of payments dated 5.6.1965 and produced as P. Exh No. 6, the same is a photocopy. It was not certified or authenticated. The makers of the document were not identified or called to produce it. The alterations and signatures appearing therein were not explained at all. The document's relevance to this case is doubtful. The addressee is missing. As regards P. Exh No. (7), an application for registration dated 28.5.1976; the same is a photocopy that the relevant authority did not certify. It bears no date as to when it was lodged, stamped and registered at the lands offices. Whether the document was paid for and particulars of the payments are missing. As regards P. Exh No. (8) the same is a photocopy which is not certified. Be that as it may, the names appearing there include those of Elija M'Twamwari. It is unclear if the deceased had four names, including his late father's name. The dates of registration and issuance of the title deed in the property section are also missing. P. Exh No. (19) is illegible, while P. Exh No. 20 is incomplete, and P. Exh No.1 5 does not indicate if the plaintiff cleared the bill.
74. The [Land Registration Act](#), the [Land Act](#), the [Land Control Act](#) and the [Law of Contract Act](#) are the principal legislations on the registration and transfer of land in Kenya Section 3 (3) of the [Law of Contract Act](#) provides that no suit on the disposition of land can be brought unless parties in writing signed the contract and the signatures were attested by a witness who was present when the contract was signed.
75. Section 44 of the [Land Registration Act](#) provides that every instrument affecting the disposition under the act shall be executed by each of the parties consenting to it and under the provision of the said section. Section 112 of the [Evidence Act](#) states that in any civil proceedings, when a fact is primarily within the knowledge of any party to those proceedings, the burden of proving or disapproving that fact is upon him.
76. In this suit, the plaintiff pleaded legality and compliance with the law on acquiring the suit parcels. It was within his knowledge that specific vital steps, processes and documents accompany a transfer and registration of a parcel of land, be they as a gift or by another consideration. To this end, the plaintiff averred that his late grandfather gifted him the three parcels of land out of his caregiver services. This was subject to both procedural, evidential and substantive law. In *Re-estate of Gedion Munzi Nzioka deceased (2015) eKLR*, the court said that there were two types of gifts between living persons; gifts *intervivos* and gifts made in contemplation of death (gifts *mortis causa*). The former is given through a deed, an instrument in writing, or delivery through registered transfer. The court said that the gift must be complete to be valid.
77. Therefore, the plaintiff had the duty to discharge the burden that the gift was legally registered for it to be complete. In this case, the deed should have included the transfer forms and the land control application forms duly signed and executed by the deceased before a witness who was present during the transaction. The framers of our laws contemplated an instrument known in law.
78. The deceased had to effect the gift by signing a transfer form and attaching all the requisite documents. Similarly, the plaintiff had to sign the transfer forms and appear with the deceased before a witness. The plaintiff would know whomever lawyer attested the signing of the transfer forms. He would know when they appeared before the land control board for subdivisions and transfers. The plaintiff did not



seek witness summons to the attesting lawyers and the chairman of the land control board, to come and testify before the court to show substantial compliance with the process. These documents would have confirmed the consideration the plaintiff gave to the deceased to be gifted the three parcels to the exclusion of the 1<sup>st</sup> – 4<sup>th</sup> defendants.

