



**Kanyeki v Kanyeki (Environment and Land Appeal E009 of 2022)
[2023] KEELC 22248 (KLR) (23 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 22248 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT AND LAND APPEAL E009 OF 2022
LN GACHERU, J
NOVEMBER 23, 2023**

BETWEEN

JOHN KAMANDE KANYEKI APPELLANT

AND

JOSEPH MUHIA KANYEKI RESPONDENT

*(Being an appeal from the Judgement of Hon. Mwanamkuu Sudi at the
Kandara Law Courts in ELC.8 of 2020 delivered on 2 nd June 2022)*

JUDGMENT

1. The Appellant herein John Kamande Kanyeki (suing as a Co-Administrator of the estate of Kanyeki Kimatu), had filed an Originating Summons No. ELC(OS) 8 of 2020, against the Respondent herein Joseph Muhia Kanyeki (sued as a co-administrator of the estate of Kanyeki Kimatu). The Appellant (as the Plaintiff) had sought for an order that Kanyeki Kimatu(deceased), be declared to have held 3.5 acres of Loc.1/Mugumo-ini/397, in trust for Joyce Gachiru Kimatu(Deceased). He had averred that the suit property LR. No. Loc.1/Mugumo-ini/397, belonged to Kimatu Wangai(deceased) who was the original unregistered owner and he died intestate in 1946.
2. That the said land was approximate 9.5 acres, and that the said deceased Kimatu Wangai had two wives – Angelina Wangui Kimatu(deceased) and Joyce Gachiru Kimatu(deceased).He had further averred that Angelina Wangui Kimatu(deceased) inherited 6.5 acres and Joyce Gachiru Kimatu inherited 3.5 acres from their husband Kimatu Wangi(deceased). He also averred that the two wives could not be registered as owners of the suit property since women then had no right to own property as they did not possess identification cards at the time. Therefore, the suit property was registered in the name of Kanyeki Kimatu, the eldest male child during demarcation and consolidation in 1954.
3. That Kanyeki Kimatu was the son of Angelina Wangui Kimatu (deceased), and he was registered as a proprietor of Loc.1/Mugumo-ini/397, holding 6.5 acres for Angelina Wangui Kimatu and 3.5 acres



- for Joyce Gachiru Kimatu. He further averred that Joyce Gachiru Kimatu was Childless and she died on 11th February, 2005. He also deposed that in 1983, Angelina Wangui Kimatu filed a suit against Kanyeki Kimatu, being Civil Suit No. 208 of 1983, before the District Officer Kandara wherein Angelina had sought for her share of 6.5 acres from Kanyeki Kimatu. That the District tribunal delivered its award on 8th August 1991, and decided that Angelina eldest Son Kanyeki Kimatu (deceased) was to get 3.5 acres and Samuel Muhia Kimatu the other son was to get 3 acres and Joyce Gachiru Kimatu, was to set 3 acres. The said award was adopted by Thika Law Courts as the order of the Court.
4. He further deposed that the said Judgement was neither appealed against nor set aside by any Court, and as it stands, and it is a valid judgment of the Court. Further at the tribunal, it was established that the suit land was held in trust by Kanyeki Kimatu. It was his claim that since the Respondent claims the entire LR No. Loc.1/Mugumo-ini/397, belongs to the Kanyeki Kimatu's estate and since the Co-administrators cannot agree on how to settle the 3.5 acres of land from the suit property, he had urged the Court to make a determination on that prayer. Further, that in the Civil Appeal No. 129 of 2018, in the Estate of Kanyeki Kimatu (deceased), the High Court at Thika had on 21st May 2020, directed that the question of trust be determined by an ELC Court or a subordinate Court with requisite pecuniary jurisdiction as to the share of 3.5 acres allegedly belonging to Joyce Gachiru Kimatu(deceased).
 5. The said Originating Summons was opposed by the Respondent herein Joseph Muhia Kanyeki, who swore a Replying Affidavit on 27th July 2020, and averred that there was no trust, that had been established between Kanyeki Kimatu (deceased), in land parcel No. Loc.1/Mugumo-ini/397, for 3.5 acres on behalf of Joyce Gachiru Kimatu(deceased).
 6. After several interlocutory Applications and a Preliminary Objection, the matter proceeded via viva voce evidence and on 2nd June, 2022, the suit at Kandara Law Courts was dismissed by Hon. M. Sudi (PM), for lack of requisite locus standi by the claimant.
 7. The Appellant herein was aggrieved by the said Judgement of the trial Court and filed this Appeal vide a Memorandum of Appeal dated 27th June 2022, and urged the Court to allow the Appeal by setting aside the Judgement of the trial Court dated 2nd June 2022, and allow the Appellant's claim in ELC (OS) No. 8 of 2020 Kandara as prayed in the Originating Summons dated 7th July 2020.
 8. The Appellant's appeal is supported by the grounds set out in the Memorandum of Appeal and among the Grounds of Appeal is that the trial Magistrate erred in holding that the Claimant(Appellant) had no locus standi to institute the said suit, an issue that had already been dealt by Hon. Manuela Kinyanjui on 26/11/2020; that the trial Court failed to properly evaluate and analyse the Judgement of the High Court at Kiambu and thus arrived at a wrong finding.
 9. The Appeal herein was admitted on 19th September 2022, and the Court directed that the same be canvassed by way of written submissions.
 10. The Appellant filed his submissions on 20th January 2023, through the Law Firm of Amutallah Robert & Co. Advocates and gave factual background founding the Appeal and set out several issues for determination; among them being whether the trial Court properly evaluated and analysed the Judgement of the High Court issued by Hon. Justice Sitati especially Paragraph 37(iii).
 11. It was the Appellant's submissions that the parties herein are step-brothers and Co-administrators of the estate of the Kanyeki Kimatu(deceased), and that the disputed property measures 3.5 acres and is registered in the name of Kanyeki Kimatu (deceased).
 12. On whether the trial Court was right to hold that the Appellant had no locus standi to institute the suit, the Appellant submitted that the said issue had been adequately dealt by Hon. Manuela Kinyanjui



