



REPUBLIC OF KENYA



**Ngugi v Kamau & another (Environment & Land Case 36 of 2020)  
[2022] KEELC 2261 (KLR) (23 June 2022) (Judgment)**

Neutral citation: [2022] KEELC 2261 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MURANGA  
ENVIRONMENT & LAND CASE 36 OF 2020**

**LN GACHERU, J**

**JUNE 23, 2022**

**BETWEEN**

**SAMUEL NDAMBO NGUGI ..... PLAINTIFF**

**AND**

**ANTHONY MUCHINA KAMAU ..... 1<sup>ST</sup> DEFENDANT**

**STANLEY KINUTHIA KAMAU ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiff herein vide a Plaint dated 19<sup>th</sup> October 2020, sought for Judgment against the Defendants jointly and severally inter alia in the following terms;
  - a. A declaration that the Parcel of Land No. LOC. 4/Gakarara/1156/23, was registered in the name of Paul Kamau Ngugi & Bros for the Late Paul Kamau Ngugi to hold it in trust for his own benefit (or his heirs), for the benefit of his siblings including the Plaintiff herein, and for the benefit of the three widows of the late Samuel Ngugi Kamau (or their heirs).
  - b. A declaration that the change of registration of ownership from Paul Kamau Ngugi & Bros to Rebecca Njeri Kamau (now deceased), Ruth Nyambura Muturi and John Muchina Ngugi was irregular and unlawful.
  - c. A declaration that the final acquisition of ownership by the 1st Defendant through succession of parcel No. LOC. 4/Gakarara/1156/23 was irregular and/ or unlawful.
  - d. A declaration that the sale of the parcel of land No. LOC. 4/Gakarara/1156/23, by the 1st Defendant to the 2nd Defendant and the change of registration of ownership in the name of the 2nd Defendant was irregular and /or unlawful and therefore null/void ab initio
  - e. An order of cancellation of the registration of the parcel of land No. LOC. 4/Gakarara/1156/23, in the name of the 2nd Defendant.



- f. Determination of the trust in favor of the Plaintiff and heirs of the estate of the late Paul Kamau Ngugi and the three widows of the late Samson Ngugi Kamau (or their heirs)
2. It is the Plaintiff's averment that the 1<sup>st</sup> Defendants and himself are beneficiaries of the estate of the late Samson Ngugi Kamau, who died in 1954. That the Late Samuel Ngugi Kamau, was polygamous and had three wives one of whom (Beth Mburu) is the mother to the Plaintiff. That prior to his demise, Samson Ngugi Kamau owned several properties including LOC. 4/Gakarara/1156/23, which is the subject of the Instant suit. That the Late Samson Ngugi Kamau, entrusted the suit land to Paul Kamau Ngugi, being his eldest son to hold it in trust for himself, the three wives of the late Samson Ngugi Kamau and his siblings inclusive of the Plaintiff. That in 1965, to effect the said trust, the suit land was registered in the name of Paul Kamau Ngugi and Bros. That the said Paul Kamau Ngugi managed the suit land as a trustee until his death in 1992.
  3. The Plaintiff further averred avers that in 1993, Rebecca Njeri Kamau (now deceased) being the wife of the late Paul Kamau Ngugi, filed Succession Cause No. 19 of 1993, in the High Court at Nairobi and she underhandedly and/or fraudulently included the suit land (LOC. 4/Gakarara/1156/23) as part of the estate. That the said Rebecca Njeri Kamau (deceased) was issued with a Certificate of Confirmation of Grant over the estate of the Late Paul Kamau Ngugi on 30<sup>th</sup> June 1993, without the Knowledge of all the beneficiaries of the trust created over the suit land. That in 2002, Joseph Kamau Ngugi and Nahashon Kamau Ngugi both being beneficiaries of the aforementioned trust by summons dated 11<sup>th</sup> March 2002, filed in Succession Cause No. 605 of 2002 and applied for nullification of the grant issued to Rebecca Njeri Kamau and the same was granted via a Ruling delivered on 16<sup>th</sup> December 2003.
  4. It is the Plaintiff's further averment that on 3rd October 2001, Rebecca Njeri Kamau secretly and /or fraudulently transferred the suit land from Paul Kamau Ngugi & Bros to Rebecca Njeri Kamau, Ruth Nyambura Muturi and John Muchina Ngugi. That Rebecca Njeri Kamau died on 16<sup>th</sup> August 2006. On 25<sup>th</sup> July 2008, the 1<sup>st</sup> Defendant was issued with a Grant of letters of Administration (testate) in respect of the Estate of Rebecca Njeri Kamau. That the Grant for the said estate was Confirmed on 17<sup>th</sup> March 2009, and was rectified on 27<sup>th</sup> July 2011. It is the Plaintiff's averment that inclusion of the suit land (LOC. 4/gakarara/1156/23, Kandara Market) in the Succession Causes was irregular and unlawful as the said property was trust property held by Paul Kamau Ngugi. That the 1<sup>st</sup> Defendant after acquiring the suit land irregularly transferred the same to the 2<sup>nd</sup> Defendant via a sale agreement on dates unknown to the Plaintiff. That the said sale agreement was null and void as the 1<sup>st</sup> Defendants title was tainted with illegality.
  5. The suit is contested by the Defendants who jointly filed a Statement of Defence dated 18<sup>th</sup> December 2020, and denied all the allegations made in the Plaintiff's Complaint and put the Plaintiff to strict proof. They averred that the Plaintiff did not oppose the Confirmation of grant issued to Rebecca Njeri Kamau on 6<sup>th</sup> May 2004, which vested the said Rebecca Njeri Kamau with proprietorship rights over various properties including the suit land. Further that the Plaintiff did not oppose the confirmation of grant issued to Anthony Muchina Kamau, Julius Gitau and the 1<sup>st</sup> Defendant over the estate of the late Rebecca Njeri Kamau and therefore the 1<sup>st</sup> Defendant was well vested with ownership and proprietorship of the suit land. That the instant suit is sub-judice and/ or res-judicata as the Plaintiff has filed several contentious matters over the same subject matter. That the 2<sup>nd</sup> Defendant is an innocent purchaser for value of the suit property without notice of any defect in title. That the 2<sup>nd</sup> Defendant purchased the suit land from the 1<sup>st</sup> Defendant for value.
  6. For the above reasons, the Defendants urged the Court to dismiss the suit with costs.



