



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT NAIROBI  
MILIMANI LAW COURTS  
CIVIL SUIT NO.1377 OF 2007  
**JAMES NDUNG’U KIARIE.....PLAINTIFF**

**VERSUS**

**1. GEOFFREY MWANGI KINUTHIA**

**2. RUTH WANJIRU KINUTHIA.....DEFENDANTS**

**JUDGMENT OF THE COURT**

The Plaintiff brought a suit against the Defendants by way of a Plaint dated 16<sup>th</sup> August 1994. The Defendants are sued in their capacity as personal representatives of one Naftary Kinuthia Kiarie (Deceased) (also referred to in this judgment as Naphtary Kinuthia Kiarie), who died on 8<sup>th</sup> March 1998. A Grant of Letters of Administration was issued to the Defendants in Nairobi High Court Succession Cause Number 2887 of 2003.

The Plaintiff is seeking the following substantive orders in the said Plaint:

1. A declaration that the Plaintiff is entitled to 10 acres of L. R. Gatamaiyu/Gachoire/234 (hereinafter referred to as the suit property) as Naftary Kinuthia Kiarie was trustee of the Plaintiff.
2. A declaration that the Defendants herein as the Personal Representatives of the estate of Naftary Kinuthia Kiarie (Deceased), hold the suit property as Trustees for the Plaintiff and the said estate in equal shares.
3. An order that the suit property be sub-divided and 10 acres out of the said land be transferred to the Plaintiff before the estate can be distributed to the beneficiaries.
4. Costs of and incidentals of this suit.

The Plaintiff’s claim is that his brother one Kinuthia Twiri was registered as proprietor of the suit property in 1958, but held the same as trustee for the said deceased Naftary Kinuthia Kiarie and 10 acres as trustee for the Plaintiff. The said brother is since deceased having died in 1970. The Plaintiff further claims that on or about 4<sup>th</sup> August 1980, the said Naftary Kinuthia Kiarie fraudulently caused himself to be registered as the proprietor of the suit property. Further that the said Naftary Kinuthia Kiarie achieved this feat by misleading the Kiambu Land Registrar through the Chief, Gatamaiyu Location, that Naftary Karanja and Kinuthia Watwiri were one and the same person, namely Naftary Kinuthia Kiarie, which was illegal, untrue and fraudulent as the two were cousins

That following the Plaintiff’s discovery of the above facts, and after several clan meetings, the deceased Naftary Kinuthia Kiarie owned up and declared that he held title as trustee for the Plaintiff for 10 acres. The declaration was documented and witnessed by several persons on 15<sup>th</sup> February 1992 at Ol

Kalou. Further, that the said deceased Naftary Kinuthia Kiarie utilized the whole land with the Plaintiff's consent at all material times. Upon the death of Naftary Kinuthia Kiarie, the Plaintiff petitioned for a Grant of Letters of Administration in February 2004, but withdrew the said petition and filed a Caveat against the suit property. The Plaintiff now claims the 10 acres of L. R. Gatamaiyu/Gachoire/234 held by said deceased Naftary Kinuthia Kiarie, which the Defendants have declined to transfer.

Summonses were issued on 20<sup>th</sup> August 2004 and the Defendants filed a Defence dated 1<sup>st</sup> November 2004, wherein they denied the allegations by the Plaintiff and put him to strict proof thereof. In the alternative they stated that the allegations of fraudulent registration of the suit property in Naftary Kinuthia Kiarie's name were false and intended to delay the conclusion of High Court Succession Cause No. 2887 of 2003.

The suit was heard on 16<sup>th</sup> November 2011 and the Plaintiff testified and called two witnesses to give evidence on his behalf. The Plaintiff in addition filed a witness statement dated 7<sup>th</sup> November 2011 and also gave oral evidence during the hearing. The Plaintiff testified that he is the brother of Kinuthia Watwiri (Deceased) and also cousin of Naftary Kinuthia Kiarie (Deceased). He produced the extract of title of the suit property as evidence and as the Plaintiff's Exhibit "1". The said extract of title showed that Kinuthia Watwiri was registered as owner in 1958, and that in 1980 the land was registered in the name of Naphtary Kinuthia Kiarie after a change of name.