vide a Ruling dated 26th November, 2020. However, the trial Court in its Judgement of 2rd June 2022, held that the Appellant had no locus standi and therefore the said trial Court purported to sit on an appeal against a decision and Ruling of another trial Magistrate, who had concurrent jurisdiction with trial Court. That the only Court that could overturn the said finding was a Superior Court and not the trial Court.

13. On whether the trial Court properly evaluated the judgment of Hon. Justice Sitati issued on 21st May 2020, it was submitted that the High Court was categorical that the issue of trust of the 3.5 acres was to be heard by an ELC or a gazetted Subordinate Court with requisite pecuniary jurisdiction. Further that as provided by Section 78 of the *Civil Procedure Act*, the High Court had framed the issue and referred it to the trial Court for determination, and the said issue was whether the deceased Kanyeki Kimatu held a half share of the property Loc.1/Mugumo-ini/397, in trust for Joyce Gachiru Kimatu(deceased). The Appellant further submitted that since the High Court had framed the issues for determination, then the trial Court should have gone ahead and determined the same instead of dealing with issue of locus standi.
14. The Appellant relied on the case of Awili Nelson vs Purity Achieng Ochieng(2021) EKRL, where the Court held that:

“From the above authorities and my assessment of the Judgement of the learned trial Magistrate, I am satisfied that the Judgement is too scanty and fell short of the requirement of Order 21 Rule 4 of the Civil Procedure Rules and therefore such a Judgement cannot stand.

See the case of Cosmas Maweliwe Wepukhulu vs Sameer Africa Ltd (previously known Firestone East Africa (1969) Ltd (2018) eKRL, where the Court of Appeal faulted the High Court for determining only one issue out of the 18 issues framed by the parties. The Court of Appeal stated as follows when referring back the case to the High Court for rehearing before a different Judge “The question that falls for our determination is whether the Honourable trial Judge addressed his mind to the 19 issues agreed by the parties for his determination”

15. It was the Appellant’s further submissions that the trial Court did not address its mind on what had been framed by the High Court.
16. On whether the trial Court appreciated the duties of an administrator/Co-administrator, the Appellant submitted that the suit before the trial Court was brought vide an Originating Summons and the Appellant sued a Co-administrator of the estate of Kanyeki Kimatu. That since parties are bound by their pleadings, it was wrong for the trial Court to draw a conclusion that the Appellant was suing on behalf of the estate of Joyce Gachiru Kamatu(deceased).
17. Further, it was submitted that the Originating Summons herein is brought under Order 37 of the Civil Procedure Rules on who may take out Originating Summons and in respect of what matters and Order 37(1) (g) stated that the ‘

“The executor or administrators of a deceased person or any of them, and the trustees under any deed or instrument.....may take out as of course an Originating Summons.....
.....for such relief of the nature or kind following, as may be the summons be specified and as circumstances of the case may require, that is to say the determination, without the administration of the estate or trust of any of the following question.