7. The matter proceeded by way of viva voce evidence wherein the Plaintiff called 4 Witnesses. The Defendants on the other hand called 2 witnesses.

### **Plaintiff's Case**

8. PW 1 Samuel Ndambo Ngugi, the Plaintiff herein, stated that the 1<sup>st</sup> Defendant was his nephew while the 2<sup>nd</sup> Defendant was not known to him. He adopted his witness statement dated 19<sup>th</sup> October 2020, as part of his evidence in chief. He also produced the documents contained in his list of Documents dated 19<sup>th</sup> October 2020 as P.Exhibits 1 -16.
9. He further testified that the suit land originally belonged to their father the late Samson Ngugi Kamau. That the suit land was transferred from the Late Samson Ngugi Kamau to Paul Kamau Ngugi (deceased) to hold it in trust for himself and the rest of the family. That upon the demise of Paul Kamau Ngugi, his wife Rebecca Njeri Kamau took out a grant over his estate. That the suit land was included as part of the estate of Paul Kamau Ngugi via an amended grant That the said amended grant was declared null and void via a Court order. Further that the grant that transferred the suit land to Rebecca Njeri Kamau was nullified by the Court.
10. The Plaintiff testified further that their father had three wives and the suit land was to be shared among them. That the suit land had been shared into 3 portions and there were tenants living therein. That Joseph Ngugi Kamau used to collect rent from those tenants and share the rent between the 3 wives. That the suit land is family land and no authority was given to Rebecca to sell it.
11. On cross examination, PW 1 testified that the suit land was to be registered in the name of three (3) brothers, but Paul Kamau Ngugi failed to do so. That ownership of the suit land moved from the late Samson Ngugi Kamau to Paul Kamau Ngugi & bros on 1965. That the said Paul Kamau Ngugi died in 1992. That they did not claim the trust during the lifetime of Paul as they had left the suit land to their parents. That they decided to start subdividing the suit land after the demise of the 3 wives of their father. That there are several rulings by various Courts over the suit land, but they were advised to file a suit in the ELC for determination of the issue of trusts. That Paul Kamau Ngugi held the suit land in trust and his wife Rebecca Njeri Kamau, failed to honour that. That the said Paul Kamau owned Plot C of the aforementioned subdivision over the suit property and there was evidence of the said subdivision. That in fact the suit land was subdivided into plots A, Band C. That he did not dispute the change of ownership because he was not aware of the said change.
12. Further that he was a son of the late Samson Ngugi Kamau and he was entitled to the suit land. That the late Paul Kamau Ngugi was only entitled to portion C and not the entire suit land as portions A & B belonged to the other families. That they had done a plan of how the suit land was to be subdivided and had even paid for the same.  
  