The Plaintiff also produced as his exhibit "2" a certified photocopy of a letter from the Land Registrar Kiambu, dated 4<sup>th</sup> September 1979, in which the Chief of Gatamaiyu Location had certified that Naphtary Kinuthia Kiarie was also Kinuthia Watwiri, and was the true owner of the suit property. The Plaintiff testified that it is not true that Naphtary Kinuthia Kiarie and Kinuthia Watwiri were one and the same person, and that the two are different people.

The Plaintiff averred that he is the leader of his Twiri clan, and Naftary Kinuthia Kiarie met with him and his brothers in Ol Kalou on 15<sup>th</sup> February 1992 and agreed that 10 acres of the suit property was the Plaintiff's to be held on behalf of the Plaintiff's clan. This agreement was written down in Kikuyu language which the Plaintiff produced as Exhibit "3A" together with an English translation thereof produced as exhibit "3B" Among the people at the said meeting who signed the agreement was George Karanja, the eldest brother of the 1<sup>st</sup> Defendant.

The Plaintiff further testified that he was not given the land as agreed because Naftary Kinuthia Kiarie thereafter had a stroke and he later died without having transferred the land. The Plaintiff gave evidence that after Naftary Kinuthia Kiarie's death, the 1<sup>st</sup> Defendant who is Naftary Kinuthia Kiarie's son took out letters of administration, and the Plaintiff took out a citation in the said succession case, namely High Court Succession Cause No. 2887 of 2003, which was acknowledged by the Defendants. The Plaintiff produced the said citation in evidence as exhibit "4". The Plaintiff concluded his testimony by stating that the reason he was in court was to be given the 10 acres out of the suit property for himself and his clan, and also sought to be paid costs of the suit.

On cross-examination, the Plaintiff reiterated that Kinuthia Watwiri was his eldest brother, and that he was 14 years old when the suit property was registered in his said brother's name. He stated that from 1958 to 2003 he was living in Ol Kalou District, and the suit property is located in Kiambu District. He however stated that he had lived on the suit property for a short while with his mother. The Plaintiff clarified that he had been discussing the issue of the land with Naftary Kinuthia Kiarie over the years culminating in the agreement made at Olkalou. He denied that he had intentions to sell the land even though the original agreement in Kikuyu language stated that once he got the 10 acres he would sell it to George Karanja at a price to be agreed later. He however stated that this part was added after everyone had signed the agreement.

The Plaintiff also denied knowing that Naftary Kinuthia Kiarie was taking the 4 loans indicated in the encumbrances section of the extract of title to the suit property, and therefore could not have asked him about the said loans or opposed them. He stated that he did not know who took the loans, but that the said

loans were taken after 1980 when Naftary Kinuthia Kiarie was registered owner. He admitted that he would not have been able to get the land had it been sold by the banks that were giving Naftary Kinuthia Kiarie the loans. Finally, the Plaintiff stated that he did not call the 1<sup>st</sup> Defendant to the meeting at Ol Kalou on 15<sup>th</sup> February 1992 because his father Naphtary and elder brother George Karanja were present. The 2<sup>nd</sup> Defendant was also not called to the meeting because she was the wife of Naftary Kinuthia Kiarie who was present, and the land was owned by Naftary Kinuthia Kiarie. The Plaintiff denied that his aim was to take another person's land by way of fraud, and stated that the suit property belongs to his clan.

The second witness for the Plaintiff was Charles Munamu Kinuthia (PW2) who testified that the 1<sup>st</sup> Defendant's father and his father were brothers, and he is a nephew to the Plaintiff. The witness also filed a witness statement dated 7<sup>th</sup> November 2011. He testified that his father left the land to Naphtary Kinuthia to look after it while he was in Ol Kalou, and that he is entitled to the suit property as his father had an interest in the said property. The witness stated that he is now 73 years of age, and was 20 years old when the suit property was adjudicated and registered in the name of Kinuthia Watwiri. He gave evidence of having attended the meeting in Ol Kalou on 15<sup>th</sup> February 1992 where Naphtary Kinuthia agreed that he would give them 10 acres and that he had signed the said agreement. The witness stated that he owns 20 acres of his own in Ol Kalou, and has so far not got the 10 acres promised by Naphtary Kinuthia as the 1<sup>st</sup> Defendant has refused to transfer it to them.