- (g) The determination of any question arising directly out of the administration of the estate or trust”.
18. It was further submitted that since the High Court had held that the said Court had no jurisdiction to determine whether or not there was an existing trust in respect of the suit property held by the deceased in favour of Joyce Gachiru Kimatu (deceased), and since the issue of trust arose during the administration of the estate of Kanyeki Kimatu(deceased), and since the two Co-administrators could not agree on the portion of 3.5 acres belonging to Joyce Gachiru Kimatu (deceased), then the suit is properly brought by one of the administrators as provided by Section 82 of the Succession Act.It was therefore submitted that the Appellant did not need a Grant of Letters of Administration for the estate of Joyce Gachiru Kimatu (deceased) and since the Appellant was a Co-Administrator and could not agree with the Respondent who was the other Co-Administrator, then he rightly brought the said Originating Summons before the trial Court.
19. In conclusion, the Appellant submitted that the Appeal should be allowed and the suit should be remitted for retrial before another trial Magistrate.
20. The Respondent filed his submissions on 24th May 2023, through the Law Firm of Mbiyu Kamau & Co. Advocates and submitted that the instant appeal has no merit and should be dismissed with costs to the Respondent.
21. The Respondent also submitted that the Appellant made a claim of 3.5 acres of land out of land parcel Loc. 1/Mugumoini/397, on behalf of the estate of Joyce Gachiru Kimatu, while he had no Letters of Administration and therefore lacked locus standi to sue for the estate of the deceased person. It was also submitted that Grant of Letters of Administration in relation to the estate of Joyce Gachiru Kimatu(Deceased), was issued to Margaret Muthoni Kanyeki, which grant was later revoked and no other person has been issued with such grant.
22. That though the Appellant submitted that the High Court conferred locus standi upon him, but it is trite that a Court cannot confer locus to either of the parties where there is none. It was further submitted that the High Court only directed that the issue of trust be determined and if any of the parties wished to pursue the issue of trust, then he needed to follow the necessary procedure so as to have locus standi to bring such a suit.
23. Further that the estates of Kanyeki Kimatu (deceased) and Joyce Gachiru Kimatu(Deceased), were not consolidated and any action on behalf of the deceased estate require Letters of Administration. Reliance was placed on the case of Otieno vs Ougo (1986 -1989) EARL, where the Court held;
- “.....An administrator is not entitled to bring any action as administrator before he has taken out letters of administration if he does so, the action is incompetent as of the date of inception”
24. Further, the Respondent submitted that the trial Court did evaluate/ analyse issues of trust as per the direction of the High Court and the trial Court properly dealt with the issued framed by the said High Court.
25. It was also submitted that since the appellant had pleaded the issue of trust, the burden of proving such trust fell on the Appellant, as was held in the case of Juletabi African Adventure Ltd & Another vs 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.”

26. It was further submitted that public interest demands that litigation must come to an end. Reliance was placed in the case of *Lal Chand Vs Radha Kishan* Air 1977 Sc 789, as cited in the case of *Kenya Commercial Bank Ltd vs Benjoh Amalgamated Ltd* (2017) eKLR, where the Court held;

“The principle of *res judicata* is conceived in the larger public interest which requires that all litigation must, sooner than later, come to an end. The principle is also founded in equity, justice and good conscience which require that a party which has once succeeded on an issue should not be permitted to be harassed by a multiplicity of proceedings involving determination of the same issue.

The practical effect of the *res judicata* doctrine is that it is a complete estoppel against any suit that runs afoul of it, and there is no way of going around it – not even by consent of the parties – because it is the Court itself that is debarred by a jurisdictional injunction, from entertaining such suit.”

27. It was his further submissions that the parties herein litigated on the issue of whether 3.5 acres of Loc. 1/Mugumo-ini/397, was held in trust by Kanyeki Kimatu(Deceased) for Joyce Gachiru Kimatu (deceased) before a Court of competent jurisdiction and there would be no need to have the matter heard again in another Court. Reliance was placed in the case of *AG vs Achieng Nyogo & Others* where the Court held;

“The Court must guard against litigants who all too often blame their losses in Court to bias on the part of the Judge.

28. In conclusion, the Respondent submitted that this Appeal lacks merit and the same should be dismissed with costs.

29. The above being the pleadings and submissions by both parties, the Court is now called upon to determine the merit of this appeal.