PW 2 Joseph P. Kamau testified that the Plaintiff was his step brother and his late father had 3 wives being Grace, Beth and Sophia. That he came from the household of Sophia who died in 2015. He adopted his statement dated 19<sup>th</sup> October 2010, as part of his evidence in chief.
13. He further testified that the suit land belonged to their late father before it was transferred to Paul Kamau and Brothers and the said Paul was to hold it in trust for the family. That the suit land is currently owned by the 2<sup>nd</sup> Defendant after he purchased it. That he did not know how the suit land had moved to Rebecca who then sold it to the 2<sup>nd</sup> Defendant.
14. On Cross examination, PW 2 testified that after the demise of their father, their elder brother Paul Kamau Ngugi was left as a trustee of all his properties including the suit land. That in 1982, the estate of the late Samson Ngugi Kamau was devolved to his beneficiaries.



PW 3 Nahashon Kamau Samson also adopted his witness statement dated 19th October 2020 as his evidence in chief.

15. On cross examination, he testified that in 1982, the estate of the late Samson was devolved to his beneficiaries, but the suit property was left for the benefit of their mothers. That the suit property was subdivided into 3 portions being A, B and C and portion C was what the late Paul was entitled to.

PW 4 Zipporah Nduku Njoroge also adopted her statement dated 19th October 2020, as her evidence in chief. On cross examination, she stated that she had rented a premises on the suit land where she was operating a hotel. She stated that rent for the said premises used to be collected by **Joseph Kamau Ngugi** on behalf of his mothers. That the said Joseph would collect the rent and share it equally to 3 of his mothers who were old. That Joseph was not collecting the said rent on behalf of Paul Kamau.

### **Defence Case.**

16. DW 1 Anthony Muchina Kamau adopted his witness statement dated 18<sup>th</sup> December 2020, as part of his evidence in chief. He also produced as evidence the documents contained in the 1<sup>st</sup> Defendant's list of documents dated 27<sup>th</sup> May 2020, as Exhibits 1-7. He also testified that the Plaintiff was his father's step brother. That he had come with the real brothers of his father who are the registered owners of the suit land. That the suit land was registered in the name of Paul Kamau & Brothers and not step brothers. That they had sold the suit land with the real brothers of his father. That he had only sold a third of the property and the other brothers had their shares. 0745438889
17. On cross examination, he testified that he knew the late Samson Ngugi Kamau, but the said Samson Ngugi Kamau, died before he was born. That the Late Samson Ngugi Kamau had 3 wives and he knew them. That his father was Paul Kamau Ngugi, who was the son of the 1<sup>st</sup> Wife. That LOC. 4/ Gakarara/1156/23, Kandara Market, was registered in the name of Paul Kamau & brothers in 1965. That the said Paul Kamau Ngugi, had 2 brothers and stepbrothers. That he did not know if the suit land was bought by his father as he found it registered in the name of Paul Kamau & Brothers. That his father died in 1992 and Succession of his estate, was done by his mother. That the suit land was included as part of his estate even though it was registered in the name of Paul Kamau & Brothers. That the brothers of his father were aware of the succession and they were given their shares.
18. That his mother died in 2006, and she had a Will. That the said Will was taken to Court and a grant was issued and confirmed. That he was the administrator of his mother's estate, which included the suit land. Further that the suit land was transferred to his mother's name in 2001. That it was shared between the 3 sons of their grandmother i.e. his father and his two brothers. That by the time it was shared as stated above, he had not done succession. That after administering the estate of his mother, the suit land was shared between five people and they all agreed to sell it to the 2<sup>nd</sup> Defendant herein.
19. DW 2 Stanely Kinuthia Kamau, adopted his witness statement dated 27<sup>th</sup> May 2021, as his evidence in chief. He also produced as D.Exhibits the documents contained in the 2<sup>nd</sup> Defendant's list of documents dated 27<sup>th</sup> May 2020, being D.Exhibits 1-3. DW 2 further testified that he purchased the suit land after he visited the Sub-County offices at Kandara. That he did a physical search and confirmed that the suit land was owned by Rebecca Njeri, Ruth Nyambura and Muchina. That it was only after he paid the full purchase price that the plot was transferred to him. That he got vacant possession of the suit land and has since developed it. That he had in his possession a Valuation report that indicated that the suit land was not customary land, but a lease from the County Council of Muranga.