On cross-examination the witness clarified that he signed the agreement on 15<sup>th</sup> February 1992, and that the 10 acres was not to be given to him personally, but that he was claiming it on behalf of his father. He also stated that the 10 acres would be divided between three houses. The witness on being asked about the attendance at the said meeting confirmed that Naftary Kinuthia Kiarie came to Ol Kalou from Kiambu with his son Karanja, but that the 1<sup>st</sup> Defendant was not invited. He denied that Naftary Kinuthia Kiarie was forced to come to the meeting, and that he came of his own accord as he wanted to make things right. He also admitted that Naftary Kinuthia Kiarie was sickly at the time of the meeting, but could understand what was being discussed, although he did not see him sign the agreement.

The witness also testified on cross-examination that he knows the 2<sup>nd</sup> Defendant who is the 1<sup>st</sup> Defendant's mother, and that she was not invited to the meeting at Ol Kalou because in their tradition women do not attend such meetings. He also testified that he was aware that the agreement stated that they would sell the land to Karanja, and was not aware that the Defendants had already given Karanja the suit property. He denied that they were trying to force the said property from the 1<sup>st</sup> Defendant, and stated that it was the 1<sup>st</sup> Defendant who has taken their land.

The Plaintiff's final witness was George Karanja Kinuthia (PW3), who stated that he lives in Lari District in Kiambu, and that the Plaintiff's father and his paternal grandfather were brothers. He also stated that the 1<sup>st</sup> Defendant is his younger brother and the 2<sup>nd</sup> Defendant is his stepmother. The witness also filed a witness statement dated 10<sup>th</sup> November 2011. The witness testified that the suit property was first owned by Kinuthia Watwiri, and then later registered in his father's, Naftary Kinuthia Kiarie's name. He stated that Kinuthia Watwiri and his paternal grandfather were brothers. He further testified that his father Naftary Kinuthia Kiarie had since died, He denied that the suit property was ever sold to his father, and that the Chief gave his father letter stating that he was the same person as Kinuthia Watwiri, but that it is not so. The witness was categorical that his father Naftary Kinuthia Kiarie was not the same person as Kinuthia Watwiri, and that the chief's letter is what determined the registration of the suit property after Kinuthia Watwiri died.

The witness stated that he felt that an injustice had been committed as Kinuthia Watwiri was not his father, and when his father had a stroke, he called the members of his family and told them that he wanted to go to Ol Kalou to take the land back. The witness testified that the first time his father went to Ol Kalou was without notice, and the Plaintiff was not there. His father then agreed to go back on a date when all the Plaintiff's clan members were present, and on 15<sup>th</sup> February 1992 his father met with the clan members and agreed to share the property in a written agreement. The witness stated he also signed the said agreement. The witness further testified that the 1<sup>st</sup> Defendant was not present on that day

because he was a teacher and was at school teaching. The witness explained that his father did not give the Plaintiff the land because his health deteriorated thereafter, and the 1<sup>st</sup> Defendant refused to return the land after getting the letters of administration after their father's death. The witness also explained that he did not sign the part of the agreement that provided that he would be sold the 10 acres given to the Plaintiff.

On cross examination, the witness testified that he lives in Gatamaiyu in Lari District on a piece of land his father assisted him to purchase. He stated that the piece of land was initially 9 acres but that he later gave away 3 acres. He said the land claimed by the Plaintiff is about 20 acres and was supposed to belong to the Plaintiff's brother. He clarified that the only differences between himself and the 1<sup>st</sup> Defendant are on whether the Plaintiff should be given the suit property, and that these differences arose after their father's death in 1998. He also stated that after the meeting in Olkalou the suit property was surveyed and divided into two equal shares, and that the 1<sup>st</sup> Defendant still farms on his half of the portion up to date.