79. A land registrar cannot register an instrument unless the parties concerned have appropriately executed and produced certain documents. The documents would include R.L. 1, a transfer form which the transferor must sign, and be attested and certified by an advocate. It must also have copies of Pin certificate and I.D. card from both parties and coloured- passport sized photographs. An application for the land control board duly executed by the parties and a letter of consent must be present. See *Evanson Wambugu Gachungi vs Simon Wainaina Gatwiri & 2 others* (2014) eKLR and *James Kithaka Kiarago vs Duncan Newton Nyaga Njugi & others* (2018) eKLR. A land registrar was unable to trace the documents from the land control board or the transfer form at the registry. The plaintiff had also not produced the land control board consent or transfer forms. The court found the certificate of title unsafe under Section 26 (1) Of the [Land Registration Act](#) as read together with Article 40 (b) of [the Constitution](#).
80. In *Mary Muthoni vs Francis Mwangi Muthara* (2016), eKLR, Musyoka J held that the bringing of property under the registration regime meant that any gifting of the property was after that to be in writing. The court held that the absence of any such transfers or written memorandum, for such gift meant that there was no inter vivo gift to anyone. The court held that the gift had not been passed to the respondent.
81. In the case of *Syles Matheka vs Alfred Nthiwa Matheka & others* (2019) eKLR, the transfers had been effected on behalf of the deceased. The court further held that without any written memorandum transfer duly signed by the deceased, it could not hold that the deceased signed the same before his death. The court drew the only logical inference that the process of the transfers was done and finalized after the death of the deceased. The court further held that it was not enough for the defendant's to assert that the deceased signed the transfer documents during his lifetime without proving the copies thereof.
82. In *Chesoli Yonah Wabomba vs Alice Khakasa Masbo & another* (2017) eKLR, the court held that mere ill health might not necessarily affect a person's state of mind or free will, and evidence must be produced to prove the fact of illness that could have affected the state of mind or free will of the deceased during the execution of the transfer to invalidate it. The court said proof of sale is by way of agreements. In *David Kamunya Kingori & another vs Wambui Nderitu & others* (2020) eKLR, the court noted that the transfer of the suit land from a husband to a wife must have presumed that the husband held the land in trust for his family, which was settled thereon by dint of Sections 27 of the [Land Registration Act](#). Based on this section, the court held that the transferee was deemed to have continued holding the land in trust for the family since no consideration had been paid for the transition. Additionally, the court said that a mutation form led to the creation of subdivisions which are subsequently registered in the proprietor's names for dealing.
83. Applying the preceding case law to the facts of this case, the plaintiff did not provide any duly signed consents, applications for the land control board consent, and the transfer forms, signed and executed by the deceased in support of the three title deeds. Additionally, the plaintiff did not produce or call the land surveyor who prepared and signed the mutation forms before and after the subdivisions and erected the beacons between the three parcels of land. This was the easiest thing that the plaintiff could have done in support of his claim, to bring copies of the executed documents. The failure to do so diminished the plaintiff's value and weight of asserting that he held valid titles to the suit lands. How else can this court find that the deceased willingly and knowingly participated in transferring and



registering his three transfers if the person is at risk of losing the case and does not produce what ideally is in his custody?

84. The plaintiff has tried to hide his inaction to produce the documents under the guise that the deceased made the transfers for him, so he should be the one who had the duty to follow up on the transfers, subdivisions and registration. This court is not prepared to accept the said explanation. It was the plaintiff who used to stay with the deceased. He must have kept custody of all his secrets and documents. He would have known where the records were kept. In the absence of any explanation to the contrary, my inference is that the papers were not procured or, if they existed, would have been prejudicial to the plaintiff's case.
85. The next issue is the nature of entry into the suit premises by the plaintiff and the 1<sup>st</sup> - 4<sup>th</sup> defendants for each to stake a claim. It is not in dispute that the plaintiff is a son of the 4<sup>th</sup> defendant and a nephew to the 1<sup>st</sup> – 3<sup>rd</sup> defendants. Further, it is not an issue that all of them are grandchildren and children of the late Jonathan M'Marete.
86. In the case of Eddah Wangu and another vs Sacilia Magwi Kivuti (deceased) substituted with Ribereta Ngai (2021) eKLR, the court cited with approval *Tau Kakungi vs Margrethe Thorning Katungi & another* (2014) eKLR, on the proposition that the purpose of Section 35 of the [Law of Succession Act](#) is that the children of the deceased are not entitled to access the net estate of the deceased so long as there is a surviving spouse and that the children's right to property crystallizes upon the determination of the life interest following the death of the life interest holder or remarriage. The court also said that the ultimate destination of the net estate was the surviving children entitled to their deceased parents' property.
87. In *Cleopa Amutala Namangi vs Judith Were* (2015) eKLR, the court held that as per Part (v) of the [Law of Succession Act](#), grandchildren have no automatic right to inherit their grandfather's property, the rationale being that they can only inherit their grandfather's property indirectly through their parent unless the said parents were dead.
88. Further, in *Elisem Mbura M'Ithara vs Harriet Ciambaka & another* (2012) eKLR, the court said that the [Law of Succession Act](#) did not discriminate between married and unmarried daughters, but gave them equal inheritance rights more so if they had been in occupation of the land of the deceased by living there.
89. In the case of *Toroitich Suter vs William Toroitich & 3 others* (2017), eKLR before the court was a dispute pitting sons and grandchildren of the plaintiff who had called the family in his old age to exercise his wishes and desires inter vivos, who had agreed to his desires with each of the sons getting 10 acres and a remainder of 10 acres left to the plaintiff. When the land surveyor was effecting the subdivisions, he was accosted by the defendants, frustrating his wishes. A caution was also placed against the title to stop the exercise. The defendants objected that the plaintiff's other two wives and children had been left out of the family meeting. Some were also claiming the right of ownership through gifts to the land. In his testimony, the plaintiff said that he had called the defendants who refused to attend.
90. The court held that the only known family interest in the property was the spousal interest, which was an overriding interest vested in the husband or wife of the registered property owner. The court held that children or grandsons of a living title holder had no overarching interest in the property of their father and grandfather.
91. In *Lepapa Ole Moshono vs Land Registrar Kajiado & another* (2019) eKLR, the court was called upon to determine whether the caution registered on the suit parcel should be removed. The court held that Section 71 of the [Land Registration Act](#) provides for who should lodge a caution so long as he is a



