



**Mbataru v Gitunga (Sued as the legal representative of the Estate of Itunga Kiragua) & 7 others (Environment & Land Case E003 of 2022) [2023] KEELC 21703 (KLR) (23 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21703 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT & LAND CASE E003 OF 2022  
CK YANO, J  
NOVEMBER 23, 2023**

**BETWEEN**

**JULIUS MBATARU ..... PLAINTIFF**

**AND**

**JUDSON MWENDA GITUNGA (SUED AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF ITUNGA KIRAGUA) ..... 1<sup>ST</sup> DEFENDANT**

**GITUNGA KIENDE ESTHER ..... 2<sup>ND</sup> DEFENDANT**

**JAMLIC KABURU GITUNGA ..... 3<sup>RD</sup> DEFENDANT**

**JOYCE NDURU M'RUKARIA ..... 4<sup>TH</sup> DEFENDANT**

**HELLEN NKUENE WILFRED GITUNGA ..... 5<sup>TH</sup> DEFENDANT**

**ESTHER MUGURE JOHN ..... 6<sup>TH</sup> DEFENDANT**

**FAITH KATHURE MURITHI ..... 7<sup>TH</sup> DEFENDANT**

**GEORGE GITONGA GITU (SUED AS THE AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF RIRIA KIRAGUA ALIAS FESTUS GIITU KIARAGUA – DECEASED) ..... 8<sup>TH</sup> DEFENDANT**

**JUDGMENT**

**Introduction**

1. The dispute before court involves close family members. The plaintiff is the son of the late Kiragau Mbataru (deceased) who had three sons namely Riria Kirigia (deceased), M'Itonga Kiragau (deceased) and Julius Mbataru, the plaintiff herein. The plaintiff's case is based on a claim under customary trust.



2. In the plaint dated 3<sup>rd</sup> February 2022 and filed in court on 4<sup>th</sup> February, 2022, the plaintiff is seeking the following orders against the defendants jointly and severally.
  - a. A declaration that M'Itonga Kiragau alias Itunga Kiragau alias Wilfred Itunga Kiragau and Festus Giitu Kiragau alias Riria Kiragau and or their legal Representative and beneficiaries hold approximately 3 acres out of land parcel No. Abogeta/U-Kithangari/502 and Land parcel No. Abogeta/U-Kithangari/503 in trust for the plaintiff to be excised from land parcel Numbers Abogeta/U-Kithangari/502 and Abogeta/U-Kithangari/503 equally.
  - b. An order directing the legal representatives and/or beneficiaries of the estate of M'Itonga Kiragua alias Itunga Kiragua alias Wilfred Itunga Kiragua and Festus Giitu Kiragua alias Riria Kiragua respectively to transfer 1.5 acres each from their respective parcels of land parcel No. Abogeta/U-Kithangari/502 and Abogeta/U-Kithangari/503 to the plaintiff forthwith thereby making it a total of 3 acres and in default of any of the defendants thereof, the Deputy Registrar of this Honourable court be empowered and/or authorized to sign, appear, execute, present documents and or otherwise deal to ensure that the said parcels of land measuring approximately 3 Acres are transferred to the plaintiff.
  - c. A declaration that the said 3 acres of land out of Land parcel No. Abogeta/U-Kithangari/502 and Abogeta/U-Kithangari/503 referred to in prayer 1 and 2 herein above should be excised at the centre where the land parcels Abogeta/U-Kithangari/502 and Abogeta/U-Kithangari/503 border each other with each of the said parcels of land parcel No. Abogeta/U-Kithangari/502 and Abogeta/U-Kithangari/503 contributing 1.5 acres each.
  - d. An order directing the defendants by themselves, their agents relatives, employees and or anybody else acting on their behalf to vacate from the said 3 acres of land referred to in prayer 1 and 2 hereinabove within 30 days from the date of delivery of the judgment and in default thereof they be evicted therefrom forcefully.
  - e. An order of permanent injunction be issued restraining the defendants jointly and severally, their agents, relatives, servants and/or employees from occupying, cultivating and/or any dealings howsoever on the 3 acres referred to hereinabove.
  - f. An order directing the 1<sup>st</sup> defendant to compensate the plaintiff a sum of Kshs. 536,098.56 from the destruction that was caused on the plaintiff's property.
  - g. Punitive damages against the 1<sup>st</sup> defendant for willingly damaging property belonging to the plaintiff
  - h. Costs of the suit and interests of "f", "g" and "h".
3. The plaintiff avers that the late Kiragau Mbataru had three sons namely, Riria Kiragau alias Festus Giitu Kiragau, Itunga Kiragau alias M'Itonga Kiragau (both deceased) and the plaintiff himself who is the youngest. That their late father, Kiragau Mbataru ( deceased) owned ancestral land measuring about 11 acres which was registered in the names of the plaintiff's elder brothers whereby the eldest, Itunga Kiragau got registered as proprietor of half of the ancestral land being Abogeta/U-Kithangari/502 measuring approximately 5.5 acres while Riria Kiragau alias Festus Giitu Kiragau was registered as proprietor of the other half being Abogeta/U-Kithangari/503 also measuring approximately 5.5 acres both registered on 27<sup>th</sup> May 1965. The plaintiff avers that it was his late father's intention that a customary trust in favour of the plaintiff who was still a minor be created against the two parcels of land whereby at least 3 acres of land were to be excised from the two parcels. The plaintiff avers that the defendants jointly and severally have breached the said customary trust by failing to transfer at least 1.5



