



Gitau & another (Suing in their capacity as the personal representatives of Paul Gitau Kinuthia) v Mwangi (Sued as the personal representative of Francis Mwangi Gitau aka Francis Kinuthia Gitau) (Environment & Land Case E029 of 2021) [2023] KEELC 18767 (KLR) (13 July 2023) (Judgment)

Neutral citation: [2023] KEELC 18767 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT & LAND CASE E029 OF 2021
LN GACHERU, J
JULY 13, 2023

BETWEEN

JOSEPH KIBUGI GITAU 1ST PLAINTIFF

CHARLES CEASER KIBUGI GITAU 2ND PLAINTIFF

SUING IN THEIR CAPACITY AS THE PERSONAL REPRESENTATIVES OF PAUL GITAU KINUTHIA

AND

STEPHEN NDUNGU MWANGI DEFENDANT

SUED AS THE PERSONAL REPRESENTATIVE OF FRANCIS MWANGI GITAU AKA FRANCIS KINUTHIA GITAU

JUDGMENT

1. The Plaintiffs claim herein is contained in a Complaint dated the 20th September 2021, wherein they have sought for judgment against the Defendant for the following orders;
 1. A declaration that Francis Mwangi Gitau in his lifetime held Plot No. Loc. 11/ Maragi/ 1193/16B, in trust for the family of the late Paul Gitau Kinuthia.
 2. A declaration that the children of Paul Gitau Kinuthia, or their descendants where such children have died are the beneficiaries of the trust.
 3. A declaration that the identities of the current beneficiaries and their shares are as set out in paragraph 9 hereof.
 4. The interest of the beneficiaries be noted in Murang'a Chief Magistrate's Court Succession Cause No. 240 of 2019.



5. The costs of this suit be recovered from the Estate of Francis Mwangi Gitau.
2. The Plaintiffs case was that the suit property belonged to Paul Gitau Kinuthia, but is now registered in the name of Francis Mwangi Gitau. They averred that the suit land was allotted to Gitau Kinuthia in 1946, who developed the suit land for his family which are the Plaintiffs, herein. That after the death of Gitau Kinuthia, Francis Mwangi Gitau, illegally and by dubious means registered the suit land in his name at the exclusion of other family members. That having registered the suit land in his own name, he held the land in trust for himself and the family of Paul Gitau Kinuthia.
3. They further averred that they discovered the registration while petitioning for letter of administration of the Estate of Paul Gitau Kinuthia. They urged this Court to dissolve the trust and divide the land as per paragraph 9 of the Plaint.
4. The Defendant opposed the Claim vide the Defence filed on 8th October, 2021. He averred that his deceased father had caused developments to be done on Plot 16, which resulted in sub-divisions of Plot 16 to 16A and 16B. That his father transferred plot 16A to his uncles and he retained plot 16B. He added that his deceased grandfather had two wives and he had distributed his properties to the eldest sons of the two houses and that's how trust was created. That his deceased father had dissolved the trust, during his lifetime and had distributed the land to his brothers who were to share with their families.
5. It was his further averments that his father was collecting rent exclusively for Plot 16B, and the particulars for trust is not true. That the Plaintiffs ought to have joined Michael Manuthia Gitau, to the proceedings in whose name the land is also registered.
6. The matter proceeded for hearing via viva voce evidence and the Plaintiffs called six witnesses.

Plaintiffs' Case

7. PW1, Joseph Kibugi Gitau, adopted his witness statement dated 20th September 2021, as his testimony, and produced the documents attached to their Plaint as his exhibits 1-8.
8. On cross-exam, he testified that the registration took place in 1987 and their father died in 1952, before registration. It was his testimony that the suit property is in Mukuyu area, and he maintained that it is a family property that should be shared by all the children of Paul Gitau Kinuthia. He further added that the suit property was developed before 1952.
9. PW2, Charles Ceaser Kibugi Gitau, the 2nd Plaintiff also adopted his witnesses statement and added that he is a biological brother of the Defendant's father- Francis Mwangi Gitau. He also testified that their mothers collected rent over the suit property and after their death, his siblings took over. He insisted on cross-exam that the suit land belonged to their father but he did not know who paid for the land rates.
10. PW3 Mary Waithira Gitau, a daughter of Gitau adopted her witness statement and also testified that the suit land belonged to their father, Paul Gitau Kinuthia.
11. PW4 Henry Mwangi Wachira, testified that he is related to the parties. It was his testimony that the suit property was registered in the name of his father Ephraim Kamau Wachira and Gitau Kinuthia. While his father's plot is 16B, 16A is registered in the name of Gitau Kinuthia, and their fathers utilized the said plots during their existence. On cross-exam, he testified that the plot was No.16, but was later sub-divided into two 16A, and 16B, in 1962.
12. PW 5 - Stephen Mwangi Njoroge & PW6 – Susan Wangui Kinuthia reiterated that the land belonged to Gitau Kinuthia.