person claiming the right to obtain an interest in land capable of creation by an instrument registrable under the statute, including as a licensee. The court said that caution could be removed under Section 73 of the [Land Registration Act](#), upon an application to the land registrar after giving notice to the cautioner. The court cited with approval Black's Law Dictionary 10<sup>th</sup> Edition that a beneficial interest means a right or expectancy in something such as a trust or an estate instead of a legal title.

92. In this suit, there is no doubt that the 1<sup>st</sup> – 4<sup>th</sup> defendants were brought forth by their deceased parents in the premises until they became adults. Evidence tendered by both sides points to the fact that the matrimonial home of their deceased parents is at the suit premises. DW's 1 -6 have all confirmed that their parents are buried at the suit parcels of land. The deceased subdivided and gave out L.R. No.1443 to the 1<sup>st</sup> defendant and was left out with L.R. No. 1442, which later on was subdivided into two. Therefore, my finding is that the entry into the suit premises by the 1<sup>st</sup> – 4<sup>th</sup> defendants must have preceded that of the plaintiff, for he could not possibly have been on the suit land other than through his mother, the 4<sup>th</sup> defendant.
93. Again, I find the version given by the 4<sup>th</sup> defendant and corroborated by the rest of the defence witnesses that the plaintiff entered the suit premises in 2015 for the sole purpose of offering caregiver services to his ailing grandfather and no more.
94. Additionally, evidence tendered by the plaintiff's mother that she is married in Embu where there is a homestead at her husband's Mr. Njiru, has not been shaken by the plaintiff. It is unbelievable that the plaintiff would go to the extent of calling his mother a stranger and disinterested in the welfare of his grandfather in old age and sickness, yet all evidence in this suit points out to the fact that she is the one who consented to and authorized the plaintiff leave their home in Embu to go and assist his ailing grandfather.
95. The plaintiff has tendered no evidence to show that he had the financial muscle to put up the immense developments on the suit premises and meet the medical bills for the deceased, between 2015 – 2017 to the exclusion of the 1<sup>st</sup> – 4<sup>th</sup> defendants.
96. As to whether the 1<sup>st</sup> – 4<sup>th</sup> defendants were entitled to move into the suit premises to arrange for the burial of their deceased father, the plaintiff has termed such entry and occupation as against his rights to own and occupy the suit premises. On the other hand, the 1<sup>st</sup> – 4<sup>th</sup> defendants pleaded and testified that they were there as of right and more so given that they owed a duty to the deceased to prepare and offer him a decent burial which efforts the plaintiff had no right to disrupt and or eject them from the suit parcels of land.
97. In the case of Joan Akoth Ajuang and Another vs Michael Owuor Osodo, the Chief Ukwala Location LSK & another (2020) eKLR, at issue was whether there was an infringement of the deceased's right to human dignity even in death due to World Health Organization (WHO) guidelines during Covid -19 without the input of his relatives who had a right to bury their loved one decently and respectably. The court cited Otieno vs Ougo & Another (1987) eKLR, that there is always a purpose for the practice of a custom which in that case among Luos was intended to unify the people in a family.
98. The court also cited with approval Associate Professor of Law Kirsten Rabe Smolensky's: "Rights of The Dead (2009) Vol 37: 763 Hofstra Law Review page 765, on the legal rules on dignity and respect for decedents' wishes.
99. The court said that Articles 11 & 44 of [the Constitution](#) promotes culture as one of the rights a person is entitled to and that traditional celebrations are encouraged. The court said that Section 21 of the [Births and Deaths Registration Act](#) was clear about a permit to dispose of a deceased person's body. Citing with approval C. Sethu Ruja vs the Chief Secretary (W.PMD) No.3888 of 2007, recorded on 28.8.2007



by the supreme court of India, the court held that the right to dignity prevails even after death and in *Ram Sharan Autyanuprasi vs Union of India* (AIR 1989 Supreme court 549) which stated that life in its expanded horizons today includes all that gives meaning to a man's life including his traditions, culture and heritage in its full measure.

