



**Gatiba & another v Wanjiru & another (Sued as the administrators
of the Estate of Paul Kungu Kabage) (Environment & Land Case
66 of 2023) [2023] KEELC 20179 (KLR) (25 September 2023) (Judgment)**

Neutral citation: [2023] KEELC 20179 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 66 OF 2023
JG KEMEI, J
SEPTEMBER 25, 2023**

BETWEEN

CHARLES KIMANI GATIBA 1ST PLAINTIFF

PETER KUNGU WAITATHU 2ND PLAINTIFF

AND

RUTH KUNGU WANJIRU 1ST DEFENDANT

FRANCIS NJOGU KUNGU 2ND DEFENDANT

**SUED AS THE ADMINISTRATORS OF THE ESTATE OF PAUL KUNGU
KABAGE**

JUDGMENT

1. The parties to this suit are related being members of the Kabage Family. The late Kungu Kabage (Kabage) (family patriarch) had three sons namely Paul Kungu Kabage (Kungu), Gatiba Kabage (Gatiba) and Waitathu Kabage (Waitathu). The family patriarch and his three sons are all deceased.
2. The 1st Plaintiff is the son of Gatiba Kabage while the second Plaintiff is the son of Waitathu Kabage. The Defendants are wife and son of the Paul Kungu Kabage respectively.
3. It is the Plaintiffs averment that the Kabage family owned parcel numbers namely Limuru/ngecha/177 and Limuru/ngecha/T.98. The latter parcel was subdivided into parcel numbers Limuru/ngecha/T.413 and T.414 (resultant subdivisions). That the suit lands were demarcated into three portions in or around 1961 with each son of the late Kungu Kabage taking possession of their portions. That during demarcation the lands were registered in the name of the eldest son Paul Kungu Kabage to hold in trust for the other two brothers in accordance with Kikuyu customs and practices.



4. That the families lived peacefully until 2008 when the Defendants threatened to remove the Plaintiffs and other family members from the suit lands despite an agreement allegedly reached in 2003 to dissolve the trust and subdivide the land for each of the three families.
5. It was averred that this suit was filed to determine the issue of trust, the same having arisen in the *succession cause No 130 of 2017* in which the court directed the Plaintiffs to file their suit in the ELC Court which is clothed with the jurisdiction to determine title.
6. In the main, the Plaintiffs vide the plaint dated the 19/8/2020 sought the following orders;
 - a. A declaration that the Plaintiffs hold customary trust rights in both parcels of land being Land Reference No. Limuru/Ngecha/177 and Land Reference No. Limuru/Ngecha T-98 (suit lands).
 - b. A declaration that Paul Kungu Kabage registered both parcels of land in his names to hold in trust for his two younger brothers, Waitathu Kabage and Gatiba Kabage.
 - c. An order do issue directing the Land Registrar to cancel the illegal subdivision of Limuru/Ngecha T-98 to Limuru/Ngecha/T-413 and Limuru/Ngecha/T-414 and revert back to its original state being Land Reference Limuru/Ngecha/T-98.
 - d. An order directing the Land Registrar to subdivide both parcels of land equally amongst the three families and issue titles thereof.
 - e. Mesne profits.
 - f. Cost of this suit together with interest thereof at such rate and for such period of time as this Honorable Court may deem fit to order be awarded to Plaintiffs.
 - g. Any other relief that this Honorable Court may deem appropriate to grant.
7. The Defendants denied the claim of the Plaintiffs vide their statement of defence filed on the 28/9/2020 on the grounds that; there is no customary trust in favour of the Plaintiffs; That the Plaintiffs fathers never claimed the land in the lifetime of Kungu or even after the death of Kungu given that Kungu predeceased them; The suit lands were registered in the name of Kungu in 1979 when Gatiba and Waitathu were not in detention; It was contended by the Defendants that the suit lands were solely and wholly owned by Paul Kungu Kabage and denied any trust in favour of his two brothers. They further contend that the Plaintiffs fathers never lived on the suit lands as they each had their parcels in Likia and Lanet respectively. Further that the Defendants occupied the suit lands cultivating them without any interference. They argued that even the two brothers never claimed the suit lands in their lifetime given that they predeceased Kungu. Interalia they deny any agreement to share the land with the Plaintiffs. The court was urged to dismiss the suit with costs.