Defence Case

13. DW1, Stephen Ndungu Mwangi, the Defendant, herein testified that his father bought the suit land and he gave a portion to his brothers. He further testified that his father having transferred a portion of the suit land to his half-brother the trust was broken. He admitted that before the land was divided, there was a trust, but which was dissolved after registration in his father's name and that of Manuthia. He also testified that the land was allotted to his father and Ephantus Wachira in 1962. He was not aware whether his father would surrender rent to the two wives of Gitau Kinuthia, but to him, his father collected the rent.
14. At the close of the hearing, parties were directed to file their written submissions.
15. The Plaintiffs filed their written submissions through the Law Firm of Wiganjo Gichuki & Co. Advocates, and summarized the cases of parties and enumerated some comments in their submissions. It was their further submissions that the Defendant was not aware of the history of the plot and added that the Defendant did not adduce any evidence to contradict the Plaintiffs' testimony.
16. The Defendant who was unrepresented took the same approach of submissions taken by the Plaintiffs of summarizing the case and criticising the Plaintiffs and then giving comments. He submitted that the original suit land was Loc. 11/ Maragi/1193/16, before being sub-divided into 16A and 16B, where the former was registered in the name of E Wachira and the later registered in his name. That his father gifted his half-brother Michael Manuthia, a portion of 40m² which consists of one half front room and one rear room, while his father retained 120m². He challenged the Plaintiffs' testimony and added that the 1st Plaintiffs was actively involved in the transfer of a portion of the land to Michael Manuthia.
17. Having considered the available evidence and the submissions by the parties, it is important to acknowledge that the parties to this suit are related. The Defendant is a nephew to the Plaintiffs. There is no search certificate relating to Loc. 11/ Maragi/1193/16B, but this Court has perused a copy of white card which shows Loc. 11/ Maragi/1193/16, was registered in the name of K Gitau and E Wachira on 26th May, 1962. The Plaintiffs contended that this plot belonged to their father Paul Gitau Kinuthia but was registered in the name of the Defendant's father to hold it in trust for his family, an allegation that the Defendant has opposed. What the Plaintiffs are claiming is ownership over Loc. 11/ Maragi/1193/16B, which they allege is registered in the name of Francis Mwangi Gitau.
18. As per the letter dated 28th June, 2021, addressed to Waiganjo Gichuki & Co. Advocates, land parcel Loc. 11/ Maragi/1193/16, was divided into two being 1193/16A and 1193/16B. As per the letter plot 1193/16A, was registered in the name of Francis Kinuthia Mwangi and plot 1193B, was registered in the name of Ephram Wachira. This Court has also gone through the various correspondences and takes note of the contents therein.
19. Having read through the pleadings and annexures thereto, and having analyzed the testimonies of the parties, and considered the rival written submissions, the Court finds the issues for the determination are;
 - i. Whether Francis Mwangi Gitau acquired the suit land fraudulently?
 - ii. Whether the suit land was held in trust for the family of Paul Gitau Kinuthia?
 - iii. Whether the orders sought by the Plaintiffs can be granted
 - iv. Who should bear the costs for this suit.



(i) Whether Francis Mwangi Gitau acquired the suit land fraudulently?

20. There was common evidence that the suit land is registered in the name of Francis Mwangi Gitau. The Plaintiffs alleged in paragraph 5 that the said Francis Mwangi Gitau, acquired the ownership of the suit land illegally, particulars of which are enumerated thereunder. A reading of paragraph 5 of the Plaint informs this Court that the Plaintiffs' case is that the deceased Francis Mwangi Gitau acquired land by fraud. The Black's Law Dictionary 10th Edition defines fraud as "A knowing misrepresentation or knowing concealment of a material fact made to induce another to act to his or her detriment".