When questioned on the Ol Kalou meeting the witness stated that his father was talking at the meeting and was able to read, but could not write. The witness however stated that it was enough that he signed the agreement as he is Naftary Kinuthia Kiarie's first born son. He also stated that there was no need to put down their ID numbers on the sale agreement, and that when they returned home they showed the agreement to the 1<sup>st</sup> Defendant. The witness was also questioned on the loans on the encumbrances section of the title to the suit property, and he admitted that he took a loan of Kshs 500,000/= on 18<sup>th</sup> July 1983 using his father's title. He stated that the 1<sup>st</sup> Defendant helped to repay the loan, but that he sold him his land in exchange. He claimed not to know that the 1<sup>st</sup> Defendant was planning to give him land as he had not been told of the said plan, and that he opposed the grant of administration to the 1<sup>st</sup> Defendant because it was not just. He stated that he has not denied that the Plaintiff's portion of the suit property was to be sold to him, and that the said property has in any case already been shared between him and the 1<sup>st</sup> Defendant.

On re-examination the witness clarified that he had not stated that his father was a thief or fraudulent, but that he wrongly registered the suit property in his name. He also clarified that all the persons at the Ol Kalou meeting were members of his clan. He also clarified that his father is the one who signed for the loans he had taken, and that the 1<sup>st</sup> Defendant had also used the suit property as security for loans. Finally, he stated that he had agreed with the 1<sup>st</sup> Defendant to share the suit property and use it for farming, and to eventually buy it if it was to be sold.

The 1<sup>st</sup> Defendant gave evidence for the Defence. He also filed a witness statement dated 18<sup>th</sup> November 2011. He stated that he lives in Gatamiyu in Lari District and the 2<sup>nd</sup> Defendant is his stepmother, and the Plaintiff a son to his elder grandfather. The 1<sup>st</sup> Defendant denied that there was an arrangement between his father and the Plaintiff's family that 10 acres of the suit property would be held in trust. He also stated that no evidence had been given as to who gave the said trust in 1958. The 1<sup>st</sup> Defendant testified that the suit property has always been registered in the name of Naftaly Kinuthia Kiarie. The 1<sup>st</sup> Defendant produced the title given to his father in 1980 as the Exhibit 1.

The 1<sup>st</sup> Defendant further testified that his father suffered 3 strokes and that the third one was fatal. He stated that in 1992 his condition was serious, he had lost his left eye and his right eye was impaired. His right hand was also incapacitated, and that he had a cerebral accident according to a doctor's report dated 16<sup>th</sup> June 2003, which the 1<sup>st</sup> Defendant produced as Exhibit 2. The 1<sup>st</sup> Defendant stated that he used to take his father to Kijabe Hospital until the time of his death.

The 1<sup>st</sup> Defendant further testified that he was close to his father and he never heard his father talk of 10 acres being excised from the suit property. He conceded that PW3 was also close to the father but the parcel of land on which he lives was located farther away, and he was not in contact with the father as frequently as the 1<sup>st</sup> Defendant. The 1<sup>st</sup> Defendant also testified that their father was unhappy with PW3

because of his inability to pay his loans and as a result exposing the suit property to auctions.

He testified that he was shocked to hear that his father was at a meeting in Ol Kalou on 15<sup>th</sup> February 1992 at a time when he could hardly walk, his speech was slurred and he was visually impaired. He denied seeing any minutes of the said meeting and stated that he was not invited to the said meeting. He was also not aware if the 2<sup>nd</sup> Defendant was at the meeting, and stated that ordinarily she would have been present to look after his father.

The 1<sup>st</sup> Defendant stated that it was as a result of his objection that the Plaintiff was not included in High Court Succession Cause No. 2887 of 2003, as the Plaintiff had already claimed an interest in the land, and because he has also filed the present suit to derail the said succession cause. He however stated that he had no objection to PW3 being enjoined in the succession cause. He produced the summons for confirmation of grant in the said succession cause as Exhibit 3. He further stated that the Plaintiff has never resided on the suit property, and that his father built on the said property in 1957 when the colonial villages were disbanded. The 1<sup>st</sup> Defendant further stated that to his knowledge the Plaintiff has always lived in Olkalou, and it would be unacceptable that he would want to claim the land after the 1<sup>st</sup> Defendant's father has died.