The Evidence

8. The Plaintiffs' case was led by 7 witnesses. PW1 – Charles Kimani Gatiba relied on his witness statement dated 19/8/2020 as his evidence in chief and produced documents marked PEX No. 1 – 18.
9. The witness stated that he was born in 1953 at Ngecha to Gatiba and Elizabeth Wanjiru Gatiba. That Gatiba was the brother to Kungu and Waitathu. That the 2 parcels of land belonged to the Kabage family on demarcation and each son occupied a distinct portion. Both his father (1998) and mother (1976) were buried on the land alongside his brother Stephen who died in 2012.



10. Further he stated that in 2002 the family agreed to subdivide the land among the families of the 3 brothers. He stated that the Defendants did not cooperate and they destroyed graves and the temporary boundaries that demarcated the 3 plots for each family.
11. In cross, the witness stated that he was 4 years during demarcation in 1957-1959. That the brothers died in succession, Kungu in 1981 while Gatiba and Waitathu died in 1996. That Gatiba and Waitathu had previously relocated to Nakuru.
12. The witness further testified that Kungu held the land in trust for his two brothers as he was the eldest son. That there was no contention as each held their portion on the land and hence the reason why the matter was not raised.
13. PW2 – Peter Kungu Waitathu testified and relied on his written submissions dated 19/8/2020 in evidence in chief.
14. He stated that he was born in 1953 at Ngecha to Waitathu but his parents later relocated to Nakuru in 1961. His father worked in Posta Corporation, Nakuru. They farmed the land at Ngecha and Susan Nyambura, the 1st wife of Kungu cared for their crops while away. That the suit land was subdivided into three (3): Kungu, Waitathu and Gatiba in that order.
15. It was his evidence that in 1995 Elkana Gitau his nephew and wife lived on their portion of land at Ngecha till 2007 when Kungu’s family chased them away and demolished their house.
16. The witness stated that it was until 2008 that they discovered the title of the suit lands was in the name of Kungu and in the custody of the 1st Defendant. It was his evidence that Kungu held the land in trust for himself and his 2 brothers.
17. In cross the witness stated that he was 8 years old during demarcation of the lands. That his father and mother died in 1996 and 2010 respectively and were buried in Nakuru. That he has never lived in Ngecha save for infrequent visits.
18. Pressed to explain how the land was subdivided he stated that he does not know save that he heard it was done by a life hedge.
19. PW 3 – James Peter Kubai Kamunyu stated that he was born in 1952 and worked as a Chief of Ngecha between 1985 – 2007. He knew the family of Kabage well and that the family owned 2 parcels of lands. That the Kabage family comprised of 3 families (sons). That in 2002 he was called upon to resolve the land dispute but referred the parties to Court. In 2003 he gave them a letter for purposes of filing Succession Cause with respect to the suit lands.
20. PW4 - Elkana Gitau Ngige stated that he was born in 1968 in Nakuru to John Ngige Waitathu, the son of Waitathu. That at 19 years he relocated to Ngecha in 1987 where he was shown a portion in the suit lands to live and cultivate by his grandfather. That he was evicted in 2007 by the Defendants when he wanted to construct a permanent house.
21. PW5 – Joan Wanjiru Njenga led similar evidence like PW4. She stated that she is the wife of PW4 having got married in 1991 at Ngecha where they lived in a temporary house at the suit land. She stated that she did not know much about the history of the land.
22. PW6 – Hannah Gathithi Njogu relied on her witness statement dated 19/8/2020 in evidence in chief. That she was born in 1949 in Kinangop and moved to Ngecha in 1950’s. She got married to the grandson of Kabage, Stephen Njogu in 1967.