100. Finally, the court held that the right to possession of a dead human today for burial is in ordinary circumstances in the spouse or other relatives of the deceased and that the disposition of the death is a matter of public interest, including public health, safety and welfare hence not the desires, whim or caprice of individuals. See [Anatomy Act](#) & [Public Health Act](#). The court further said that a deceased person's family has a personal right to bury the dead body of their relative and that under Kenyan culture, a burial ceremony was a vital component of honouring the dead.
101. Flowing from the preceding persuasive case law, it goes without saying that in African cultures, and everywhere else, is a custom that the role and participation of an immediate deceased family in their burial cannot be gain said. The plaintiff believes that the 1<sup>st</sup> – 4<sup>th</sup> defendants were busybodies who only became interested in accessing the deceased's body at death, yet before then, they were not taking care of, visiting him or offering him any assistance towards his health and welfare.
102. Further, the plaintiff averred and testified that since he was now the registered owner, he had exclusive control of the suit parcels of land, which were infringed by the 1<sup>st</sup> – 4<sup>th</sup> defendants with the sole aim of staking a claim to lands already transferred to him.
103. In my view, the acts of the 1<sup>st</sup> – 4<sup>th</sup> defendants could not be termed as amounting to trespass or interference with the plaintiff's right to own and occupy the land. Evidence shows that the 1<sup>st</sup> & 3<sup>rd</sup> defendants have homesteads within the suit parcels of land.
104. There is also evidence that the 1<sup>st</sup> – 4<sup>th</sup> defendants had been accessing, staying, living and using the suit parcels of land during the lifetime of their deceased parents. Similarly, there is evidence that the 1<sup>st</sup> – 4<sup>th</sup> defendants participated in the burial of their deceased mother in 2007 and planned how their father would be cared for by the plaintiff. There is further evidence that the 1<sup>st</sup> defendant, alongside the other defendants and relatives, cleared the medical bills and funeral expenses. As much as the plaintiff wishes to isolate the 1<sup>st</sup> – 4<sup>th</sup> defendants from the life and affairs of their late father even after death, this would have amounted to infringement of the dignity of the deceased.
105. The 1<sup>st</sup> – 4<sup>th</sup> defendants had all the rights to offer a decent and befitting burial to the deceased. This could not have been possible without accessing the suit parcels of land, establishing the burial site and making appropriate preparations.
106. My finding is that the 1<sup>st</sup> – 4<sup>th</sup> defendants were justified in entering and remaining in the suit parcels of land. Therefore, they did not require the plaintiff's consent or approval to gain entry and stay on the suit lands. Similarly, and by the same reasoning, when the 1<sup>st</sup> – 4<sup>th</sup> defendants felt their rights, interests and entitlements to the parcels of land threatened, it was prudent for them to invoke Sections 68 & 71 of the [Land Registration Act](#) by registering a restriction to safeguard their rights.
107. There is no evidence that the plaintiff sought the withdrawal or cancellation of the cautions before moving to court with the 5<sup>th</sup> defendant. In the absence of the exhaustion of the internal dispute mechanism under Sections 68 – 74 [Land Registration Act](#), my finding is that it was premature for the plaintiff to jump the gun and move to court against the 5<sup>th</sup> defendants on removing the caution. Similarly, no evidence has been advanced to establish loss or damage due to the alleged wrongful cautions. The claim for general damages stands unproved against the 1<sup>st</sup> – 4<sup>th</sup> defendants.