Upon cross-examination and re-examination, the 1<sup>st</sup> Defendant stated that he was 15 years old in 1958. He stated that he would not have attended any elders meeting at the time and was not invited to any. He reiterated that the title deed was issued to Naphtary Kinuthia Kiarie on 4<sup>th</sup> August 1980, and that he was also the first registered owner in 1958 and that the suit property has been in his father's custody since 1958. The 1<sup>st</sup> Defendant stated that according to the chief's letter Naphtary Kinuthia was also Kinuthia Twiri and that he was one and the same person, and explained that he had the alias Twiri because he was circumcised at the home of Gatwiri.

When questioned on the doctors report produced as Exhibit 2, the 1<sup>st</sup> Defendant stated that the letter was written on 16<sup>th</sup> June 2003 and that his father died in 1998. He stated that the report indicates that progressive confusion was noted in his father after July 1992, and agreed that the agreement made at Ol Kalou and produced as Plaintiff's Exhibit 3A is dated 15<sup>th</sup> February 1992, which is an earlier date. He confirmed that he got the medical report as evidence to show his father was medically unfit because there was a person claiming the land. The 1<sup>st</sup> Defendant stated that the absence of a court stamp or Deputy Registrar's signature on the summons for confirmation of grant (Exhibit 3) was an error made by his previous lawyer, who had many cases that distracted her. He claimed he signed the summons and left them at his lawyer's office and he did not know if it was commissioned. He also admitted that his previous lawyer had not procured the certificate of confirmation of grant, and that he did not get PW3's consent to the application for the letters of administration.

The 1<sup>st</sup> Defendant was also questioned on the loans taken out on the suit property and stated that he had paid the loan taken by PW3 to save the suit property from auction. He confirmed that he uses 12 – 13 acres of the suit property for farming, as PW3 had agreed to part with his 2 acres after he paid the balance of his loan. He finally testified that he has seen documents his father has signed as Kinuthia Watwiri, but that he had not used the name after 1980 as he changed his name to Naphtary Kinuthia Kiarie.

After the close of evidence the Advocates for the parties agreed with the consent of the Court to file and exchange written submissions. Mr. Munene, the Advocate for the Plaintiff, filed written submissions dated 8<sup>th</sup> December 2011 wherein he contended that the Land Registrar's entry on the extract of title effecting a change of name was incompetent, and did not meet legal standards as it was not based on adequate proof. Therefore the land never passed from Kinuthia Watwiri to Naphtary Kinuthia as this was a fraudulent transaction. He further submitted that the said Naphtary Kinuthia held the land as trustee after the change of name.

The Plaintiff's Advocate further submitted that the Plaintiff took over the Twiri clan leadership after the death of Kinuthia Watwiri, and that he had a claim under the Kikuyu customary law on trust having

shown that the suit property was family land, and Naphtary Kinuthia having acknowledged that he was a trustee before his death. The Plaintiff's Advocate relied on the authority of **Gathiba v Gathiba (2002) 2 EALR 342** to show the existence of the concept of a trust under Kikuyu customary law, and on **Kanyi v Muthiora (1984) KLR 712** for the position that registration of land does not remove the customary obligations of a trustee.

Mr. Kibunja, the Defendants' Advocate, filed written submissions dated 17<sup>th</sup> January 2012. He argued in his submissions that a claim relating to land cannot be enforceable under contract when one the parties lack the requisite capacity to comprehend the nature of the transaction involved. Further, that the Plaintiff and his witnesses, and the Defendant all confirmed that the deceased was infirm and lacked proper knowledge to understand and comprehend, leave alone being able to read and sign the alleged letter of trusteeship.

The Defendants' Advocate urged the court to dismiss the said letter for reasons that the Plaintiff was aged 14 years when he purported to be appointed as the trustee of the Twiri clan; the said letter was never signed by the deceased; no identifications were embodied on the letter to confirm the authenticity of the witnesses present; no government representative such as the area Chief or the village elder attended the meeting nor was called to confirm that the deceased was present; the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were never informed of the function which was said to have taken place in Ol Kalou which is many miles from the deceased home in Kiambu where the suit land is located; and that the addendum at the foot of the said agreement clearly stated that the land was to be sold to George Karanja who is the brother to the 1<sup>st</sup> Defendant and son of the 2<sup>nd</sup> Defendant.