30. This is first Appeal and as provided by Section 65(b) of the *Civil Procedure Act*, this Court is allowed to determine the appeal on both the law and facts. It is clear that the trial Court exercised its discretion based on facts placed before it and therefore this Court cannot simply interfere with that discretion just because it has been moved on appeal.

31. See the case of *Mbogo & Another vs Shah* (1968) EA page 15 where the Court held;

“An appellate court will not interfere with the exercise of the trial court’s discretion unless it is satisfied that the court in exercising its discretion misdirected itself in some matters and as a result arrived at a decision that was erroneous, or unless it is manifest from the case as a whole that the court has been clearly wrong in the exercise of judicial discretion and that as a result there has been misjustice.”

32. Further as provided by Section 78 of the *Civil Procedure Act*, this Courts role is to re-evaluate, re-assess and re-analyze the evidence as contended in the Record of Appeal and the grounds set out in the Memo



of Appeal. This was the position held in the case of Abok James Odera t/a A.J Odera & Associates vs John Patrick Machira t/a Machira & Co. Advocates (2013) eKLR, where the Court held;

“This being a first appeal, we are reminded of our primary role as a first appellate Court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.

See also *Selle vs Associated Motor Boat CO.* (1968) E A 123.

33. With the above in mind, the Court has a duty to delve into factual details and revisit the facts presented before the trial Court, then analyse the same, evaluate it and arrive at an independent conclusion.
34. Evidently, this Court cannot simply interfere with the discretionary powers of the trial Court which powers are donated by *the Constitution* and statute.
35. Taking into consideration the above analysis and having carefully considered of the Record of Appeal, the Grounds of Appeal, the rival written submissions and the cited authorities, the Court finds the issue for determination is whether the appeal is merited.
36. In determining whether this appeal is merited or not, the Court will have to consider the Grounds of Appeal as stated in the Memorandum of Appeal as the said Grounds form the basis of the Appeal.
37. In grounds No.1, 2 and 3, the Appellant had averred that the trial Court erred in law in revisiting the issue of locus standi, which issue had adequately been dealt by Hon. Manuela Kinyanjui, a trial Magistrate also had concurrent jurisdiction as Hon. Mwanamkuu Sudi (PM), who eventually determined the matter.
38. Indeed, this Court has gone through the Record of Appeal and has noted that after the Originating Summons was filed at Kandara Law Courts, the Defendant filed a Preliminary Objection on 27th July, 2020 and raised various grounds among them that :-

“The Plaintiff in Originating Summons No.8 of 2020 (John Kamande Kanyeki, had no locus standi, having not sought and obtained Letters of administration to the estate of Joyce Gachiru Kimatu (deceased).”
39. After parties had filed their submissions, the trial Court issued a Ruling on 26th November 2020 and in Paragraph 18 held that:-

The Plaintiff has capacity to bring the suit as a Co-Administrator as directed by the High Court and he did it within the stipulated 60 days. The Defendant is also a Co-Administrator and I see no prejudice occasioning him, she shall not suffer loss or damage”.
40. The trial Court having held that the Plaintiff (Appellant) had locus standi to bring the suit, if the Defendant(Respondent) was not satisfied with that finding, he ought to have appealed. Later, the trial Court (Hon. M. Sudi) held that the Plaintiff had no locus standi to institute the suit. That holding indeed contradicted the earlier findings of Hon. Manuela Kinyanju, and infact the said finding by the trial Court (Hon. Sudi) was like sitting on an appeal against a determination of another trial Court with concurrent jurisdiction.
41. The Court has considered the Judgment of the trial Court and the major reasons for the dismissal of the same was the fact that the Plaintiff did not have locus standi, as he did not have the requisite Grant



of Letters of Administration to sue on behalf of the estate of Joyce Gachiru Kimatu. The Court went further to hold that it would not delve into the issue of trust to avoid overlap.