21. The Court in the case of Ahmed Mohammed Noor v Abdi Aziz Osman [2019] eKLR, when discussing fraud considered the writings of Bullen, Leake & Jacobs on Pleadings, 13th Edition which this Court found so relevant. The authors had this to say:

"Where fraud is intended to be charged, there must be a clear and distinct allegation of fraud upon the pleadings, and though it is not necessary that the word fraud should be used, the facts must be so stated as to show distinctly that fraud is charged. The statement of claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that fraud was the cause of the loss complained of (see). It is not allowable to leave fraud to be inferred from the facts pleaded and accordingly, fraudulent conduct must be distinctly alleged and distinctly proved. 'General allegations, however strong may be by words in which they are stated, are insufficient to amount to an averment of fraud of which any Court ought to take notice'".

22. In the case of Emfil Limited v Registrar of Titles Mombasa & 2 others [2014] eKLR, the Court pronounced itself on matters of fraud and held;

Allegations of fraud are allegations of a serious nature normally required to be strictly pleaded and proved on a higher standard than the ordinary standard of balance of probabilities". (emphasis added)

23. Similarly, the Court of Appeal in the case of John Kamunya & another v John Nginyi Muchiri & 3 others [2015] eKLR, held:

"we find that the law is clear as put by Mr. Karanja that matters of "fraud" must be strictly and specifically pleaded before these can be interrogated by a Court of law. Alternatively, even though not pleaded, these may be raised in the cause of the trial, evidence tendered on them, submission made on them and then left for the Court to determine."

24. This Court has overemphasized the issue of fraud and it is therefore the duty of the Plaintiffs herein to lead evidence to the effect that the Defendant's father fraudulently registered himself as the owner of the suit land. As per the white card availed before this Court, it is evident that the land was first registered in the names of two people - K Gitau and E Wachira. The Plaintiffs have alleged that K Gitau is the Defendant's father and this had not been objected to. The foregoing parties were registered on the 26th May 1962, and it is evident they were the first registered owners. Gitau Kinuthia, is alleged to have died in 1952 which is about 10 years, before the land was registered in the foregoing names.

25. No document in the form of an allotment letter was presented before this Court to show that Gitau Kinuthia, was ever the allotted the suit land. The Plaintiffs maintained that this was a family land, whether it was family land or not this Court will find out. As per the particulars of illegality enumerated in paragraph 5 of the Plaint, the Plaintiffs alleged that the deceased used his privilege of being educated and the eldest child to cause the land to be registered in his name without telling his sibling.



26. Section 107-109 of the *Evidence Act* place a duty on the Plaintiffs to lead evidence of the irregularity. What was common in the testimonies of the Plaintiffs and their witnesses was that the suit land belonged to Gitau Kinuthia, and as such the land was a family land, which ought to be shared equally among the children. Interestingly, the Plaintiffs produced in this Court a letter dated 21st February, 1991, which was purportedly addressed to the Plaintiffs herein. As per the letter, Francis Kinuthia Gitau, maintained that the land belonged to him and he made reference to existing family feuds over the land.
27. The County Government of Murang'a wrote a letter dated 28th June 2021, which shows that the letter of allotment over the suit land was missing. Unfortunately, the Plaintiffs did not avail any documents to aid their case in terms of availing a copy of an allotment letter or even any document showing Gitau Kinuthia, was issued with the land pending registration. The Plaintiffs did not lead any evidence which intimates that the registered proprietors ever misrepresented themselves as the absolute owner of the suit land.
28. As a matter of evidence, the suit land was first registered in the name K Gitau and E Wachira. In the letter dated 28th June 2021, by the County Government of Murang'a, K Gitau is registered as the owner of plot 1193/16A, while Ephram Wachira is registered as a proprietor of plot 1193/16B. The Plaintiffs' claim is on plot 16B, and as testified by PW4, the suit land is registered under his father's name, Ephram Wachira. There is no shred of evidence that suggests plot 16B, was obtained by fraud.
29. The Defendant maintained that the suit land belonged to his father and no one has challenged that plot 16A, does not belong to the Defendant. The contention is on plot 16B, which as confirmed by the County Government belongs to someone else. Even if that was not the case, parties to the suit did not give a cogent reason why Kinuthia Gitau and Ephram Wachira became the registered owners yet 1193/16, was property allegedly belonged to Gitau Kinuthia. Ephraim Wachira was not a son of Gitau Kinuthia. Doubt is raised in the eyes of the Court as to the history of the land and it was the duty of the Plaintiffs to cast away this doubt through production of evidence.
30. This Court has pointed above that the legal burden remains with the Plaintiffs and which burden is wholly supported by evidence. It is trite law that the burden of proof rests with the person alleging. What will shift often times is the evidentiary burden. For a Court to consider whether the burden shifted, it will have to look at the evidence adduced during trial. This was well explained in the case of *Mbuthia Macharia v Annah Mutua Ndwiga & another* [2017] eKLR, where the Court expressed itself as follows:
 - (16) The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence?"
31. Looking at the evidence and the testimonies by the Plaintiffs' witnesses, it will not be difficult for this Court to conclude that the burden never shifted. And as already pointed out, allegations of fraud have serious ramifications that require a party alleging to strictly plead and prove. The duty to strictly prove was not achieved in this case. To this end, there was no evidence placed before the Court so that the Court can find and hold that the suit land was illegally transferred in the name of Kinuthia Gitau.