The Defendant's Counsel also doubted the testimony given by George Karanja on behalf of the Plaintiff as he had differences with the deceased Naphtary Kinuthia Kiarie for failing to service the loans which the 1<sup>st</sup> Defendant did take on his behalf. The Advocate contended that the 1<sup>st</sup> Defendant has filed High Court Succession Cause No. 2887 of 2003, which George Karanja did not consent to, and this prompted him to join the Plaintiff as his witness. It was further submitted that the Plaintiff never filed a suit between 1992 and the year 1998 when the deceased was alive to enforce the purported agreement of trust, and equity aids a vigilant and not an indolent person. The Advocate also submitted that section 27 and 28 of the Registered Land Act is clear that first registration cannot be defeated, not even by a trust relation which does not in the first place feature in this case.

I have carefully read and considered the Applicant's pleadings, evidence and submissions. There are two issues for consideration. The first is whether the registration of the suit property in the name of Naphtary Kinuthia Kiarie was a first registration. The second issue is whether Naphtary Kinuthia Kiarie held the suit property or any part thereof in trust for the Plaintiff.

On the first issue it is alleged by the Plaintiff that Kinuthia Watwiri who was his elder brother was the first registered owner, and held the land in trust for the Twiri Clan. He further alleges that the registration of Naphtary Kinuthia Kiarie was fraudulent as he was misrepresented as Kinuthia Watwiri. He has brought evidence of persons who were family members and knew both Kinuthia Watwiri and Naphtary Kinuthia Kiarie to testify that they were two different persons, including PW3 who is a son of Naphtary Kinuthia Kiarie. This evidence was rebutted by the 1<sup>st</sup> Defendant who insisted that Naphtary Kinuthia Kiarie and Kinuthia Watwiri were one and the same person. He however did not bring any other corroborating evidence on this fact. I find that the Plaintiff has shown on a balance of probabilities that the suit property was first registered in Kinuthia Watwiri, who was a different person from Naphtary Kinuthia. In light of the circumstances of the registration of the suit property in Naphtary Kinuthia Kiarie's name, and particularly the evidence given on the change of name shown on the extract of the title, I am of the opinion that Naphtary Kinuthia Kiarie's held the suit property in a fiduciary capacity, and the said registration was subject to whatever interests the Plaintiffs may have had arising from the first registration in Kinuthia Watwiri's name. This position is also expressly provided for in the proviso to section 28 of the Registered Land Act. It must however be pointed out that this proviso would still apply even if the registration in Naphtary Kinuthia Kiarie's name was a first registration, so long as it is shown that he held the suit property in trust for the Plaintiff. This was stated by the Court of Appeal in **Kanyi v Muthiora**

**(1984) KLR 712** wherein it was held that the registration of land under the Registered Land Act, whether as a first or subsequent registration, does not extinguish rights under Kikuyu customary law and neither does it relieve the registered owner of his or her duties or obligations under section 28 as a trustee.

The above findings lead me to an examination of the second issue as to whether Naftary Kinuthia Kiarie held the suit property in trust for the Plaintiff. The Plaintiff alleges that this trust arises from the said Naftary Kinuthia Kiarie holding the suit property in trust for the family of Kinuthia Watwiri, who was the first registered owner, and who held the land in trust for his family members. He has provided evidence of an agreement between the Twiri clan members and the deceased Naftary Kinuthia Kiarie in which this trust relationship is acknowledged. The Defendants dispute the said agreement for the reasons given in their evidence and submissions, but do not dispute that there is a family relationship between the Plaintiff and the deceased Naphtary Kinuthia.

The existence of this family relationship and understanding on the suit property, coupled with the fact that the land was first registered in the name of Kinuthia Watwiri who was the Plaintiff's elder brother is enough to raise the inference of a trust as known under Kikuyu customary law, irrespective of the disputed agreement. This was so held in **Gathiba v Gathiba (2002) 2 EALR 342** wherein Khamoni J. stated as follows on the nature of a customary trust over land:

“In the instant case, there is no instrument of trust as such, but there is evidence that the plaintiff was registered as the proprietor of the suit land through an undertaking between members of the family and in concert with the custom that being the second eldest son in the family, he was to be registered as the caretaker of the suit premises on his own behalf and on the behalf of the defendant. That family undertaking and tradition in itself was sufficient to result into an instrument of acquisition showing that the plaintiff was acquiring the suit parcels of land in a fiduciary capacity.”