- acres each to the plaintiff in accordance with the wishes of their late father. The plaintiff has enumerated particulars of the alleged customary trust in his favour and particulars of alleged breach on the part of the defendants as well as particulars of alleged destruction of his property by the 1<sup>st</sup> defendant.
4. The 1<sup>st</sup> to 7<sup>th</sup> defendants filed a joint statement of defence and counterclaim dated 21<sup>st</sup> June 2022 wherein they denied the plaintiff's claim and stated that Gitunga Kiragau (deceased) gathered his own land during adjudication and had the same registered in his name as Abogeta/U-Kithangari/502 measuring 5.5 acres. They further averred that at the time of gathering and adjudication of land around upper Kithangari area, one person was not allowed to gather more than one parcel of land, and therefore Kiragau Mbataru (deceased) gathered land parcel No. Abogeta/U-Kithangari/503 measuring 5.5 acres which was registered in the name of Festus Giitu alias Riria Kiragau (deceased) to hold on his behalf and on behalf of the plaintiff who was then a minor in equal shares. That the two parcels of land are bordering each other. The 1<sup>st</sup> to 7<sup>th</sup> defendants aver that having gathered his land No. Abogeta/U-Kithangari/502, the late Gitunga Kiragau (deceased) divested his interest over land parcel No. Abogeta/U-Kithangari/503 and left it to his younger brothers, Festus Giitu alias Riria Kiragau and the plaintiff. It is their contention that the plaintiff was given 1.5 acres by his brother Festus Giitu alias Riria Kiragau in 1978 on the Eastern side of parcel No. Abogeta/U-Kithangari/503 where he has settled with his family ever since, but that during the implementation of the grant to the estate of Gitunga Kiragau (deceased) issued in Nkubu CM succession cause No. 92 of 2016, the surveyor discovered that the plaintiff had encroached onto parcel No. Abogeta/U-Kithangari/502 by about 0.5 acres which prompted the plaintiff to file this suit to frustrate the implementation of the said grant.
  5. In the counterclaim the 1<sup>st</sup> to the 7<sup>th</sup> defendants pray for orders that-;
    - a. A declaration that the encroachment and continued occupation of 0.5 acres of land parcel No. Abogeta/U-Kithangari/502 by the defendant in the counterclaim or his agents, family members, assigns or successors in title is unlawful.
    - b. An order that the defendant in the counterclaim and/or his family members, agents, employees, assigns or successors in title do vacate land parcel No. Abogeta/U-Kithangari/502 and in default to be forcefully evicted therefrom with assistance of the officer commanding Murungurune Police Station.
    - c. An order of permanent injunction restraining the defendant in the counterclaim from entering, occupying or remaining in occupation of land parcel No. Abogeta/U-Kithangari/502 or in any other way interfering with the plaintiff's in the counterclaim user, occupation or enjoyment of land Parcel No. Abogeta/U-Kithangari/502.
    - d. Mesne profits.
    - e. Costs of the suit and interest
    - f. Any further or better relief.
  6. The 8<sup>th</sup> defendant filed a statement of admission of the plaintiff's case dated 5<sup>th</sup> September. 2022.