20. On cross examination, DW 2 testified that he purchased the suit land in October 2013, for a consideration of Kshs. 4, 950,000/=. That he did due diligence and confirmed that the land was owned by the said vendors. That he did not check how the suit land moved to Rebecca and the records are kept by the County Council. That at the time of purchase, he was not aware about the contest of proprietorship and the aggrieved parties can be compensated by way of damages. That he was not willing to compensate the Plaintiff and that he did not want the title to be cancelled. However, if title was cancelled, he would wish to be compensated at market value. That damages should be paid by the person who breached the trust.
21. After viva voce evidence, the Court directed the parties to file their written submissions.
22. The Plaintiff through the Law Firm of Gori, Ombongi & Company Advocates, filed his written dated 7<sup>th</sup> March 2022. On whether the instant suit is res judicata, the Plaintiff submitted that the issue before this Court is not a succession cause, but the law of succession was used to defeat the trust created in his favour. That the issue of res judicata was dispensed with by this Court in a Ruling delivered on 11<sup>th</sup> February 2021, which dismissed the Defendants Preliminary Objection.
23. On the issue of whether a customary trust has been proven, It is the Plaintiff's Submissions that he demonstrated all the requirements necessary for creation of a customary trust as was outlined in the case of *Isack Kieba M'inanga v Isaaya Theuri M'Lintari & another* [2018] eKLR.
24. On whether the 2<sup>nd</sup> Defendant was a bonafide purchaser for value, the Plaintiff submitted on the negative for reasons that the 1<sup>st</sup> Defendant had a faulty title and could not therefore transfer good title to the 2<sup>nd</sup> Defendant.
25. In Conclusion, the Plaintiff submits that he has proved his case on a balance of probability and that Judgement should be entered in his favour as prayed in the Plaintiff.
26. The Defendants through the Law Firm of Gatitu Wang'oo & Co Advocates, filed his Written Submissions dated 6<sup>th</sup> May 2022. The Defendants identified five issues for determination by this Court. The Defendants relied on a litany of cases inter alia the case of *Isack Kieba M'inanga v Isaaya Theuri M'Lintari & another* [*supra*] where the Supreme Court stated the requirements of a customary trust as follows;
  - “ 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 so 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.”
27. It is the Defendants further submissions that the Plaintiff has failed to prove the necessary requirements for a customary trust. That the Plaintiff was also not clear in whose favour the trust was registered. That even if breach of trust has been established, it does not entitle the Plaintiff to a cancellation of title, but to damages. That trust being an equitable trust, the remedy should be damages and Section 26 of the *Land Registration Act* does not provide breach of trust as entitling a person to challenge the title.