23. She stated that the Kabage family comprised of 3 sons Kungu, Gatiba and Waitathu and owned 2 parcels of land.
24. She testified that she and Stephen Njogu built a permanent house on T. 98 and have lived there to date. That the 3 brothers lived on each portion demarcated by vegetation boundaries. When her mother in law, Elizabeth died, they buried her on Gatiba's portion of land. Gatiba died in 1996 and was buried next to his wife Elizabeth on the portion of his land. Kungu died in 1982 and was equally buried on his portion. Susan Nyambura the 1st wife of Kungu was buried next to him on Kungu's portion.
25. That all was well till 2003 when the families decided to commence succession process and in 2008 the Defendants refused to cooperate stating that the land belonged to Kungu alone and produced a title registered in the name of Kungu. She was emphatic that Kungu was the eldest and held the land in trust for himself and his 2 brothers. That the lands belonged to Kabage and should be subdivided among the 3 families.
26. In cross the witness statement that Waitathu relocated to Nakuru leaving Kungu and Gatiba on the land.
27. PW7 – Peter Michugu Waitathu testified and stated that his father was a brother to Kabage and that he was born in 1936. That he was present in 1959 when the land was demarcated in the area. That according to Kikuyu traditions land was registered in the name of the eldest son to hold it for the younger sons in the family. That the lands were demarcated for each son using life hedge boundaries and each family cultivated their portions. That the family also owned a plot which was subdivided into 3 portions.
28. That the families lived peacefully until 2008 when they felt that it was time to subdivide the lands into 3 each for the 3 sons. That he attended all the Court proceedings when the Defendants raised an objection on grounds that the land belonged to Kungu. It also emerged that the 1st Defendant held a title registered in the name of Kungu. That the 1st Defendant later proceeded to destroy the fences and the graves on the suit land. That PW6 has constructed a permanent house on the land.
29. The witness stated that he could not recall the year Kabage died as he was quite young. That at the time of demarcation Kungu and Gatiba were in detention. That Waitathu never relocated in Nakuru. He worked in Nakuru and his wife lived on the land at Ngecha.
30. PW1 – Francis Njogu Kungu testified and relied on his witness statement dated 22/10/2020 in evidence in chief. He stated that the 1st Defendant is his mother and he is the son of Kungu. He is also one of the administrators of the estate of Kungu together with the 1st Defendant. He stated that he was born in 1966 in Ngecha that Kungu had 2 brothers: Gatiba and Waitathu. That Kungu died in 1981, Gatiba and Waitathu in 1996 and 1997 respectively. The Plaintiffs are his cousins and sons of Gatiba and Waitathu respectively.
31. The witness stated that his father was registered owner of the two suit lands. The witness averred that he was informed by elders in the village that the suit lands were community lands and that at the time of subdivision of community lands, each of the brothers received their respective shares. Waitathu sold his land at the point of subdivision and used the proceeds to marry and buy another property in Nakuru where he lived and later buried. Equally that Gatiba too sold his share of the land and went to Likia Nakuru where he lived as a squatter. That out of gratitude Kungu gave his children a place to stay. In his old age Gatiba returned to the land where he lived until his death and on request by the children, the Defendants allowed them to bury their father on the land.



32. The witness further stated that Kungu held the land absolutely devoid of any customary trust. That moreover the brothers never claimed land in their life times: that they never lived on the land.
33. That they did not attend the meeting at Chiefs office in 2003 nor attended any family meeting that discussed the issue of the land principally because the land belongs to their father Kungu. He added that the Succession proceedings were heard in Limuru and the High Court.
34. Asked how the caution lodged by Stephen Njogu Gatiba was removed, he stated that he was not aware.
35. The witness admitted that Gatiba, his wife and son were buried on Parcel 777 that they lived on T98 and cultivated Parcel 777. That Waitathu was buried in Nakuru as he had no land at Ngecha.
36. PW2 – Peter Muniu Kubai relied on his witness statement dated 22/10/2020 in evidence in chief. He stated that he was born in 1945 at Ngecha. That he knew the family of Kabage as well as the suit lands. That Kungu was his father’s friend and he had confided in him and showed him title of the suit lands. In addition he added that Gatiba and Waitathu never claimed the land from Kungu or his family. That the land belonged to Kungu and his family.
37. The witness stated that he witnessed the demarcation in 1957. That then Kungu and Gatiba were in detention but was released in 1958. That he did not attend the funeral of Gatiba, his wife and son Stephen and as such was not aware of the burial dispute surrounding the burial of Stephen.
38. In addition the witness stated that he was not aware that Gatiba and Waitathu were working in Nakuru though he lived in the neighbourhood. He stated that he was present when Elkana was stopped from constructing a house on the suit land – Parcel 777 by the family of Kungu.