### **Plaintiff's Case**

7. The plaintiff testified as P.W 1 and adopted his statement dated 3<sup>rd</sup> February, 2022 as his evidence-in-chief. He produced the documents filed on 4<sup>th</sup> February, 2022 as P exhibit 1 – 9 respectively. These are minutes of the “Munju clan” meeting dated 23<sup>rd</sup> March 1991, copies of official search certificates, and green cards for Abogeta/U-Kithangari/502 and Abogeta/U-Kithangari/503, Copy of RIM indicating the positions of the said parcels, photographs, copy of extract OB No. 37/09/11/2021, Copy of



valuation report dated 1<sup>st</sup> February, 2022 and certificate of confirmed grant dated 19<sup>th</sup> October, 2019. He also produced the documents in his further list of documents dated 21<sup>st</sup> September, 2022, as P exhibits 10 – 13 respectively, and these are Agricultural Officer report dated 11<sup>th</sup> November, 2021, copy of consent judgment in Nkubu PM ELC No. 121 of 2014, a copy of amended grant dated 21<sup>st</sup> October, 2019 and a copy of register in Meru CMCC No. 182 of 1992. He was cross examined and re-examined.

8. The plaintiff testified that he was born in 1950 and demarcation was done in the area in 1965 when he was 15 years old and therefore a minor who could not be given land. That his father was aged and he called his clan members who summoned the plaintiff's elder brother and directed each of them to give the plaintiff 1 ½ acre from their respective shares of family land. That one of the brothers, M'Itonga Kiragau declined to give the plaintiff the said portion of land, but Festus Giitu complied. That unfortunately, the late Kiragau Mbataru died shortly thereafter in 1972 leaving the plaintiff pursuing his claim before the chief and the clan members. That members of the clan met and decided that the plaintiff ought to get 1.5 acres from each of his brothers and the minutes were forwarded to the area chief who, however, was unable to persuade M'Itonga Kiragau to transfer 1.5 acres to the plaintiff. The plaintiff was advised to seek remedy from the court.
9. The plaintiff stated that he only knew of the dealings by the 1<sup>st</sup> to 7<sup>th</sup> defendants on land parcel No. 502 when goons descended on his farm and attacked him. The plaintiff denied being informed of the succession proceedings before Nkubu Law Court in Succession cause No. 92 of 2016. That from 1968 to 2009, his other brother, Riria Kiragua had verbally acknowledged the plaintiff's claim over the suit properties and as directed by their father whereby he was shown his portion to develop and put up his home on the eastern side of land Parcel Abogeta/U-Kithangari/503 bordering Abogeta/U-Kithangari/502 where he said he settled after marrying in 1978. The plaintiff testified that his brother started chasing him away immediately he procured the title deed on or about 13<sup>th</sup> October, 2009. He therefore sought for the court to protect his interests on both parcels due to customary rights that he had on the suit lands.
10. During cross examination, the plaintiff testified that even though he had acquired a consent judgment in Nkubu ELC case 121 of 2014 he could not enforce it because the court lacked pecuniary jurisdiction to grant the orders.
11. 2 was Kithinji Nkaabu who adopted his statement dated 3<sup>rd</sup> February, 2022 as his evidence in chief. He testified that he was present in the clan meeting held on 15<sup>th</sup> March 1991, though he could not participate in the decision-making since he was still a boy, and Kimeru customs prohibited minors from doing so. His evidence was that the elders ruled that the plaintiff was to get 3 acres of land from his two brothers to be carved out of land Parcels numbers 502 & 503.
12. 3 was Charles Miriti Mugambi who adopted his statement dated 4<sup>th</sup> March 2022 as his evidence-in-chief. He testified that he was the area chief in 1991 and left in the year 2004. He further testified that the plaintiff went to his office and reported that his brothers had refused to transfer to him 1.5 acres from each of the suit parcels of land as per their late father's wishes. That he asked the clan members to deliberate on the matter and the minutes dated 25<sup>th</sup> March 1991 were brought to him. That he advised the plaintiff to pursue his claim in court.