42. The Court has also noted that the genesis of the Originating Summons at the trial Court which led to the impugned Judgment was the determination by the High Court in Civil Appeal No.129 of 2018, at Kiambu, which Judgment was issued on 26th May, 2020. In the said Judgment, the High Court had held that it had no jurisdiction to determine an issue of trust in respect of the estate of Joyce Gachiru Kimatu. The Court further directed that either of the Administrator of the estate of Kanyeki Kimatu, being either John Kamande Kanyeki or Joseph Muhia Kanyeki, to file a substantive suit within 60 days either in the ELC in Kiambu or in a Subordinate Court with requisite pecuniary jurisdiction gazetted to determine the said issue of trust in respect of Loc.1/Mugumo-ini/397, and whether ½ share of it was held in trust for Joyce Gachiru Kimatu.
43. Following the above determination by the High Court, the impugned Originating Summons at Kandara Law Courts was filed on 7th July 2020. The Appellant and the Respondent are both Co-administrators of the estate of Kanyeki Kimatu(deceased), and were granted Letters of Administration in Thika Succession Cause No.107 of 2005. After the distribution of the estate of Kanyeki Kimatu (deceased), the suit property herein Loc.1/Mugumo-ini/397, was distributed into two equal shares for each of the houses of Kanyeki Kimatu:- one represented by Margaret Muthoni Kanyeki, and the other Magdaline Gathoni Kanyeki, to hold in trust for their respective children, and an appeal was lodged by the Appellant herein. The Appellant in the said Civil Appeal No.129 of 2018, had averred that in the distribution of the estate of Kanyeki Kimatu (deceased), the trial Magistrate failed to appreciate that the late Kanyeki Kimatu held 3½ acres, in trust for Joyce Gachiru Kimatu.
44. As already noted above, the issue of locus standi had been raised on a Preliminary Objection dated 27th July, 2020, and the trial Court had dismissed the said Preliminary Objection and held that the Plaintiff thereon had locus standi.
45. The Appellate Court in Civil Suit No.129 of 2018, had framed issues as provided for by Section 78(1) of the *Civil Procedure Act*, which prescribe the powers of Appellate Court and one such power is 78(1) (c) to frame issues and refer them for trial.

One such issue is that any of the Co-administrator can file a suit to determine the issue of trust.

46. It is evident that the Appellant herein filed the ELC OS No.8 of 2020, at Kandara Law Courts on 7th July, 2020, following the Judgment of the High Court. Indeed, as submitted by the Respondent, the High Court cannot confer locus standi or jurisdiction, but it is evident that the Appellant herein is a Co-administrator of the estate of Kanyeki Kimatu, and there is an issue of whether the said estate is holding 3.5 acres in trust for the estate of Joyce Gachiru Kimatu. That issue was framed by the High Court and the Appellant brought the suit as a Co-administrator of the estate of Kanyeki Kimatu, and not as an administrator of the estate of Joyce Gachiru Kimatu (deceased). The powers of personal administrators are provided for in Section 82 of the Law of Succession and Section 82(a) provides: -

The personal representative shall, subject only to any limitation imposed by their Grant have the following powers:

- a. To enforce, by suit or otherwise all causes of action which by virtue of law, survive the deceased or arise out of his death for his estate”.



47. Therefore, in filing the Originating Summons herein, following the directions of the High Court, the Appellant herein was exercising his power as a Co-Administrator. He did it by filing an Originating Summons as provided for by Order 37(1)(g) of the Civil Procedure Rules, which states:

“The executors or administrators of a deceased person or any of them----may take out as of course an Originating Summons ---- for such relief of the nature or kind following, as may be the summons specified and as circumstances of the case may require -----the determination without the administration of the estate or trust of any of the following questions:

(g) the determination of any question arising directly out of the administration of the estate or trust”

48. While the Co-Administrators are carrying out their administrative duties such as ensuring the estate of the deceased has been distributed, there arose a question of whether the said estate is holding 3½ acres on behalf of the estate of Joyce Gachiru Kimatu. Therefore, the Appellant herein had locus standi to file the said Originating Summons at the trial Court. The trial Court indeed erred in law and fact in finding that the Appellant had no locus standi, thus dealing with an issue that had been dealt with in the Preliminary Objection dated 27th July, 2020. The trial Court indeed overturned a finding of Hon. Manuela W. Kinyanjui, a trial Court of concurrent jurisdiction, which Court had earlier dealt with the said issue.

49. The Court will also condense grounds No.4, 5 & 6, where the Appellant had averred that the trial Court failed to analyse and evaluate of the High Court specifically paragraph 37(iii) which states as follows:-

“Pending the hearing and determination of the suit in the ELC or a subordinate Court with pecuniary jurisdiction, gazzeted to determine land matters, a stay Order be and is hereby issued in respect of grant confirmed to John Kamande Kanyeki and Joseph Muhia Kanyeki on 27th September 2018. The Grant confirmed may be rectified accordingly as per the final decision of ELC or Subordinate Court with pecuniary jurisdiction to determine land matters”

50. Flowing from the above findings, it is clear that there is a stay in respect of the confirmed Grant for the estate of Kanyeki Kimatu (deceased) which was to await the determination of the suit filed to determine the issue of trust. Therefore, the trial Court ought to have determined the issue of trust with a finality and not through a technicality. In any event, the Grant in respect of the estate of Joyce Gachiru Kanyeki had been revoked.