28. It is the Defendants further submissions that the 2<sup>nd</sup> Defendant is a bonafide purchaser for value, who had no notice of a defect in title since he did his due diligence on the suit property before purchasing the same. That as a result, the Plaintiff had failed to satisfy a claim for fraud and illegality against the Defendants.
29. In conclusion, the Defendants submitted that there was no customary trust established and proved over the suit land, and no fraud and/or illegality has been proved against the Defendants. That due process was followed for the 1<sup>st</sup> Defendant to acquire ownership of the suit land through two succession causes that were all within the knowledge of the Plaintiff. That the 2<sup>nd</sup> Defendant is a bonafide purchaser for value and he followed due process to acquire the suit land. The Defendants urged this Court to be persuaded by their submissions and dismiss the Plaintiff's Claim.
30. The Court has carefully read and considered the pleadings by the parties, the evidence adduced, the rivals written submissions, authorities cited and the relevant provisions of law and finds that the issues for determination are;
  - i. Whether the Plaintiff has made a case for existence of a trust over the suit land.
  - ii. Whether the 2nd Defendant is a bonafide Purchaser for value without notice
  - iii. Whether the 1st Defendant had a good title to pass to the 2nd Defendant
  - iv. Whether 2nd Defendant's title should be cancelled
  - v. Who should bear the cost of the suit?
31. Before this court delves into the aforementioned issues, it will outline the undisputed facts from the pleadings and the evidence of the parties herein. Undoubtedly, the suit land was originally owned by the late Samson Ngugi Kamau. The said Samson Ngugi Kamau had 3 wives namely Beth Mburu, Sophia Nyambura Ngugi and Grace Wambui. Prior to his death, Samson Ngugi Kamau transferred ownership of the suit land to Paul Kamau Ngugi and bros.
32. The said Paul Kamau Ngugi, however died in 1992, and it is not in dispute that the suit land remained registered in his name until then. In 1993, Rebecca Njeri Kamau being the wife of Paul Kamau Ngugi took out letters of administration over his estate. It is not in dispute that the said Rebecca included the suit land as part of the estate of Paul Kamau and in June 1993, the said grant was confirmed and subsequently amended. Armed with said amended grant, Rebecca Njeri procured a transfer of the suit land to her name, jointly with others more specifically Ruth Nyambura Muturi and John Muchina Ngugi.
33. Further it is not in dispute that Rebecca Njeri Kamau died testate in 2006, and the 1<sup>st</sup> Defendant was the executor of her estate, which included the suit land. That the suit land upon distribution of the estate was registered in the name of the 1<sup>st</sup> Defendant, Ruth Nyambura Muturi and John Muchina Ngugi. That the 1<sup>st</sup> Defendant jointly with the co-owners then sold the suit land to the 2<sup>nd</sup> Defendant, who is the current registered owner of the suit land.
34. This Court notes that said amended Certificate of Confirmation of Grant has been the subject of various litigation before various courts of concurrent jurisdiction and various Judgments and rulings to that effect have been delivered. In fact, the High Court in Nairobi Succession Cause 605 of 2002, termed the amended Certificate of Confirmation of Grant null and void, as it was not based on any Order of Court. It is however the Court's view from a perusal of the pleadings and rulings herein that the issue of trust has not been at the core of the filed litigation and therefore the instant suit is not res-judicata.



35. Having outlined the above, this Court will now proceed to deal with the issues for determination outlined herein above.

**Whether the Plaintiff has made a case for existence of a trust over the suit land.**

36. On whether a customary trust was established over the suit land, the Plaintiff contends that the suit land was originally registered in the name of his father Samson Ngugi Kamau, who transferred the same to Paul Kamau Ngugi, to hold it in trust for his family hence the registration in the name of Paul Kamau Ngugi and bros. The Plaintiff's contention was corroborated by the evidence of PW 2, PW 3 AND PW 4. In addition, the Plaintiff produced P.EXB 1 and 2 which evidenced the said transfer of the suit land from Samson Ngugi Kamau to Paul Kamau Ngugi & Bros. Further, the Plaintiff produced EXB 3, being a document dated 4<sup>th</sup> February 1981, drawn by Paul Kamau Ngugi, outlining the properties owned by Samson Ngugi Kamau, and how they would be distributed amongst his family. The Court noted that the Defendants did not object to production of this letter dated 4<sup>th</sup> February 1981, as evidence and as such this Court has no reason to doubt its authenticity.
37. The Defendants on the other hand concur that the suit land was registered in the name of Paul Kamau Ngugi, and bros, but contend that the term bros referred to the siblings of Paul, born by the same mother. That the said term in no way included his step brothers. It is therefore the Defendants contention that prior to the sale of the suit land to the 2<sup>nd</sup> Defendant, they conferred with the 'real siblings' of Ruth Nyambura Muturi and John Muchina Ngugi and they consented to the said sale. That Rebecca Njeri Kamau had registered the siblings of Paul Kamau Ngugi as co-owners of the suit land and therefore they were beneficiaries of the sale and subsequent transfer to the 2<sup>nd</sup> Defendant.
38. The Court notes that the Succession Act, Cap 160 Laws of Kenya which provides for administration of the estate of a deceased person was accented to in 1972, but commenced on 1<sup>st</sup> of July 1981. While it is not clear the exact date when the said Samson Ngugi Kamau passed on, it is evident that he passed on before the commencement of the Law of Succession Act and therefore his estate was administered under customary law. It therefore follows that the alleged distribution of the estate of Samson Ngugi Kamau, having not been contested, is presumed to have been compliant with customary law and the beneficiaries therein are presumed to have been contented with it.
39. The rights of a registered owner of property were clearly set out under Sections 27 of the Registered Land Act Cap 300(now repealed) which have now been mirrored in Section 24 of the Land Registration Act 2012 as follows; -