### **Plaintiff's Submissions**

13. The plaintiff filed submissions dated 8<sup>th</sup> September, 2023 and supplementary submissions dated 13<sup>th</sup> October, 2023 through the firm of Ngunjiri Michael & Company advocates giving a background of the case. It is their submissions that the plaintiff had proved his claim under customary trust and relied



on the case of *Isaack M’Inanga Kiebia Vs Isaaya theuri M’Lintari & another* [2018] eKLR, *George Opuko Omoriti Vs John Omoriti* [2018] eKLR. Counsel for the plaintiff submitted inter alia that the only reason that the plaintiff could not get his share of the family land was because he was a minor during the registration unlike his two other bothers. That there is credible evidence for the court to declare existence of the trust and cited the case of Isaac M’Inanga (supra) where the Supreme Court held inter alia, that whether or not the claimant has part or no possession is not a relevant consideration in determining existence of trust by dint of Section 28 of the *Land Registration Act*.

14. The plaintiff’s advocates submitted that the plaintiff’s claim over the suit lands amounts to an overriding interest over the two parcels and that registration of the land did not extinguish his rights over the whole parcel which subsisted before registration of the two parcels in the names of the plaintiff’s deceased brothers. Counsel for the plaintiff cited Section 27 of the *Land Registration Act* and relied on the case of *Justus Maina Muruku Vs Jane Waitihira Mwangi* [2018] eKLR.
15. On whether the plaintiff’s claim is time barred, the plaintiff’s counsel submitted that a claim under customary trust, just like trespass, is a continuing cause of action and can run for decades without any limitation of action. They relied on the case of *Ralph Kivuti Njoka v Jessi Nyaga Karuagi* [2017] eKLR and submitted that as the present suit is being made against the legal representatives and beneficiaries of the plaintiff’s brothers cannot be defeated by limitation of actions as his overriding interests subsist even after transmission of the land.
16. It is further submitted that Nkubu Succession cause No. 92 of 2016 was done secretly to avoid the plaintiff bringing to the attention of the court of subsisting rights within land parcel 502 under customary trust rights. It is the plaintiff’s submission that the 1<sup>st</sup> – 7<sup>th</sup> defendants have not proved their counterclaim and urged the court to dismiss it with costs and grant the plaintiff the reliefs sought in the plaint with costs and interests.

#### **1<sup>st</sup> – 7<sup>th</sup> Defendants’ Case**

17. Judson Mwenda Gitunga, testified as D.w 1 on behalf of the 1<sup>st</sup> – 7<sup>th</sup> defendants. He adopted his statement dated 21<sup>st</sup> June 2022 as his evidence in chief and produced the documents in the list dated 12<sup>th</sup> July, 2022 and a further list dated 26<sup>th</sup> July, 2022 as D exh 1 (a) – (d) – 8 respectively. These are copies of the grant in Nkubu PMC Succession cause No. 92 of 2016, court order dated 12<sup>th</sup> October, 2021, surveyor’s report, plaint and defence in Meru HCC No. 143B of 2009 ( now Nkubu ELC 121 of 2014), charge sheet in Nkubu PMC case No. 488 of 2021 search certificates for LR Abogeta/u-Kithangari/502 and 503, summons dated 15<sup>th</sup> June 2022 in Nkubu PMC Succession Cause No. 92 of 2016 as well as a replying affidavit, notice of preliminary objection and ruling in the said succession cause at Nkubu Law Court.
18. D.w 1 testified that he is the administrator of the estate of his grandfather, Itunga Kiragau (deceased) who was a brother to the plaintiff herein. The 2<sup>nd</sup> – 7<sup>th</sup> defendants are his uncle and aunties respectively. He informed the court that his grand father initially was living with his other brothers, including the plaintiff, on parcel of land No. Abogeta/U-Kithangari/503 which parcel of land was gathered by the plaintiff’s father, Kiragau Mbataru (deceased) who had also gathered his own land No. Abogeta/U-Kithangari/502 which was registered in his name since he was of majority age. D.w 1 denied ever having any land dispute between the plaintiff and Itunga Kiragau (deceased) until the year 2022 when the plaintiff filed this suit. D.W 1 wondered why the plaintiff would wait for over 42 years from 1965 to 2007 when Itunga Kiragau died and again for over 15 years after his demise to institute this suit. He argues that the suit is an afterthought and meant to delay the implementation of the grant issued at