The written submissions

39. On whether the Plaintiffs hold customary trust rights over the suit lands, the Plaintiffs submitted that the land was family land registered in the name of Kungu, the eldest son to hold in trust for himself and the 2 brothers. That the registration of Kungu as the owner did not preclude him from holding an interest in trust for the 2 brothers. See *Isack Kieba M'inanga v Isaaya Theuri M'Lintari & another* [2018]eKLR.
40. That the Defendant’s contention that the brothers were allocated land which they sold was not proven, hence the averment is a mere afterthought as it was not pleaded in the defence. Inter alia that the Plaintiffs are beneficiaries of the estate of their father which include the suit lands. Further that the relationship of the Plaintiffs to the Kungu’s family is close; Plaintiffs are grandsons of Kabage and nephew of Kungu. That the Plaintiffs could be registered as beneficiaries of their father’s estate. The Defendants have been sued as the administrators of the estate of Kungu the initial registered owner.
41. Citing Isaack Kieba case the Plaintiffs argued that though Waitathu relocated to Nakuru where he worked and purchased land it is the law that possession is not a requirement in order to proof customary trust.
42. The Plaintiff’s further relied on the cases of *Francis Kichire v Gitonga Muthambura N'Rukunga* (2020)eKLR and *Justus Maina Muruku v Jane Waitihira Mwangi* (2018)eKLR.
43. Whether the subdivision of Parcel T.98 into 2 parcels was fraudulent the Plaintiffs submitted that while the appeal case was pending in the High Court the Defendants without the knowledge of the Plaintiffs filed a *Succession Cause No. 130 of 2017*. John Kimani Kungu relied on an affidavit where he deponed that he had the authority of Stephen Njogu to swear the Affidavit. This was despite the fact that Stephen had died in 2012 and could not have given authority to Kimani in 2017. That the



Replying Affidavit indicated that Kimani and Stephen had been given their portions as beneficiaries and had since sold their portions. The statements were false and the order to remove the cautions in 2017 was obtained through misrepresentation of facts. The caution was removed paving way for the subdivision of the land into 2 portions. The Defendants action was fraudulent and it is only met and just that the subdivisions be cancelled.

44. In conclusion the Plaintiffs urged the Court to order that the land be subdivided into 3 portions for the respective families.
45. The Defendants filed written submissions through the firm of Wasonga & Associates on 20/4/2023.
46. The Defendants submitted that the issues for determination are: Whether the Plaintiffs have proved customary trust in the suit lands and if so whether they are entitled to the prayers sought.
47. The burden of proof rests on the person who alleges customary trust – See the case of *Juletabi African Adventure Limited & Another v Christopher Michael Lockley* [2017] eKLR.
48. Relying on the Isaack Kieba case the Defendants submitted that on evaluation of the Plaintiffs' evidence it was found out that PW1; PW2 were minors during demarcation and therefore not in a position to lead credible evidence on how the demarcation was done. PW4 and PW5 were not even born. PW3, the Chief stated that Gatiba and Waitathu died while he was the area Chief and that they never claimed the land during their lifetime neither did they inform him of any existing dispute. PW4 and PW5 stated that they were told that Francis the 1st Defendant would give them permission to build on the property at Ngecha. PW5 did not know the history of the land. See the case of *Peter Wainaina Macharia v Mburu Macharia alias Simon Mburu Macharia* [2018]eKLR.
49. The Defendants have contended that the Plaintiffs have not established in their testimonies and evidence the intention of the parties to create a customary trust. That the mere fact that the parties are related and the fact that the land was registered in the name of Kungu is not proof of existence of custody trust.
50. The Defendants further submitted that though PW7 indicated that he was present during demarcation, the family minutes for the meeting held in 2010 his name does not appear. It was submitted that the 3 sons each got their respective lands and the allegation that the land was being held by Kungu was not true. That the Plaintiffs' fathers sold their respective parcels and moved to Nakuru therefore the 2 brothers were not in possession of the suit lands. That the fact of the relocation was supported in evidence by PW2 when he stated that "I was born in Ngecha and my parents relocated to Nakuru while I was still young."
51. It was submitted that the Plaintiffs' fathers who died after Kungu never at any one time claimed the land, not in the lifetime of Kungu or in their lifetimes. That the titles are prima facie evidence that Kungu is the absolute and indefeasible owner of the properties subject to overriding interests which must be proven. That the Plaintiffs failed to proof the existence of trust and the Court was urged to dismiss the suit with costs.