ii. Whether the suit land was held in trust for the family of Paul Gitau Kinuthia?

32. The Plaintiffs maintain that this is land held in trust and which was registered in the name of Kinuthia Gitau, to hold in trust for himself and the family of Gitau Kinuthia.
33. Trust is one of the overriding interests contemplated under the [Land Registration Act](#). It is also one of the factors that can take away the indefeasibility of titles guaranteed under Section 26 of the [Land Registration Act](#). Section 28 provides:
34. Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register—
- a.
 - b. Trusts including customary trusts;
 - c.
.....
35. Registration of the suit land was done under the old land Registration regimes. The Registered [Land Act](#), in Section 30 made provisions for Overriding interests over land. The Plaintiffs claim is that the suit land belonged to their father Gitau Kinuthia, who was allotted the land around or before 1946, and the suit land was used for the benefit of the whole family. That the land was irregularly registered in the name of Kinuthia Gitau, but the registration did not make him the sole owner of the land as his actions depicted that he held the land in trust for the family, particulars of which are enumerated in paragraph 6 of the Plaint.
36. The Supreme Court in the case of *Isack M'inanga Kieba vs Isaaya Theuri M'lintari & Another* {2018}, expressed itself as follows on matters trust:

If the said holding is for the benefit of other members of the family, then a customary trust would be presumed to have been created in favour of such other members, whether or not they are in possession or actual occupation of the land. Some of the elements that would qualify a claimant as a trustee are:

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



37. Further, the Court in the case of *Twalib Hatayan & Anor vs. Said Saggar Ahmed Al-Heidy & Others* [2015] eKLR, pronounced itself on matters trust specifically constructive and resulting trust. The Court held:

"Trusts are created either expressly (by the parties) or by operation of law. An express trust arises where the trust property, its purpose and beneficiaries have been clearly identified (see. Halsbury's Laws of England vol 16 Butterworths 1976 at para 1452). In this case, we have a definite property and beneficiary. The purpose/intent for which the property was bought remains in dispute. This negates the existence of an express trust herein. In the absence of an express trust, we have trusts created by operation of the law. These fall within two categories; constructive and resulting trusts. Given that the two are closely interlinked, it is perhaps pertinent to look at each of them in relation to the matter at hand. A constructive trust is an equitable remedy imposed by the Court against one who has acquired property by wrong doing. (see Black's Law Dictionary) (Supra). It arises where the intention of the parties cannot be ascertained. If the circumstances of the case are such as would demand that equity treats the legal owner as a trustee, the law will impose a trust. A constructive trust will thus automatically arise where a person who is already a trustee takes advantage of his position for his own benefit (see. Halsbury's Laws of England supra at para1453). As earlier stated, with constructive trusts, proof of parties' intention is immaterial; for the trust will nonetheless be imposed by the law for the benefit of the settlor. Imposition of a constructive trust is thus meant to guard against unjust enrichment. In the present case, a constructive trust cannot be imposed or inferred since the suit premises were yet to be transferred to the third party."

The Court further held:

"This leaves us with resulting trusts; upon which the appellants had laid their claim. A resulting trust is a remedy imposed by equity where property is transferred under circumstances which suggest that the transferor did not intend to confer a beneficial interest upon the transferee (see Black's Law Dictionary) (supra). This trust may arise either upon the unexpressed but presumed intention of the settlor or upon his informally expressed intention. (See Snell's Equity 29th Edn, Sweet & Maxwell p.175). Therefore, unlike constructive trusts where unknown intentions maybe left unexplored, with resulting trusts, Courts will readily look at the circumstances of the case and presume or infer the transferor's intention."