- Nkubu Law Courts. He stated that in the year 1991 he was aged over 20 years and wonders why his name does not appear in the clan elders' minutes which showed children below 10 years in attendance.
19. It was the evidence of D.W 1 that it was the wish of his late grandfather, Itunga Kiragau (deceased) that since he had his own land parcel No. Abogeta/U-Kithangari/502 he would leave land parcel No. Abogeta/U-Kithangari/503 to his two brothers to share equally since they did not have any other land. That Itunga Kiragau (deceased) moved to his aforesaid parcel of land and left his two brothers with their father, Mbataru Kiragau (deceased) who upon his demise was buried on land parcel No. Abogeta/U-Kithangari 503. He denied that the plaintiff has ever occupied land parcel No. Abogeta/U-Kithangari/502, though it was discovered that he had encroached on a portion measuring 0.5 acres of it at the time the grant in Nkubu succession cause No. 92 of 2016 was being implemented. According to D.w 1, the exercise of subdivision and clearing of the boundary was supervised by Police Officers under the O.C.S Murungurune Police Station as per the order in the said succession cause and therefore the claim for damages has not been proven. It is the testimony of D.w 1 that the plaintiff has totally frustrated the implementation of the said grant and therefore should be evicted therefrom.
20. D.w 2 was George Mbaya Manyara who adopted his statement dated 21<sup>st</sup> June 2022 as his evidence in chief. He denied attending the clan elders meeting alleged to have taken place in the year 1991 as he was too young.

#### 1<sup>st</sup> – 7<sup>th</sup> Defendants' Submissions

21. In their submissions dated 9<sup>th</sup> October, 2023 filed through the firm of Kiautha Arithi & Co. advocates the 1<sup>st</sup> – 7<sup>th</sup> defendants advocates gave a brief background of the case and pointed out that the plaintiff had instituted Meru ELC No. 182 of 1992 against Itunga Kiragau (deceased), but failed to prosecute the same until Itunga Kiragau died in 2007 and the suit must have abated sometime in the 2008. They cited order 24 of the *Civil Procedure Rules* and relied on said *Sweilem Gheithan Sanum Vs Commissioner of Lands & 5 others* [2015] eKLR, *Titus Kiragu Vs Jackson Mugo Mathai* [2015] eKLR and *Macfoy Vs United Africa co. Ltd* All ER 1169. It was further submitted that the plaintiff instituted another suit against *Festus Giitu Kiragau (deceased)* in Meru ELC No. 143B of 2009 which was later transferred to Nkubu law Courts and given ELC No. 121 of 2014 and which he failed to include the legal representative of the estate of Itunga Kiragau (deceased) hence showing that he had no claim against parcel of land No. Abogeta.U-Kithangari/502.
22. It is the 1<sup>st</sup> – 7<sup>th</sup> defendants' submission that there was no clan meeting held in 1991 as alleged by the plaintiff and pointed out the contradiction in the testimonies of the plaintiff and P.w 2. It was submitted that there was no intention that the Itunga Kiragau (deceased) would be registered as owner of the suit land to hold in trust to the plaintiff or at all. Counsel for the 1<sup>st</sup> – 7<sup>th</sup> defendants submitted that trust can never be implied by the court, unless there was intention to create the same in the first place. They cited Section 27 of the Registered *Land Act* (now repealed) which has now been mirrored in Section 24 of the *Land Registration Act* 2012 and relied on the case of *Isack Kieba M'Inanga vs Isaaya Theuri M'Lintari & another* [2018] eKLR, *Peter Ndungu Njenga Vs Sophia Watiri Ndungu* [2000] eKLR and *Juletabi African Adventure Limited & another Vs Christopher Michael Lockley* [2017] eKLR.
23. It is also the 1<sup>st</sup> – 7<sup>th</sup> defendants' submission that from the evidence adduced, the title of Itunga Kiragau (deceased) is not impeachable and cited Section 26 (1) of the *Land Registration Act*, Sections 107, 108, and 109 of the *Evidence Act* and relied and the case of *Elijah Makeri Nyangw'ara Vs Stephen Mungai Njuguna & another* [2013] EKLR, *Kinyanjui Kamau Vs George Kamau* [2015] eKLR and submitted that the plaintiff has not substantiated the claim for customary trust and should be dismissed. The 1<sup>st</sup> – 7<sup>th</sup> defendants also submitted that the plaintiff is not entitled to damages since the valuation report



shows that it is the 8<sup>th</sup> defendant who instructed the valuers, adding that the actions complained of were undertaken during the implementation of the orders issued in Nkubu Law courts in the succession cause.