Analysis and determination

52. Having considered the pleadings the evidence adduced at the hearing, the rival written submissions and all the material placed before the trial Court, the issues that commend themselves for determination are; whether the Plaintiffs have proved customary trust and if yes whether Plaintiffs are entitled to the reliefs sought.



53. In brief the Plaintiffs claim is that the 1st Defendant's husband Kungu held the land in trust for himself and the Plaintiffs' father. That land was alienated to the family of Kabage during demarcation in 1957/58 and recorded or registered in the name of Kungu. Therefore the land was and is family land. That the three brothers settled on their respective portions of the land whose boundaries were delineated by a natural hedge. That on Kungu's portion, he and his wife Susan Nyambura were buried therein. Equally on the portion of Gatiba, he, his wife Wanjiru and son Stephen were buried on their portion. That Waitathu's portion existed and was farmed by his family though they lived in Nakuru. That in 1987, the family of the grandson of Waitathu would be shown where to live on the portion but were evicted in 2007 by the Defendants when he started constructing a permanent house. It is therefore their case that the land though registered in the name of Kungu and now the 1st Defendant is encumbered with customary trust in favour of the estates of their deceased fathers.
54. The Defendants have denied the claim of the Plaintiff on several fronts: on demarcation each brother received separate parcels of land: However Gatiba and Waitathu sold their portions and relocated to Nakuru where they lived with their families. That Waitathu died in Nakuru. That Gatiba went and lived as a squatter in Nakuru and later returned and Kungu allowed him to live on the land. Upon his death his children requested the Defendants to allow them to bury him on the suit land.
55. It is the Defendants' defence that: no proof of customary trust has been established by the Plaintiffs; the intention of the parties to create trust has not been demonstrated; the brothers sold their parcels of land – no trust on the suit land existed, Kungu was the prima facie absolute and indefeasible owner; the brothers never claimed the land in their lifetimes.
56. The starting point is a reflection on the legal framework of trust in Kenya. Article 60 of *Constitution* of Kenya provides that land shall be held, used and managed in a manner that is equitable, efficient, productive and sustainable and in line with principles of equitable access to land and intra generational and intergenerational equity.
57. In Kenya registration of a person as proprietor of land shall vest in that person the absolute ownership of and together with all rights privileges in line with Section 24 of the *Land Registration Act* . Rights of a proprietor howsoever lawfully acquired are subject to overriding interests set out in Section 28 of the *Act*, which interests need not be noted on the register. Nothing therefore shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.
58. Section 28 of the *Act* states as follows:-
- “ 28 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 being noted on the register:-
- a.
- b. Trust including customary trusts”
59. Going by the Act, trusts including customary are part of overriding interests.
60. Customary trust is a question of fact to be observed on the land. They are overriding. They subsist on the land. The person asserting customary trust must prove the same by laying cogent evidence



to demonstrate the existence of trust in line with Section 107 of the Evidence Act which provides as follows:-

- “(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

61. It follows therefore that the Plaintiffs bear the onus or responsibility to prove the existence of customary trust on a balance of probability.