51. It is therefore clear that the trial Magistrate failed to analyse the High Court Judgment in terms of Paragraph 37(iii). Further, as submitted by the Appellant, the trial Court also failed to appreciate that the Originating Summons at the trial Court had been filed by one of the Administrators of the state of Kanyeki Kimatu, under Order 37 Rule (i) (g) of the Civil Procedure Rules but not as the Administrator of the estate of Joyce Gachiru Kanyeki.

52. The High Court, while finding that it had no jurisdiction to deal with the issue of trust had framed one issue to be determined by the Court which was to hear the suit filed by either of the administrators. This issue was “whether the deceased Kanyeki Kimatu held a half share of the property No.Loc.1/ Mugumo-ini/397, in trust for Joyce Gachiru Kimatu.”



53. That was indeed the only issue to be determined by the trial Court, but though the trial Court scratched on the issue in passing, the said issue was not conclusively determined as the Court held that the Appellant had no locus standi.
54. Having now found that the trial Court erred in not delving into the issue of trust as directed in Civil Appeal No.129 of 2020, this Court takes into account that as provided by Section 78 of the [Civil Procedure Act](#), the power of this Court entails among others:
- a. To determine a case finally.
55. In carrying out the above duty, this Court will consider the evidence in totality, evaluate it, re-assess the same and then come with its own independent findings. Indeed, the Court will take into account that it never saw nor heard the witnesses. See the case of Peter M. Kariuki Vs Attorney General [2014] eKLR, where the Court held:
- We have also, as we are duty bound to do as a first appellate court, reconsidered the evidence adduced before the trial court and reevaluate it, to draw our own independent conclusions and to satisfy ourselves that the conclusions reached by the trial judge are consistent with the evidence.”
56. At the heart of this matter is the issue of trust. The Appellant herein who is a Co-administrator of the estate of Kanyeki Kimatu, had alleged that Kanyeki Kimatu (deceased), who was his father was holding 3.5 acres of Loc.1/Mugumo-ini/397, in trust of Joyce Gachiru Kimatu(deceased). The allegation was vehemently opposed by the Respondent who is a Co-administrator. Both the Appellant and Respondent are the sons of Kanyeki Kimatu, but from different mothers. Joyce Gachiru Kimatu is their step grandmother as she was a wife of Kimatu Wangai, the grandfather to the parties herein.
57. The genesis of this case is that the suitland was initially owned by Kimatu Wangai, who allegedly passed on in 1946. It was alleged that the land was ancestral land and that Wangai Kimatu had two wives – Angelica Wangui Kimatu, who was bequeathed 6.5 acres by Kimatu Wangai and Joyce Gachiru Kimatu who was also bequeathed 3.5 acres. The Appellant has alleged that the two wives could not be registered as proprietors of their respective parcels of land. He averred that his father Kanyeki Kimatu was registered as the sole proprietor of the suit land during demarcation in 1954, to hold in trust for his two mothers. He averred that later Angelica Wangui Kimatu distributed her 6.5 acres to her two sons Kanyeki Kimatu and Muhia Kimatu, and that 3.5 acres was left intact for Joyce Gachiru Kimatu. That both Kanyeki Kimatu and Joyce Gachiru Kimatu, are deceased and therefore in the distribution of the estate of Kanyeki Kimatu, account should be taken of 3.5 acres for Joyce Gachiru Kimatu (deceased), and that can only be done with a holding of the Court that Kanyeki Kimatu held 3.5 acres in trust for Joyce Gachiru Kimatu (deceased).
58. There was also no doubt that Joyce Gachiru Kimatu (deceased) was childless and she died intestate. The only asset earmarked for her by the Appellant is the suit property Loc.1/Mugumo-ini/397, which suit property was subject of distribution in Succession Cause No.107 of 2005 at Thika Law Courts.
59. This suit property was distributed equally between the two houses of Kanyeki Kimatu (now deceased). However, the Appellant alleges that the 3.5 acres had been given to his mother Margaret Muthoni Kanyeki by Joyce Gachiru Kimatu, during her lifetime and therefore the estate of Joyce Gachiru Kimatu, should be allowed to retain 3.5 acres which in turn shall be inherited by Margaret Muthoni Kanyeki. Margaret Muthoni Kanyeki is also entitled to inherit from the estate of Kanyeki Kimatu.
60. The issue herein is therefore a determination of customary trust. It is evident that customary trust is an encumbrance on land. These are non-registrable rights which run with the land. They are overriding



and subsist on the land (See the Ngugi vs Kamau) ELC Case No.36 of 2020(2022)KEELC 2261(KLR) Judgment.