24. It is submitted that the 1<sup>st</sup> – 7<sup>th</sup> Defendants have tendered tangible proof that the plaintiff is in illegal occupation of a portion measuring 0.5 acres in Land Parcel No. Abogeta/U-Kithangari/502 and therefore they submitted that the counterclaim should be allowed and the plaintiff ordered to be evicted from the said land. The 1<sup>st</sup> – 7<sup>th</sup> defendants, counsel urged the court to dismiss the plaintiff suit and allow the reliefs sought in the counter claim with costs and interest. They cited Halsbury 4<sup>th</sup> ed, vol 45 at Para 26, 1503, section 2 of the Civil Procedure Act, Order 21 Rule 13 of the Civil Procedure Rules and relied on Rajan Shah t/a Rajan S. shah & partners V Bipri P.Shah [2016] eKLR.

### **8<sup>th</sup> Defendant's Case.**

25. The 8<sup>th</sup> defendant admitted the plaintiff's claim and testified as D.w 3. He adopted his statement dated 8<sup>th</sup> September, 2022 as his evidence in chief and was cross examined. In his submissions dated 9<sup>th</sup> October, 2023, the 8<sup>th</sup> defendant submitted that his admission is sufficient in so far as the plaintiff's claim for 1.5 acres in land parcel No. 503 is concerned. That the plaintiff is currently in occupation on family land within the said 1.5 acres and the only thing remaining is the subdivision.
26. The 8<sup>th</sup> defendant further submitted that even though the consent judgment in Nkubu ELC 121 of 2014 was entered vide a purported consent between him and the plaintiff, the said judgment could not be enforced as by the time of the entry, he was yet to be appointed as a legal representative to the estate of his father and therefore could not bind the estate and therefore the content was partly made without him attaining proper authority. Further, that the judgment was over land valued at over Kshs. 10 million which was beyond the magistrate's court's jurisdiction. The 8<sup>th</sup> defendant further submitted that the 1<sup>st</sup> defendant was solely responsible for the destruction of the plaintiff's properties. He denied the alleged collusion between him and the plaintiff and submitted that no costs are attributable to him.

### **Analysis And Determination**

27. I have considered the pleadings, the evidence, rival submissions and the authorities relied on. The plaintiff's claim is based on customary trust. The issues for determination are whether the plaintiff has proved his claim under customary trust and whether he is entitled to the reliefs sought and whether the 1<sup>st</sup> – 7<sup>th</sup> defendants have proved their counterclaim.
28. In this case, there is no dispute that the parties are related. The plaintiff is a blood brother to the late Itunga Kiragau and the late Festus Giitu Kiragau and the three are sons of the late Kiragai Mbataru. The plaintiff's case is that the late Kiragau Mbataru owned land that later got registered as Abogeta/U-Kithangari/502 in the name of Itunga Kiragau (deceased) and Abogeta/U-Kithangari/503 in the name of Festus Giitu alias Riria Kiragau (deceased). Whereas it is the plaintiff's case that he is entitled to 1.5 acres from each of the said two parcels of land, the 1<sup>st</sup> – 7<sup>th</sup> defendants allege that the late Itunga Kiragau (deceased) gathered his own land parcel No. Abogeta/U/Kithangari/502 which was registered in his name. That the late Kiragau gathered the land parcel No. Abogeta U/Kithangari /503 which borders parcel No. 502 and the same was registered in the name of Festus Giitu alias Riria Kiragua (deceased) to hold on his own behalf and on behalf of the plaintiff who was then a minor in equal shares. That having gathered his own land parcel No. Abogeta/U-Kithangari/502, the late Itunga Kiragau divested his interest over land parcel No. Abogeta/U-Kithangari/503 and left it to his younger brothers, Festus Giitu alias Riria Kiragau and the plaintiff.