62. In the case of Kanyi v Muthiora 1984 KLR 712 the Court stated as follows:-

“The registration of the land in the name of the Appellant under the Registered Land Act (Cap 300) did not extinguish the respondents rights under Kikuyu Customary Law and neither did it relieve the Appellant of her duties or obligations under Section 28 as trustee.... The trustees referred to in Section 28 of the Act could not be fairly interpreted and applied to exclude a trustee under Customary law, if the Act had intended to exclude Customary law rights it would have been clearly so stated.”

63. The leading authority on customary trust is found in the Supreme Court case of Isaac Kieba where the Court laid the guiding principles as follows:-

“Each case has to be determined on its own merits and quality of evidence. It is not every claim of right to land that will qualify as a customary trust. In this regard, we agree with the High court in Kiarie v Kinuthia, that what is essential is the nature of the land intention of the parties Some of the elements that would qualify a claimant as a trustee are; the land in question was before registration family, clan, or group land; 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; the claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances, the claim is directed against the registered proprietor who is a member of the family, clan, or group.”

64. It has been averred that the land is family land allocated to the family of Kabage who had 3 sons. Evidence was led that the senior Kabage died in 1950's. That the land was initially community land before the process of demarcation in 1957/58. Demarcation of land entails the ascertainment or rights and interests in the land and the recording of the same against an individual or group or clan. PW6 and PW7 led evidence that the land was demarcated for the family of Kabage. It is common knowledge that land was held in terms of families groups and clans before registration. In the Agikuyu Community, to which all parties subscribe to it was an accepted practice to register land in the name of the eldest son to hold in trust for the others. See the case of Henry Mwangi v Charles Mwangi CA 245 of 2004.

65. In this case the Defendants have argued that each brother received their portions of land however Gatiba and Waitathu sold them and relocated to Nakuru.

66. At this point the burden of proof to show the contrary lies with the Defendants. The Defendants failed to lead evidence to show the description of the land demarcated to Gatiba and Waitathu in form of land reference number. Also the person to whom the 2 brothers sold land to was not disclosed. Moreover evidence was led by PW7 that he was present in 1957/58 at the age of about 22 years when the land was demarcated to the family of Kabage. That no land was demarcated to the sons individually but



- as a family. He further led evidence that Gatiba and Kungu were then in detention but were released thereafter and that Kungu was the eldest son and their father having died in the 1950's fell on him to hold the land for the family.
67. PW6 – Hannah led evidence that she got married to the family 1967 and found the families living in each portion of the land separated by a life hedge. This evidence was supported by PW7 as well.
68. Evidence was led that upon being released from detention the 2 brothers were employed at Posta: Kungu working in Nairobi while Waitathu in Nakuru. That Waitathu therefore relocated his family to Nakuru where he lived and was buried. It is now the law that possession is not a prerequisite to establishing customary trust. See the case of Kieba. Nothing therefore turns on this point to preclude Waitathu from claiming land if indeed it was family land.
69. The Defendants have argued that PW1, PW2, PW3 and PW4 were minors or were yet to be born during the demarcation of the land and that their evidence is hearsay and inadmissible. The Court cannot agree more with the Defendants. Also on the other hand the Court finds the evidence of PW1 to be hearsay when he claims that he heard from old men in the village that the 2 brothers had received land and sold and moved to Nakuru.
70. Why did Gatiba come back to the land if indeed the land belonged to Kungu solely? PW1 states that Gatiba sold land, left his family behind and settled as a squatter in Nakuru. That later he was allowed by his father to come and live with his children. PW6 Hannah gave illuminating evidence on this issue. That Gatiba's family lived on the land and that is why at his old age he came back to his portion of the land where he was buried alongside his wife and son Stephen. The evidence of PW6 is believable. She was categorical that Kungu and his kin were buried on his part of the land while Gatiba was buried alongside his wife and son on his portion of land, being parcel No 777. That to date she lives on Parcel T. 98 where she has constructed a permanent home. This was captured in the valuation report dated 8/5/2018 produced by PW1 on page 3 as follows:-

“Registered owner : Kungu Kabage ID/KBU/471374

Physical Inspection Information

Date of Inspection : The property was inspected for valuation on 8th May 2018

Plot Description : This is a rectangular shaped parcel with red soils and boundaries marked by a natural hedges. There was a 2 bedroomed permanent house made of natural colored quarry stones, plastered and painted internally. Main doors are made of heavy metal casement type while internal ones are flush type glazed for burglar proofing. Floors are finished off in colored cement screed while the roof is pitched on timber traces on g.c.i roofing. There was also a semi-permanent house made of g.c.i roofing and subsidiary brick houses.”