108. Given that the plaintiff has failed to establish ownership of the suit premises and its infringement by the defendants, I find him not entitled to the reliefs sought.
109. The next issue is whether the 1<sup>st</sup> – 4<sup>th</sup> defendants could lodge and sustain the counterclaim. It is trite law that parties are bound by their pleadings as aforesaid. This was the position taken in *Mutinda Mule vs IEBC (2013) eKLR*. The plaintiff sued the 1<sup>st</sup> – 4<sup>th</sup> defendants in their individual capacities claiming that they had entered into the suit parcels and committed acts inconsistent with his right to own and occupy the land. After the 1<sup>st</sup> – 4<sup>th</sup> defendants were sued, they filed a defence and counterclaim to justify why each was on the land and the nature of their interest on the suit parcels bordering on family or ancestral rights.
110. The plaintiff filed a reply to the defence and defence to the counter claim dated 7.10.2019 where he joined issues raised in the defence and counterclaim with his amended pleadings. Further, the plaintiff refuted any alleged ancestral family rights over the land, including any customary or constructive trust alleged by the 1<sup>st</sup> – 4<sup>th</sup> defendants.
111. Nowhere in reply to the defence and defence to the counterclaim did the plaintiff raise an objection on the locus standi of the plaintiff in the counterclaim. The same was also not raised in his testimony. Furthermore, the plaintiff was categorical that the three titles to the land did not form part of the deceased's estate since they were gift inter vivos to him.
112. Therefore, I find the preliminary objection coming too late through written submissions that do not amount to pleadings or evidence in law. Additionally, there is no requirement in law for one to obtain letters of administration as a condition precedent to lodging a claim based on either customary trust or constructive trust. The plaintiff sued the 1<sup>st</sup> – 4<sup>th</sup> defendants in their individual capacities and were therefore entitled in law to respond to the claim as brought against them, assert and advance their claim on trust to what they believe amounts to trust properties currently registered in the names of the plaintiff, which in law are overriding interests did not require to be indicated in the land register. See *Mbui Mukangu vs Gerald Mutwiri Mbui (2004) eKLR*.
113. Having found that the 1<sup>st</sup> – 4<sup>th</sup> defendants are correct before this court, the next issue is whether they have established either a constructive or customary trust against the plaintiff.
114. In the case of *Twalib Hatayan Twalib (supra)*, the court cited with approval *Black's Law Dictionary 9<sup>th</sup> Edition*, which defines trust as a right enforceable solely in equity to the beneficial enjoyment of property to which another holds a legal title a property interest held by one person (trustee), at the request of another (settlor), for the benefit of a third party (beneficiary).
115. The court said that under the *Trustee Act*, trust and trustee extend to an implied and constructive trust, the latter being an equitable remedy imposed by the court against one who has acquired the property by wrongdoing in circumstances where the intention of the parties cannot be ascertained and where the events would demand that equity treats the legal owner as a trustee. Further, the court said that where a person takes advantage of his position for his benefit, constructive trust will thus automatically arise.
116. In the case of *Peter Ndung'u Njenga vs Sophia Waitiri Ndungu (2000) eKLR*, it was held that a court would only presume a trust in cases of absolute necessity only to give effect on the intention of parties after clearly determining if such facts exist before implying the trust.
117. In the case of *Margaret Wacuka Kuria vs Joseph Kabira Irungu & Land Registrar Kiambu (2020) eKLR*, the court cited with approval *Juletabi African Adventure Ltd & another vs Christopher Michael Lockley (2017) eKLR*, that imposition of a constructive trust was meant to guard against unjust enrichment.



118. Further, in *Kazungu Fondo Shutu & another vs Japheth Noti Charo & another* (2021) eKLR, the claim was against a half-brother said to have been holding the land in trust for the family who, in breach of trust had subdivided and began selling to third parties. The appellants had sought to be declared the rightful legal, beneficial and bonafide owners of the land.
119. The land's history was traced to a grandfather known as Shutu Masha, which the respondent was disputing, saying that the appellant's claim was on neither identifiable nor ascertainable land. The Court of Appeal cited with approval *Mumo vs Makau* (2002) IEA 170, that trust was a question of fact to be proved by evidence and that the onus lies on the party relying on the existence of trust to prove it through the evidence on the presence of facts pointing at on trust. The court said more evidence needed to be adduced on why Mzee Charo Wa Shutu would inherit all the land from the appellant's grandfather when the appellant's father was alive and had his own children.
120. The plaintiff has averred that his late maternal grandfather legally transferred the suit parcels of land to him; therefore, his maternal uncles, aunt and mother, claiming to be the sole beneficiaries, have no legal rights to the land. He asserted that the land was not ancestral or family land but one acquired by his late grandfather in 1965, who willingly exercised his rights during his lifetime, which the 1<sup>st</sup> defendant knew about. He has relied on a sale agreement produced as P. Exh No. 5 (a) and P. Exh No. (6). Other than PW 2 and the affidavit sworn by the deceased, no other independent testimony was produced to discount the version by the 1<sup>st</sup> – 4<sup>th</sup> defendants that the land was ancestral or family land.
121. In *M'Imanyara M'Murithi vs Nkanata Murithi & another* (2012) eKLR, the court said that evidence before the primary court showed that the entire family lived together but temporarily moved out of the suit land during the Mau Mau uprising, which did not in any way change the status of the land. The court observed that the quick transfer of the suit land from the 1<sup>st</sup> respondent to the 2<sup>nd</sup> respondent was intended to put the land out of the appellant's reach, hence imposing trust against the 1<sup>st</sup> respondent. The court said that the land remained ancestral land.
122. The 1<sup>st</sup> – 4<sup>th</sup> defendants' evidence is that the circumstances in which the title deeds came under the plaintiff's name were suspect; even if legal, the plaintiff held the suit lands subject to their overriding rights since they have been occupying the suit parcels of land during the deceased's lifetime.
123. DW 1 – DW 6 evidence was that they have consistently been on the land since 1965 and have developments on the suit land made with the deceased's consent, knowledge, approval and acquiescence. The plaintiff has also acknowledged in his cross-examination the developments, especially the homestead of the 1<sup>st</sup> defendant.
124. Further, PW 1 also admitted that the 1<sup>st</sup> – 4<sup>th</sup> defendants had nowhere else to go since the only family land they could inherit from their deceased father belonged to him. The 1<sup>st</sup> – 4<sup>th</sup> defendants have testified that their late father would not have transferred all their land, oblivious of their accrued rights.
125. In the case of *Joseph Ngahu Njigu & others vs Zakayo Macharo Kairuki & others* (2018) eKLR, subdivisions of the deceased's land had occurred in circumstances which were said to have been unknown or not within his knowledge since he was allegedly sick and on his death bed. The court found no evidence of fraud since the complaint at the DCIO had found no fault on the transfer form, and secondly, since a land control board consent had been produced showing that the deceased freely and willingly signed them.
126. In *Lukutsa vs Sebensia Achitsa Amuli* (2021) KECA 241 (KLR) 21 December (2021) (Judgment). The court said that a title to land falls for a challenge in circumstances where there is proof that the same was acquired through fraud, misrepresentation or a corrupt scheme. Regarding the legality of the