29. I have perused copies of the registers on the two parcels of land which were produced as exhibits. Land Parcel No. Abogeta/U-Kithangari/502 was first registered on 27<sup>th</sup> May 1965 in the name of Itunga Kiragua while land parcel No. Abogeta/U-Kithangari/503 was first registered on 27<sup>th</sup> May 1963 in the name of Riria Kiragua. The two parcels of land are each shown to have approximate area of 2.22 hectares.
30. From the evidence, it is clear to me that the two elder brothers (now both deceased) to the plaintiff were the ones who had their names as proprietors of the two parcels of land. The plaintiff, who was still a minor as it is stated that he was born in 1950 was not registered in any parcel of land. However, it is also not in dispute that the plaintiff settled at the boundary of the two parcels Nos. Abogeta/U-Kithangari/502 and Abogata/U-Kithangari/503 thus occupying a portion of each of the said parcels of land. Indeed the 1<sup>st</sup> – 7<sup>th</sup> defendants admit this fact and have filed a counterclaim seeking inter alia to have the plaintiff and his family evicted from land parcel No. Abogeta/U-Kithathari/502.
31. In the case of Isack M’Inanga Kiebia Vs Isaaya Theuri M’Lintari & another (Supra) the Supreme Court of Kenya 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 a customary trust. In this regard, we agree with the High Court in 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 a customary trust would be presumed to have been created in favour of such other members, whether or not they are in possession or actual occupation of the land. Some of the elements that would qualify a claimant as a trustee are-;

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

(53) we also declare that rights of a person in possession or actual occupation under Section 30 (g) of the Registered *Land Act* are customary rights. This statement of legal principle, therefore reverses the age old pronouncements to the contrary in Obiero V Opiyo and Esiroyo Vs Esiroyo. Once it is concluded that such rights subsist, a court need not fall back upon a customary trust to accord them legal sanctity, since they are already recognized by statute as overriding interests.

(54) In the foregoing premises, it follows that we agree with the court of Appeal’s assertion that “to prove a trust in land, one need not be in actual physical possession and occupation of the land.” A customary trust falls within the ambit of the proviso to Section 28 of the Registered *Land Act*, while the rights of a person in



possession or actual occupation are overriding interests and fall within the ambit of Section 30 (g) of the Registered *Land Act*.”

32. In light of the above decision of the Supreme Court, which no doubt is binding on this court, I proceed to find out whether the plaintiff’s claim herein has merits. First, the plaintiff and the defendants trace their family line to their father. The plaintiff’s father and that of his two brothers who got the suit parcels of land registered in their names is the same. The two elder brothers of the plaintiff are the ones who were the original owners of the said parcels of land. The plaintiff who was still a minor, did not have any land registered in his name. However, the plaintiff’s brothers allowed him to settle on the boundary of the two parcels of land, in essence occupying a portion of each of the parcels of land. This must have been family land. It appears their father who was still alive at the time, did not register the land in his name. Instead, he allowed two of his sons who had attained the age of majority to get registered in each parcel of land. The two parcels of land are equal in size. Quite clearly, the plaintiff would, in my view have also had some portion registered in his name, but for the reason that he was still a minor. It is in recognition of this that the two elder brothers of the plaintiff showed the plaintiff the portion he now lives and occupies with his family. The said portion traverses the two parcels of land. No doubt, credible evidence adduced shows clearly that the plaintiff has met the threshold set out in the criteria enumerated in the Supreme Court decision. He becomes entitled to the portion he possess and occupies by dint of his familial or lineal ties to the registered owners of the two parcels of land. The registered owners are the blood brothers to the plaintiff and they got registered because they had by then attained majority age. The plaintiff was still a minor and therefore could not have any land registered in his name. It is my finding that the suit parcels of land are family land. The plaintiff belongs to the family. His relationship to the family is close, not remote. A trust is clearly manifest. The law with regard to overriding interest such as customary trust need not be noted on the register of the land. It therefore follows that the registration of a person as a proprietor of land does not preclude him from holding an interest in trust for another. Customary trust is an encumbrance on the land. These are non registrable rights which run with the land. They are overriding and they subsist on the land.
33. Therefore, despite the registration and the title deeds being issued to M’Itonga Kiragau and Riria Kiragau, such registrations do not affect the customary rights that subsist in favour of the plaintiff. The 1<sup>st</sup> – 7<sup>th</sup> defendants counsel have submitted that the plaintiff’s claim is infact time barred. However, it is trite law that in a case founded on trust, no plea of limitation is available to a fiduciary in possession of trust property. See *Stephens Vs Stephens* (1987) KLR and *Macharia Kihari Vs Ngigi Kihari* C.A No. 170 of 1993. That is essentially the plaintiff’s claim in this case. It is a claim in customary trust which cannot be defeated by the provisions of Section 7 of the *Limitation of Actions Act*. The overriding interests subsists even after transmission of the land.
34. The plaintiff is also seeking damages against the 1<sup>st</sup> defendant for damaging the plaintiff’s property. However, from the evidence adduced, the said actions were undertaken with a view to implementing a court order pursuant to a court order in Nkubu PMC succession Cause No. 92 of 2016. I therefore decline to award the relief.
35. Having found that there exists trust on the suit land in favour of the plaintiffs, the defendants are holding 1.5 acres out of land Parcel No. Abogeta/U-Kithangari/502 and Abogeta/U-Kithangari 503 in trust for the plaintiff. Further, since the plaintiff’s claim on trust having been successful it follows that the 1<sup>st</sup> – 7<sup>th</sup> defendant’s counter-claim must fail and the same is hereby dismissed. It is also my finding that 1.5 acres out of LR No. Abogeta/U-Kithangari/502 did not form part of the estate of the deceased in that cause and could not be distributed or shared out.