71. Evidently the 2 houses belonged to Kungu and Gatiba's families. The evidence of PW6 remained unchallenged.
72. It has been argued that Waitathu never lived on the land. I have perused the minutes of the family meetings produced by PW1 and it is manifestly clear that the clamor for each family started in 1997. Save that the Defendants did not agree nor attend the meeting, it can be seen that indeed they were present in the meeting held in 2010 where the issue of dissolving the trust and subdividing the suit lands was discussed. Apparently the 1st Defendant was unhappy on the position of Kungu's portion and this was the beginning of their non-cooperation. This non-cooperation continued into the Succession Cause forcing the Plaintiffs to file the cause but the Court held that they cannot be beneficiaries.



73. With respect to the portion by Waitathu the Court found that possession is not a requisite to proving trust. The evidence of Elkana and his wife that they were put in possession of the land of their grandfather is in agreement with an interest created in trust in favour of the Waitathu family. Elkana is the grandson of Waitathu thus claims ancestry to the Waitathu family.
74. Evidence was led that there are clear boundaries on the land which boundaries and graves were destroyed by the 1st Defendant. It is unfortunate that the 1st Defendant did not rebut this evidence. The Court takes it as cogent. It is the finding of the Court that the 1st Defendant holds titles encumbered by a trust in favour of the families of Waitathu and Gatiba. Holding otherwise will lead to disinheriting the families of Waitathu and Gatiba especially Gatiba's who reside on the land today. The Court does not agree with the evidence of PW1 on the alleged tokenism by his father to the family of Gatiba.
75. From the foregoing the Court finds that the Plaintiffs have succeeded in establishing trust on the suit lands.
76. On the question of fraudulent removal of caution, the Court finds the same was not rebutted. Evidence was led that Stephen died in 2012 and therefore in 2017 he would not have risen from the grave so as to give instructions to his cousin to so remove the caution. The removal of caution was inter alia obtained through misrepresentation and fraud.
77. Having found that the titles are encumbered with trust, the Court will make appropriate orders to restore the lands to its original state to allow the beneficiaries to determine the trust and subdivide the land between themselves.
78. On the question of mesne profits, the Court is constrained from considering this claim for lack of evidence. It is declined.
79. Final orders and disposal:-
- a. It is hereby declared that the Plaintiffs are entitled to customary trust rights in both parcels of land being Land Reference No. Limuru/Ngecha/177 and Land Reference No. Limuru/Ngecha T-98 (suit lands).
 - b. It is hereby declared that Paul Kungu Kabage, Deceased registered both parcels of land in his names to hold in trust for his two younger brothers; Waitathu Kabage and Gatiba Kabage.
 - c. An order do and is hereby issued ordering the Land Registrar to cancel the illegal subdivision of Limuru/Ngecha T-98 to Limuru/Ngecha/T-413 and Limuru/Ngecha/T-414 and revert back the land to its original state being Land Reference Limuru/Ngecha/T-98.
 - d. An order do and is hereby issued ordering the Land Registrar to subdivide both parcels of lands equally amongst the three families and issue titles thereof.
 - e. Mesne profits is disallowed for the reasons given in the Judgment.
 - f. Parties being related I make no orders as to costs.
80. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 25TH DAY OF SEPTEMBER, 2023 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE



Delivered online in the presence of;

Shikali HB Mr. Kiprop for 1st and 2nd Plaintiffs

Asasha HB Wesonga for 1st and 2nd Defendants

Court Assistants – Phyllis & Lilian