38. What this Court deduces from the above is that trust can either be customary trust, resulting trust or constructive trust. As per the Court in the case of *Twalib Hatayan & Anor* (supra) constructive and resulting trusts are created by operation of law. While the former arises in cases where there is already an established trust relationship, the later trust is inferred by the intentions of parties. The Plaintiffs averred that a trust was created by operation of law through the actions of Francis Mwangi Gitau. Perhaps it is important to point out that this Court cannot impose trust and the person alleging trust must lead evidence on that. This was the position of the Court in the case of *Juletabi African Adventure Limited & another v Christopher Michael Lockley* [2017] eKLR, where the Court held:

"It is settled that the onus lies on a party relying on the existence of a trust to prove it through evidence. That is because: -

The law never implies, the Court never presumes, a trust, but in case of absolute necessity. The Courts will not imply a trust save in order to give effect to the



intentions of the parties. The intention of the parties to create a trust must be clearly determined before a trust will be implied.”

39. The Court notes and appreciates that the issue of trust is premised on a land alleged to have been family land. Within the pronouncement of the Court in the case of *Isack M’inanga Kieba vs Isaaya Theuri M’lintari*, supra, where the Court expressed itself:

If the said holding is for the benefit of other members of the family, then a customary trust would be presumed to have been created in favour of such other members, whether or not they are in possession or actual occupation of the land” emphasis added

40. The Plaintiffs submissions did not aid this Court in its finding as their reliance was on trust, but did not adduce evidence on whether it was customary or resulting trust.
41. In the interest of justice this, Court will look into either trust. The principles laid out in the case of *Isack M’inanga Kieba vs Isaaya Theuri M’lintari*, supra, will guide this Court.
42. Borrowing from the five principles and applying in the circumstances raised by parties, the Court will first determine the issue of customary trust. It should be pointed out that the suit land is held under leasehold, but it could still be property held for the interest and benefit of the family. While the Plaintiffs maintained it was family land, the Defendant alleged that the land belonged to his father exclusively. The Plaintiffs testified that their mothers collected rent from the suit property and PW1 testified on re-exam that they had lived on the suit property at some point.
43. What is interesting is that the suit property was jointly registered in the name of Kinuthia Gitau and a Ephraim Wachira and none of the parties explained to this Court the reason for registering land in the name of Ephraim Wachira, who is not a family member. This raises doubt whether the land was indeed a family land or not.
44. As at the time of the land was being registered in the name of the proprietors, Gitau Kinuthia was dead. What is not clear is the circumstances that lead to the land being registered in the name of Kinuthia Gitau. Without a challenge, the claim is against the registered owner and it is clear the parties are related. But for the claim of customary trust to succeed, it must first be shown that the land is family land. There was no independent witness who was brought to help this Court listen to testimony on the history of the land.
45. While the Court cannot control who a party can call as a witness, testimonies of independent and credible witness may aid a Court. The Plaintiffs’ witnesses were old person who may have a grasp of what happened then, but there seem to be no clear evidence as to why land could have been possibly been registered in the name of Kinuthia Gitau and Ephraim Wachira, yet the later was not a family member. PW4 testified being the son of Ephraim Wachira, who is the owner of plot 1193/16B, and which is the land in question, perhaps the suit herein should have been against his family and not Kinuthia Gitau ,who this Court confirms from the County Government’s letter that he is the owner of plot 1193/16A, which is not the subject matter of this suit. Be that as it may, there seem to be confusion by the Plaintiffs who despite having knowledge of the letter, did nothing to their pleadings. There was no material evidence placed before this Court that the land was family land, and this Court finds that a claim for customary trust cannot issue.
46. On resulting and constructive trusts, it should be noted that there is a general rule applicable that a resulting trust, will automatically arise in favour of the person who advances the purchase money. However, this is not the case herein. Also, constructive trust is an equitable remedy, that the Court grants against a person who acquires property by wrong doing. The Court in the case of *TMG &*



another v AP (Civil Appeal 138 of 2019) [2022] KECA 612 (KLR) (6 May 2022) (Judgment), when determining an issue of constructive and resulting trusts looked at the writings in Halsbury's Laws of England, 4th Edition Vol. 48 at paragraph 597, where the learned authors state:

A resulting trust is a trust arising by operation of law:

- i. Where an intention to put property into trust is sufficiently expressed or indicated, but the actual trust either is not declared in whole or in part or fails in whole or part; or
- ii. Where property is purchased in the name or placed in the possession of a person ostensibly for his own use, but really in order to effect a particular purpose which fails; or
- iii. Where property is purchased in the name or placed in the possession of a person without any intimation that he is to hold it in trust, but the retention of the beneficial interest by the purchaser or disposer is presumed to have been intended.”