61. In the case of Kanyi VS Muthiora (1984) KLR 712, the Court stated:

The registration of land in the name of the Appellant under the registered *Land Act* (Cap 300) did not extinguish the Respondent's right under Kikuyu Customary Law and neither did it relieve the Appellant of her duties or obligations under Section 28 of a trustee".

In the case of Mbui Mukangu VS Gerald Mutwiri Mbui C.A. No.281 of 2000, the Court of Appeal stated that customary trust is a concept of intergenerational equity where the land is held by one generation for the benefit of succeeding generations. The Court also held that possession and occupation are key elements in determining the existence of customary trust.

62. In the present case, the parties shares are common ancestor that is Kimatu Wangai. He is alleged to have been the owner of the suit property, but it was also alleged that he died in 1946. Though the pleadings states that Kimatu Wangai had two wives, there was other evidence in the pleadings which show that he had other wives and one witness alleged that he had 12 wives, and he gave them their respective properties. It was also alleged that the suit property was registered in the name of Kanyeki Kimatu during demarcation and consolidation in 1954. However, the title deed in question was issued in 1974.

63. Once Kanyeki Kimatu was registered as the owner of the suit property, he became the absolute proprietor bearing all the rights and privileges as provided by Section 27 of the Registered *Land Act*, Cap 300 (now repealed).

64. As a registered proprietor, the said land vested upon him as an absolute owner and that right can only be defeated in the manner provided under the Act (See Section 28 of Cap 300 now repealed)

65. However, as was provided by Section 30(b) of the said Act, (Cap 300 now repealed) the said rights are subject to overriding interest. The said Section 30 of Cap 300 provides:-

Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interest as may for the time being subsists and affect the same without them being noted on the register"

(a)

(b) trust including customary trust.

66. The above Section is similar to Section 28 of the *Land Registration Act*.

67. As captured above, Kanyeki Kimatu is the registered owner of the suit property. However, his right can be defeated by the issue of trust as provided by Section 30(b) of Cap 300 (now repealed) and/or Section 28 of the *Land Registration Act*.

68. The issue of Customary trust was well explained by the Supreme Court in the case of Isaack Kieba M'Inanga VS Isaaya Theuri M'lintari & Another (2018) eKLR, where it held as follows:-

"Each case has to be determined on its own merits and quality of evidence. It is not every claim of a right to land that will qualify as Customary trust. In this regard, we agree with the High Court on Kiarie VS Kinuthia, that what is essential is the nature of the holding of the land and intention of the parties. If the said holding is for the benefit of other members of the family, then 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.



69. Further, the SCOK enumerated some of the elements that would qualify a claimant as a trustee. These are:-
- a. The land in question was before fixed registration was family, clan, or group land;
 - b) The Claimant belonged to such family, clan, or group;
 - c) The relationship of the claimant to such family, clan, or group was not so remote or tenuous as to make his/her claim idle or adventurous;
 - d) The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances;
 - e) The claim was directed against the registered proprietor who was a member of the family, clan, or group.”
70. The Appellant herein alleged that his father Kanyeki Kimatu was holding ½ of the suit land in trust for Joyce Gachiru Kimatu. He alleged that the said position was acknowledged by both of their grandmothers and in 1983, his grandmother Angelica Wangui Kimatu, sued their father Kanyeki Kimatu, for a claim of her 6.5 acres. He alleged that the District Officer Kandara heard the matter and the tribunal delivered its award on 8th August 1991. That as per the award, Joyce Gachiru Kimatu was decreed to get 3 acres. The said proceedings were attached as exhibits. However, these proceedings do not identify the land as Loc.1/Mugumo-ini/397, the suit land. Given that Kimatu Wangai had many wives and other parcels of land, what could connect those proceedings to the suitland - None!!
71. It is trite that Customary trust must be proved by way of evidence. See the case of Susan Mumbi Waititu VS Mukuru Ndale & 4 Others (2007) eKLR, where the Court held: -
- “As for trust, the Plaintiff must prove with cogent evidence that the suit premises was an ancestral land and thus family land”
72. The Appellant needed to call cogent evidence to prove that indeed the suitland held by Kanyeki Kimatu was a family land and that Joyce Gachiru Kimatu was entitled to it. The Appellant also needed to prove that Joyce Gachiru Kimatu could have been entitled to be registered as the owner or other beneficiary of the land but for some intervening circumstances she was not. See the case of Isaack Kieba M’Inanga VS Isaaya Theuri M’lintari & Another (2018) eKLR when it held as follows:-
- The Claimant could have been entitled to be registered as an owner or other beneficiary of land, but for some intervening circumstances.”
73. It is trite that Court cannot imply a trust, but trust must be proved. Further, the intention of the parties to create a trust must be clearly determined before a trust can be implied. In the case of Juletabi African Adventure Ltd & Another VS Christopher Michael Lockley (2017) Eklr, the Court of Appeal held as follows:-
- The law never implies, the Court never presumes a trust but only in case of absolute necessity. The Court will not imply a trust 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 the trust is implied”.
74. Therefore, it follows that the existence of trust is a question of evidence. The burden of proof is on the party claiming existence of trust. In this case, it was the Appellant who had the burden of proof.