“ 24. Subject to this Act

- (a) The registration of a person as proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”

Section 25(1) which mirrors section 28 of Cap 300(repealed) provides that such a registered owner's rights are indefeasible and are held free from all other interests and claims and that the rights can only be defeated in the manner provided under the Act. The rights of a registered owner are however subject to overriding interests declared by section 28 of the Land Registration Act as not requiring noting in the register.



Section 28 of the [Land Registration Act](#) which is similar to Section 30 of Cap 300(repealed) provides that:

“Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register—

- (a) .....
- (b) trusts including customary trusts;”

40. Customary trust was well explained by the Supreme Court in the case of [Isack Kieba M'inanga v Isaaya Theuri M'Lintari & another](#) [2018] eKLR,s 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 a customary trust. In this regard, we agree with the High Court in *Kiarie v. Kinuthia*, that what is essential is the nature of the 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 so 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.”

41. In this case, the Plaintiff has pleaded customary trust in the suit land. The 1<sup>st</sup> Defendant’s case is that he was the absolute registered owner of the suit land pursuant to a grant of administration before he sold the same to the 2<sup>nd</sup> Defendant. The provisions of the law above are to the effect that the overriding interest such as customary trust need not be noted in the Register of the suit land.

42. Therefore, it follows that 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 land. These are non - registrable rights which run with the land. They are overriding. They subsist on the land. In the case of [Kanyi vs Muthiora](#) (1984) KLR 712, the Court stated that;

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



43. This Court notes that while the title of the suit land did not overtly indicate the suit land was trust land, it indicated that the suit land was registered in the name of Paul Kamau Ngugi & Bros. It is not clear what the term Bros meant, but from the evidence of the parties herein, it is safe to conclude it meant brothers. The said Paul Kamau Ngugi, having been born to a polygamous family, had both brothers born of his mother and step brothers born of the 2<sup>nd</sup> and 3<sup>rd</sup> House. It is not therefore clear which of the brothers the term bros was referring to.
44. The legal burden to prove the existence of the trust rests with the one who is asserting a right under customary trust. To discharge this burden, the person must prove that: -
- (a) the suit properties were ancestral clan land;
  - (b) during adjudication and consolidation, one member of the family was designated to hold on behalf of the family;
  - (c) the registered persons were the designated family members who were registered to hold the parcels of land on behalf of the family. In essence, one had to lay bare the root of the title to create the nexus or link of the trust to the title holder and the claimant.
45. In the case of *Njenga Chogera –vs- Maria Wanjira Kimani & 2 Others* [2005] eKLR, which quoted with approval the holding in the case of *Muthuita –vs- Muthuita* [1982 – 88] 1 KLR 42, the Court of Appeal held that customary trust is proved by leading evidence. Trust is a question of fact, which must be proved by whoever is claiming a right under customary trust. A trust can never be implied by the Court, unless there was intention to create a trust in the first place. In *Peter Ndungu Njenga vs. Sophia Watiri Ndungu* [2000] eKLR, the Court held,
- “The concept of trust is not new. In case of absolute necessity, but only in case of absolute necessity, the Court may presume a trust. But such presumption is not to be arrived at easily. The Courts will not imply a trust save in order to give effect to the intention of the parties. The intention of the parties to create a trust must be clearly determined before a trust is implied.”
46. Further, In *Juletabi African Adventure Limited & Another Vs Christopher Michael Lockley* [2017] Eklr, the Court also held that .... 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.”
47. Going by the decision of the Supreme Court referred to herein above, it follows that evidence must be led that points to the root of the land. Pertinent question that must concern this Court are such as; how was the land first registered? Was it clan, communal or family land before registration? Was the land inherited or passed down from the family lineage? How did the 1<sup>st</sup> Defendant acquire this land? Did he inherit or he acquired by way of purchase or a gift?
48. From the evidence led by both parties, they agree that the land was originally registered and owned by the late Samson Ngugi Kamau, who later transferred it to Paul Kamau & bros and upon his death, it devolved to his wife Rebecca Njeri. That upon the demise of Rebecca, the suit land devolved to her son, the 1<sup>st</sup> Defendant herein, who sold it to the 2<sup>nd</sup> Defendant.