47. It is clear from the Plaintiffs' suit that their claim for trust majorly lies on trust by operation of law. That the intentions of Kinuthia Gitau, depicted one that was holding the land in trust for the family. The Plaintiffs contended that their deceased mothers were collecting rent. As per the letter dated 21st February 1991, addressed to some of the Plaintiffs by Kinuthia Gitau, this Court draws the conclusion that in deed their mothers were collecting rent. But what is uncertain is that Kinuthia Gitau, averred in his letter that this was with his permission, as he was helping the mothers. It is not clear to this Court whether there were any arrangements between the three parties on rent collection. It is sad that the matter had to wait for this while before it could be brought before this Court.

48. On the developments done on the suit property, it is not in dispute that there are some rental houses thereon. There was an allegation that rent was collected by the family of Kinuthia Gitau and Michael Manuthia and his wife. PW6, testified that indeed they have been collecting rent. The Defendant testified in his testimony that Michael Manuthia was collecting rent from a portion of the plot. In his submissions the Defendant gave details on how the property was shared to Michael Manuthia by his father. Kinuthia Gitau's letter of 5th October produced before this Court suggests some arrangement between Michael Manuthia and Kinuthia Gitau, whether this was ever revoked or was implemented cannot be deduced by this Court.

49. There is no dispute that Kinuthia Gitau acquired ownership of the said land and there is also no dispute that he jointly owns the land with Ephraim Wachira. It was prudent that evidence be led that they acquired property by wrong doing, so that this Court can punish the wrong doing by sharing land with the deserving parties. It must be seen from evidence that the actions of Kinuthia Gitau was to create trust. This Court cannot infer trust from the conduct of the parties. The Court in Peter Ndungu Njenga v Sophia Watiri Ndungu [2000]eKLR, held

The concept of trust is not new. In case of absolute necessity, but only in case of absolute necessity, the Court may presume a trust. But such presumption is not to be arrived at easily. The Courts will not imply a trust save in order to give effect to the intention of the parties. The intention of the parties to create a trust must be clearly determined before a trust is implied.”

50. Francis Mwangi Gitau who has been referred to as Kinuthia Gitau, has since died. It is curious that the Plaintiffs never saw the need to sue him despite the correspondences the Court has perused. There was



testimony by PW2 that their deceased father had other properties which they have since sub-divided, but the suit plot was not sub-divided since it was small. This does not aid the Court in finding that this was a family property that the Kinuthia Gitau, registered in his name for the interest of the family. Therefore, it follows that a claim for trust has not been adequately proved before this Court and this Court proceeds to decline the order for declaration of trust.

iii. Whether the orders sought by the Plaintiffs can be granted?

51. The Plaintiffs want a declaration that Francis Mwangi Gitau, held plot No. Loc.11/Maragi/1193/16B, as a trustee for the family of Paul Gitau Kinuthia. It has been established from evidence that the said plot belongs to Ephraim Wachira, who was the father of PW4. It is trite law that parties are bound by their pleadings. This position was reiterated by the Supreme Court in the case of Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR, where the Court pronounced itself:-

"In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the Court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a Court to frame an issue not arising on the pleadings....."

52. All the parties to the suit proceeded as though the said Kinuthia Gitau, is the registered proprietor of the said suit property- 1193/16B, Even though there is clear evidence as to ownership and possession, it is not clear to this Court why the parties opted to proceed that way. Consequently, the Plaintiffs are not entitled to the prayers sought, and their claim must fail.

iv. Who should bear the costs for this suit?

53. It is trite law that costs shall follow the events and the successful party is entitled to costs. In this case the Defendant is entitled to costs. However, this Court notes and appreciates that this is a family dispute and proceeds to determine the issue of Costs by directing that each party bears their own costs.

54. Having now carefully considered the evidence and having analysed it as above, the Court finds and holds that the Plaintiffs have failed to prove their case on its required standard of balance of probabilities.

55. For the above reasons, the Plaintiffs case as contained in the Plaint dated 20th September 2021, is hereby dismissed entirely with an order that each party to bear its own costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 13TH DAY OF JULY, 2023.

L. GACHERU

JUDGE

Delivered online in the presence of; -

Mr Waiganjo Gichuki for the Plaintiffs

Stephen Ndungu Mwangi appearing in person - Defendant



Joel Njonjo - Court Assistant

L. GACHERU

JUDGE

13/7/2023