transfer, the court said that the respondent had pleaded irregularity, unprocedural transfer, illegality and fraud attributed to the appellants, whose standard of proof under Sections 107 and 112 of the *Evidence Act* was higher than in ordinary suits. The court held that since the evidence had been offered that the deceased at the time was bedridden and could only transact business with the help of caregivers, among them PW 3, who could not recollect witnessing the deceased undertake the transactions or taking him to any office or any place and seeing him execute any documents for the transfer of the contested property in favour of the appellant. The court found such evidence as unshaken, cogent, plausible and credible.

127. The court went on to say that once the evidence was found credible, the burden shifted to the appellants to prove either that PW 1 & PW 3, were not truthful in their assertions and that they did witness the deceased undertake the transactions through a thumbprint and or signature to the transfer form in his favour. The court held that in the absence of discharging the burden, the only plausible and logical conclusion to be drawn by the trial court was that the entire process leading to the appellants' acquisition and registration of the contested property was tainted with fraud, illegality and was unprocedural. It was, therefore, a product of a corrupt scheme hatched by the appellants and a person known to him to defraud the deceased of a portion of the original suit property. Regarding fraud, the court cited with approval Black's Law Dictionary 9<sup>th</sup> Edition, page 131, that it includes a knowing misrepresentation of the truth or concealment of a material facts to induce another to act to their detriment. The court held that the appellant's failure to discharge the burden of proof shifted upon him to demonstrate the legality, regularity and procedural processes undertaken to vest him with the title to the suit property.
128. On cancellation of title, the court held that the sale agreement and the documents were suspect for lack of proof that the deceased endorsed them; for failure to explain the change of figures of the monies paid contrary to the ones on the transfer forms and lastly; for attaching photographs to the transfer form which did not belong to the deceased. The court said that so long as the transfer form stood faulted, there was no way the appellant could claim to be a lawful transferee of the contested suit property. Additionally, the court said that since it was the appellant who had asserted and alleged a valid claim to the contested suit property, it was incumbent upon him to call the land registry to confirm that the process undertaken by them to vest him with title to the contested suit property was regular, legal and procedural. The court also found that the appellant was privy to the fraud, irregularity, and unprocedural means in reality and by conduct.
129. The court guided by *Arithi Highway Developers Ltd vs West End Butchery (2015) eKLR*, reiterated that no court of law should sanction either the acquisition of title property in favour of crooks using deceit or a transfer of title or issue a decree founded on fraud since such a decree or title amounted to a nullity ab initio and lastly that a court should not enforce an illegal contract or be made the instrument of enforcing an illegality.
130. As concerns customary trust, the court in *Kiebia vs M'Lintari (supra)* set the parameters to be met namely that the land was family, clan or group before registration, that the claimant belongs to that clan, family or group, that the claim is directed at the member of that clan, group or family; the claimant would have been the registered owner but due to intervening circumstances.
131. Guided by the above-cited case law, there is no doubt that the court has established that the 1<sup>st</sup> – 4<sup>th</sup> defendants are the immediate family members of the deceased who have been on the land for decades and have established residences on the suit parcels of land. There is ample evidence that the deceased caused the initial land No. 615 to be subdivided into two portions, one in favour of the 1<sup>st</sup> defendant and the rest was left as L.R. No.1443 under his name. L.R. No. 1443 is where the deceased residential home is situated. It is also under occupation by the 3<sup>rd</sup> defendant. At the time of the subdivisions,