49. The Plaintiff led evidence to the fact that the suit land was family land and was transferred to Paul Kamau, being the eldest son of the late Samson Ngugi Kamau to hold it in trust for the entire family, hence the reason it was registered as Paul Kamau and Bros. The evidence of the Plaintiff was corroborated by the PW2, and PW 3, who were also brothers to the Plaintiff and beneficiaries of the said trust. The Defendants on the other hand seemed to agree that a trust had indeed been established but only for the benefit of the maternal brothers of Paul.
50. This Court in *Justus Maina Muruku v Jane Waitihira Mwangi* [2018] eKLR cited with approval the Court of Appeal in *Henry Mwangi vs Charles Mwangi* CA 245 of 2004 where it stated that;-
- “under Kikuyu Customary Law, to which both parties are subject to, the eldest son inherits land as a Muramati to hold in trust for himself and other heirs. It would follow that even when the suit land was under the name of the Plaintiff’s father it was subject to customary trust. The registration of the Plaintiff pursuant to the grant of administration did not extinguish the trust on behalf of the lineage of Romano Kung’u. The land was already subject to customary trust.”
51. This state of affairs appears to be similar in some aspect with the instant case. As stated above, it is trite that customary trust must be proved. The Plaintiff led evidence that rent over the suit land used to be collected and shared equally among the 3 houses, when their matriarchs were alive, and it is for this reason they had not pursued subdivision of the suit land.
52. Therefore, it is irregular for the 1<sup>st</sup> Defendant to allege that the trust was registered only on behalf of the maternal brothers of Paul Kamau Ngugi, and yet he has not produced any evidence in support of this allegation. Further the 1<sup>st</sup> Defendant neither called any witnesses to support his allegations, including but not limited to John Muchina Ngugi, who was present in Court during the hearing.
53. This Court notes that the 1<sup>st</sup> Defendant is a son of the late Paul Kamau Ngugi, and he was born after the said trust had been created. It is his statement that he did not meet Samson Ngugi Kamau, and he did not know how the suit land was registered in the name of Paul Kamau and bros. It follows therefore that he cannot speak factually about the said trust and can only speak from what he had been told, which is hearsay evidence and hence not admissible.
54. From the above analysis and based on the evidence adduced and weighing it on a balance of probabilities, the Court finds and holds that customary trust subsists on the suit land in favor of the Plaintiff herein. Paul Ngugi Kamau was holding the suit land in trust for his own behalf and his siblings, the Plaintiff herein included.

**Whether the 2<sup>nd</sup> Defendant is a bonafide Purchaser for value without notice.**

55. The 2<sup>nd</sup> Defendant bought the suit land from the 1<sup>st</sup> Defendant and has attached evidence to support his claim. The 1<sup>st</sup> Defendant on the other had led evidence that he acquired the suit land from the estate of Rebecca Njeri, having been a beneficiary of it under Nairobi Succession Cause 754 of 2008.



56. A bonafide purchaser has been defined by the Court in the case of *Lawrence Mukiri v Attorney General & 4 Others* [2013] eKLR as

“... a bona fide purchaser for value is a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine, he must prove the following:

- a. He holds a certificate of Title.
- b. He purchased the Property in good faith;
- c. He had no knowledge of the fraud;
- d. The vendors had apparent valid title;
- e. He purchased without notice of any fraud;”

57. Further in Uganda case of *Katende v Haridar & Company Limited* [2008] 2 E.A.173 as quoted by the Court of Appeal in *Nakuru CoA App No. 291 of 2013 Weston Gitonga & 10 others v Peter Rugu Gikanga & another* [2017] eKLR where the former held:

“For the purposes of this appeal, it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine, (he) must prove that:

- (a) He holds a certificate of title;
- (b) He purchased the property in good faith;
- (c) He had no knowledge of the fraud;
- (d) He purchased for valuable consideration;
- (e) The vendors had apparent valid title;
- (f) He purchased without notice of any fraud;
- (g) He was not party to any fraud.”