75. Having found that the proceedings at the District Officer at Kandara cannot aid in proving existence of trust, the Court will turn to the other evidence.
76. Though the Appellant alleged that Kanyeki Kimatu was registered as the proprietor of the suit land in 1954, it is clear that he was registered so in 1974. Was there a first registration in 1954 and then Kanyeki Kimatu's in 1974? There was no evidence that clearly brought out this issue.
77. Joyce Gachiru Kimatu died in the year 2005, and that was after the death of Kanyeki Kimatu. There was no evidence that during her lifetime she claimed the 3.5 acres from Kanyeki Kimatu. The issue of 3.5 acres came about during the distribution of the estate of Kanyeki Kimatu. It is clear that Margaret Muthoni Kanyeki, the mother to the Appellant had filed for Letters to be Administrator for the estate of Joyce Gachiru Kimatu. She intended to inherit the 3.5 acres, that is allegedly belonging to Joyce Gachiru Kimatu. The late Joyce Gachiru Kimatu was childless and even if the Court was to find that the land was held in trust for her, that would mean Margaret Muthoni Kanyeki's, house where the Appellant belongs would be entitled to the said share. Thus the house of Margaret Muthoni Kanyeki, would get a bigger share of the suit property Loc.1/Mugomo-ini/397. That would not augur well on the distribution of the estate of Kanyeki Kimatu, wherein the Appellant and the Respondent are all beneficiaries. However, the above issues are not within the jurisdiction of this Court to determine.
78. This Court, as an Appellate Court had a duty to re-consider, re-evaluate and re-assess the evidence available before the trial Court and then decide the case finally. The Court has had the opportunity to do so and finds that relying on the decision of Isaack Kieba M'Inanga VS Isaya Theuri M'lintari & Another (2018) eKLR where, it held as follows: -

“each case has to be determined on its own merits and quality of evidence”, the Appellant was not able to prove on the required standard that the late Kanyeki Kimatu held 3.5 acres from Loc.1/Mugomo-ini/397, in trust for the late Joyce Gachiru Kimatu (deceased) who died without a child.
79. Is it evident that the estate of Kanyeki Kimatu is subject of Thika Succession Cause No. 107/2005, and the Court urges the parties herein who are Co-administrators to pursue the distribution of the suit property herein through the said Succession Cause.
80. In conclusion, the Court finds and holds that apart from the finding of the trial Court that the Appellant herein did not have locus standi to file the ELC OS No.08 of 2020 at Kandara Law Courts, and the fact that trial Court failed to properly analyse paragraph 37(iii) of the decision in Kiambu HC Civil Appeal No.129 of 2018, the Court finds no evidence of existence of Customary trust in favour of the estate of Joyce Gachiru Kimatu (deceased).
81. Accordingly, the Court finds and holds that the instant appeal is not merited and the said Appeal is dismissed entirely with costs to the Respondent.
82. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 23RD DAY OF NOVEMBER 2023.

L. GACHERU

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JUDGE

I certify that this is a true copy of the original



Signed

DEPUTY REGISTRAR

Delivered online in the presence of; -

Mr. D. Amutallah for the Appellant

Mr. Mbugua holding brief for Mr. Mbiyu Kamau for the Respondent