36. The upshot is that judgment is entered for the plaintiff against the defendants jointly and severally in the following terms:-
- a. The plaintiff's suit is hereby allowed.
  - b. A declaration be and is hereby made that M'Itonga Kiragau alias Itunga Kiragau alias Wilfred Itunga Kiragau and Festus Giitu Kiragau alias Riria Kiragau and/or their legal representatives and beneficiaries hold 3 acres out of land parcel No. Abogeta/U-Kithangari/502 and Abogeta/U-Kithangari/503 in trust for the plaintiff to be excised from land parcel No. Abogeta/U-Kithangari/502 and Abogeta/U-Kithangari/503 equally i.e 1.5 acres from each of the said parcels.
  - c. An order is hereby made directing the legal representatives and/or beneficiaries of the estate of M'Itunga Kiragau alias Itunga Kiragau alias Wilfred Itunga Kiragau and Festus Giitu Kiragau alias Riria Kiragau respectively to transfer 1.5 acres each from their respective parcels of land Nos. Abogeta/U-Kithangari 502 and Abogeta/U-Kithangari/503 to the plaintiff within sixty (60) days from the date hereof, and in default by any of the defendants the Deputy Registrar of this court is empowered and or authorized to sign and execute all relevant documents to ensure that 1.5 acres from each of the said parcels is transferred to the plaintiff
  - d. A declaration is made that each of the 1.5 acres from each of the land parcels hereinabove should be excised at the centre where the two lands border each other.
  - e. Having found that the 1.5 acres out of land parcel No. Abogeta/U-Kithangari/502 and 1.5 acres out of Land Parcel No. Abogeta/U-Kithangari/503 are held in trust for the plaintiff, I direct the succession court in Nkubu PMCC succession cause No. 92 of 2016 to rectify the confirmed grant issued and exclude the 1.5 acres out of LR No. Abogeta/U-Kithangari/502 and or award it to the plaintiff.
  - f. The land registrar Meru is directed not to implement the grant in Nkubu Succession case No. 92 of 2016 until the same is rectified accordingly.
  - g. The 1<sup>st</sup> – 7<sup>th</sup> defendants' counterclaim is dismissed
  - h. This being a matter involving close family members, I would be reluctant to condemn any side to pay costs. Let parties bear their own costs.

37. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MERU THIS 23<sup>RD</sup> DAY OF NOVEMBER, 2023**

**C.K YANO**

**JUDGE**

In the presence of - .

Njindo for plaintiff

Nyaga for 1<sup>st</sup> -7<sup>th</sup> defendant

8<sup>th</sup> defendants – present in person