- the deceased's intention, both on paper and on the ground, was affected by a registered land surveyor. He had willingly shown his intention to the defendants at the land control board meeting and on the ground. I believe the deceased's initial mutation form left no doubt that he intended all his two sons to benefit from his family land. During his lifetime, the deceased allowed the 1<sup>st</sup> – 4<sup>th</sup> defendants to access, occupy and develop the suit premises. If the deceased had any change of heart after 1992 and 2007, respectively, when his wife passed on, the plaintiff failed to lead evidence to show why the deceased would suddenly have a second thought and change that clear and consistent intention.
132. The court has found no evidence that the deceased notified the 1<sup>st</sup> – 4<sup>th</sup> defendants to formally vacate his land for any lack of care or facilitation in accessing medical attention. Evidence herein shows that the 1<sup>st</sup> – 4<sup>th</sup> defendants took the deceased to the best medical facilities to access medical care. The 1<sup>st</sup> – 4<sup>th</sup> defendants also cleared the medical and funeral expenses to facilitate his burial. The deeds or actions by the 1<sup>st</sup> – 4<sup>th</sup> defendants between 2015 – 2020 are consistent and point to caring children, contrary to the mere words uttered by PW 1 and PW2.
133. No will was written by the deceased or attested by a third party to show that he intended to and voluntarily transferred his three parcels of land. Even if that were to be so, the plaintiff knew of his uncles and aunts' interest in the suit parcels of land. It defeats logic that the deceased also wished the plaintiff to acquire the entire suit parcels of land with the exclusion of his mother, the 4<sup>th</sup> defendant. The plaintiff failed to produce any documentary evidence quantifying his total contribution in monetary terms for the period he cared for his grandfather to justify the consideration to acquire the three titles of land at the expense of his uncles and aunts, the 1<sup>st</sup> – 3<sup>rd</sup> defendants.
134. As the only person who had the eye and the ear of the deceased, it is inconceivable that the plaintiff did not have in custody with him all the original transfer, forms agreements to gift, stamp duty payments, application for land control forms and all expenses which he made towards the transfer, registration and acquisition of the suit premises. See *Pauline Chemunge Sugawara vs Nairuko Ene Mutarakwa Kiruti (2022) eKLR*, *Samson Karanja Njuguna vs Khamis Ali Mohamed (2021) eKLR*.
135. The affidavit sworn by the deceased must be considered alongside all other evidence before this court. In *Green Hills Investment Ltd & another China National Complex Plant Export Corporation Complaint T/A COVEC Milimani Commercial Court No. 572 of 2000*, the court said that an affidavit was not a pleading. The exact position was repeated in *Simon Kitave Nduto & another vs Owenga Anjere Nairobi CA No. 170 1995* & *In NHC vs Martin Ndapatana (2022) eKLR*. Section 35 (1) of the [Evidence Act](#) provides for the admissibility of documentary evidence. Section 34(1) (a) of the [Evidence Act](#) allows for the admissibility of evidence given in previous proceedings.
136. The contents of the deceased's affidavit are contested in this suit. The law expects an instrument of transfer to have been signed and registered over and above the mere word that the deceased had willingly and voluntarily transferred the suit parcels of land. The affidavit cannot replace a mandatory statutory instrument under the [Land Registration Act](#) the [Land Act](#), the [Law of Contract Act](#) and the [Land Control Act](#). The plaintiff was allowed to call the maker of the disputed affidavit and the Advocates who prepared or commissioned the affidavit. Unfortunately, none could explain why this particular evidence should be admissible. In the absence of the said makers, the court finds the testimony inadmissible and lacking any probative value.
137. In *John Gitiba Buruna & another vs Jackson Rioba Buruna (2007) eKLR*, the court held that constructive trust arises when a person has a property where it would be inequitable to allow him to assert full beneficial ownership. In *Mwangi & another vs Mwangi (1980) eKLR*, the court said that registration of titles was a creation of the law, and one must consider the surrounding the titles' registration to determine whether a trust was envisaged.