In addition even if the evidence provided of the agreement signed on 15<sup>th</sup> February 1992 may not prove the acknowledgement of the trust by Naftary Kinuthia Kiarie, it is proof of the stand and understanding by the Twiri clan that the suit property was registered in Naftary Kinuthia Kiarie's name for their benefit.

I must also address the submissions made on the lack of occupation of the suit property by the Plaintiff. While occupation may be relevant and has been found to be relevant in some cases in raising the inference of a trust, it is not in my opinion a necessary ingredient for a trust to be established. What is essential is the nature of the holding of land and intention of the parties, and if the said holding is for the benefit of other family members then a customary trust is created whether or not there is occupation of the same by the said family members. I am again persuaded in this respect by the judgment of Khamoni J. in **Gathiba v Gathiba** wherein he stated as follows:

“The parties before me are Kikuyus and the origin of the trust they are talking about is Kikuyu customary law whereby a member of a family can hold a piece of land on his own behalf and on behalf of the family or on behalf of himself and on behalf of one or more members of the family. Before me in this case there has been no dispute that Kikuyu customary law contains the concept of a trust or a resulting trust within its jurisprudence as demanded by sections 48 and 51 of the Evidence Act. Both parties accept that the concept exists and that all that is needed is for the party alleging the existence of a trust to give evidence of the existence of such a trust in the facts of that particular case.”

Occupation arising under customary law in my opinion only becomes relevant when one is pleading an overriding interest under section 30(g) of the Registered Land Act. Likewise, this is a trust as known under customary law, and not arising from equity, and the Defendants submissions on delay are therefore misplaced. It is also evident from the Plaintiff's testimony that he took various steps after the discovery of the facts giving rise to this suit to seek redress, and cannot be said to be culpable of delay.

Finally, I do not find the evidence on the loans taken by PW3 or on the intention of the Plaintiff to sell his portion to the suit property to PW3 relevant to the issues of first registration or of whether a trust has been established, and also for reasons that there was independent evidence additional to that of PW3 provided on these issues. I will therefore not belabour with a consideration of the said evidence. The evidence

given on High Court Succession Cause No. 2887 of 2003 is also only relevant to the extent that it establishes the existence of, and stage of proceedings in the said suit, and also to the extent that the orders given in this suit may have a bearing on the said succession cause in the event that the suit property is in the list of properties subject to distribution.

In light of the forgoing reasons and findings, I find judgment for the Plaintiff as against the Defendant and hereby declare as follows:

- a) The Plaintiff is entitled in his capacity as the leader of the Twiri Clan to 10 acres of L. R. Gatamaiyu/Gachoire/234 as Naphtary Kinuthia Kiarie was trustee of the Plaintiff.
- b) The Defendants herein as the Personal Representatives of the estate of Naphtary Kinuthia Kiarie (Deceased) hold L. R. Gatamaiyu/Gachoire/234 as Trustees for the Plaintiff in his capacity as leader of the Twiri Clan and the said estate in equal shares.

Accordingly;-

1. The Plaintiff's claim is hereby allowed;
2. The Defendants are hereby ordered to sub-divide the said parcel of land namely L. R. Gatamaiyu/Gachoire/234 into two equal portions of 10 acres each with two separate titles, and one portion be transferred to the Plaintiff before the estate of Naphtary Kinuthia Kiarie (Deceased) is distributed to the beneficiaries. In default, the Deputy Registrar of this Court to execute all the relevant sub-divisional, transfer and other necessary documents for and on behalf of the Defendants.
3. The survey costs and other incidental costs of the said sub-division and transfer to be met equally by the Plaintiffs and Defendants.

This being a family matter there will be no order as to costs.

Dated, signed and delivered in open court at Nairobi this \_\_\_\_8<sup>th</sup>\_\_\_\_ day of \_\_\_\_March\_\_\_\_, 2012.

**P. NYAMWEYA**  
**JUDGE**