138. Order 2 Rule 10 (a) of the Civil Procedure Rules provides that the particulars of misrepresentation, fraud, breach of trust, willful deceit or undue influence must be listed. The 1<sup>st</sup> – 4<sup>th</sup> defendants led evidence on the manner, nature and status of their interests and rights on the suit parcels of land. The 1<sup>st</sup> – 4<sup>th</sup> defendants' evidence has been consistent that the initial land before subdivisions was family land, and an intention had been expressed by their late father that L.R No. 1443 would go to the 3<sup>rd</sup> defendant. The 1<sup>st</sup> – 4<sup>th</sup> defendants have testified that the plaintiff, as a grandchild, cannot stand between them and their late father to defeat their beneficial interest as provided under Section 29 of the [Law of Succession Act](#).
139. The 1<sup>st</sup> – 4<sup>th</sup> defendants' evidence is anchored in the case of “In the matter of the estate of Veronica Njoki Wakagoto (deceased) (2013) eKLR. The rights of the 1<sup>st</sup> – 4<sup>th</sup> defendants also crystallized upon their father passing on, in priority as dependants under Sections 35, 38 and 40 of the [Law of Succession Act](#). Unlike the plaintiff, the 1<sup>st</sup> – 4<sup>th</sup> defendants rank higher in priority. In *Mwai Kibaki & another vs Mathingira Wholesalers Co. Ltd and others* (2018) eKLR, the court held that equitable principles applied when there was an express statutory law governing how shares should be transferred from one person to another. The court found that in the face of flagrant disregard of procedures set out, new members had not acquired any rights in the 1<sup>st</sup> respondent which were known or could be recognized in law.
140. In this suit, the plaintiff failed to rebut the evidence the 1<sup>st</sup> – 4<sup>th</sup> defendants advanced to find either a constructive or customary trust. In *African Common Industries Ltd vs Rural Development Services Ltd* (2021) eKLR, the court held that Section 3 (3) of the [Law of Contract Act](#), as read together with Section 38 of the [Land Registration Act](#), requires that no suit shall be brought upon a contract for the disposition of an interest in land unless the agreement was in writing, signed by all the parties and the signature of each party signing it attested by a witness who was present when the contract was signed.
141. The 1<sup>st</sup> – 4<sup>th</sup> defendants have raised the issue of the incapacity of the deceased and their overriding/family interests in the property. The law presumes that every person is of sound mind to be held responsible for his actions. The 1<sup>st</sup> – 4<sup>th</sup> defendants have given evidence that the deceased was ailing and therefore was not in a reasonable frame of mind. Further, the 1<sup>st</sup> – 4<sup>th</sup> defendants believe there was undue influence or duress. In *KCB vs Samuel Kamau Macharia & others* (2008) eKLR, the court held that commercial pressure was a ground for vitiating a contract if a person acted against his will and had no alternative cause open to him and was confronted by coercive acts by the party exerting pressure.
142. In their case, the 1<sup>st</sup> – 4<sup>th</sup> defendants have pleaded and testified that the deceased was unwell, irritated, disoriented and may not have been in a reasonable frame of mind. Further, they said their consent was not obtained, so family interests vitiate the transfers. The plaintiff has not countered this evidence by bringing independent witnesses who witnessed the transfer forms, application for land control board consents and the registration of the titles in the presence of the deceased. Therefore, this court, in the absence of contrary evidence to rebut the presumption of trust, finds that the circumstances of this case show a clear intention by the deceased to identify and be sensitive to the interests of his children, the 1<sup>st</sup> – 4<sup>th</sup> defendants.
143. Therefore, the registration of the title deeds in the plaintiff's name was subject to the overriding rights of the 1<sup>st</sup> – 4<sup>th</sup> defendants. Such equitable rights, as held in *Willy Kitilit vs Michael Kibet* (2018) eKLR, have been elevated to constitutional principles and values under Article 10 (2) (b) of [the Constitution](#).
144. The upshot is that the amended plaint is dismissed with costs and judgment allowed in favour of the plaintiffs to the counterclaim as follows



1. That declaration be and is hereby issued that the defendant in the counterclaim holds L.R No's Nyaki/Mulathankari/3702, 3703 and Nyaki/Kithoka/4742 in trust for the plaintiffs.
2. An order do issue that the defendant in the counterclaim to sign transfer forms in favour of the plaintiffs in the counterclaim within 30 days from the date hereof and in default the same to be executed by the Deputy Registrar.
3. An order of permanent injunction do issue restraining the defendant in the counter claim, his servants or agents from interfering with the plaintiffs' occupation and use of the suit land in (1) above.
4. Costs to the plaintiffs.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 17<sup>TH</sup> DAY OF MAY 2023**

**In presence of**

C.A John Paul

Kiplagat for the plaintiff

Mr. Kariuki for 1<sup>st</sup> – 4<sup>th</sup> defendants

Miss Mbaikyatta for the 5<sup>th</sup> defendant

**HON. CK NZILI**

**ELC JUDGE**