59. The 2<sup>nd</sup> Defendant produced exhibits including an Agreement for Sale dated 15<sup>th</sup> October 2013, and a registration of transfer via a letter dated 20<sup>th</sup> March 2015. There was no evidence that 2<sup>nd</sup> Defendant purchased the suit property in bad faith and with knowledge of irregularity and/ or illegality if any. The 2<sup>nd</sup> Defendant gave testimony on how he bought land from the 1<sup>st</sup> Defendant, and that prior to the said purchase, he conducted due diligence and established the suit land was owned by the Vendors.

59. Further, 2<sup>nd</sup> Defendant told the Court that before buying the property, he visited the said suit property to view the property and confirm boundaries before conducting a search, which showed the land belonged to the 1<sup>st</sup> Defendant, Ruth Nyambura Muturi and John Muchina Ngugi. The 1<sup>st</sup> Defendant has corroborated the evidence of the 2<sup>nd</sup> Defendant and confirmed that they indeed received the purchase price. Having conducted a search and obtained evidence of ownership, it would be difficult for a reasonable person to infer irregularities by looking at the document.



60. The Court of Appeal in civil Appeal No. 156 of 123 [\*Elizabeth Wambui Githinji & 29 others v Kenya Urban Roads Authority & 4 others\*](#) [2019] eKLR held

“It was not their duty to ensure the accuracy of the information contained in the register. They fully relied on the information contained in the register before committing themselves as they did beyond recall”.

61. This Court has no reason to doubt the testimony of the 2<sup>nd</sup> Defendant to the extent that he bought property based on the evidence of the register.
62. This Court therefore finds and holds that the 2<sup>nd</sup> Defendant meets the above criteria for establishing a bona fide purchaser for value without notice and finds him so.

### **Whether the 1<sup>st</sup> Defendant had a good title to pass to the 2<sup>nd</sup> Defendant**

63. This Court has already found that the Plaintiff has proved on a balance of probability the existence of an overriding interest of customary trust over the suit property. It follows therefore that the said suit land could not have been included as part of the estate of Paul Kamau Ngugi and subsequently in the estate of Rebecca Njeri.
64. Having found that the suit land was irregularly included in both estates of Paul Kamau Ngugi and Rebecca Njeri, this Court finds no difficulty to conclude that the 1<sup>st</sup> Defendant did not have a good title to pass to the 2<sup>nd</sup> Defendant. Although, Courts have occasionally found that if it is established that parties bought land in good faith without knowledge of fraud and/ or irregularity, title can pass, this is an ancestral land held in trust by Paul Kamau Ngugi and therefore 1<sup>st</sup> Defendant could not pass a good title.
65. Article 40 of [\*the Constitution\*](#) provides for the protection of the right to property and forbids any person from arbitrarily depriving a person of his or her property.
66. In [\*Charles Karatbe Kiarie & 2 others v Administrators of the Estate of John Wallace Mathare \(Deceased\) & 5 others\*](#) [2013] eKLR the Court held:

“We have taken this long route in order to explain that it has always been the law under the Registration of Titles Act and based on the Torrens system, that the title of a bona fide purchaser for value and without notice of fraud could not be impeached. This is what the judges in the Uganda case of *Lwanga V. Registrar of Titles*, Misc. Cause No. 7A of 1977 (1980) HCB 24, called the paradox of registered conveyancing – that the registration obtained by fraud was void and yet capable of becoming a good root of title to a bona fide purchaser for value. Because of the seriousness of allegation of fraud, a criminal act, the burden of proof is on the party who alleges it and the standard of proof is more than a mere balance of probabilities. Fraud, for that reason, is treated as matter of evidence”.

67. Similarly, the Court of Appeal in Civil Appeal No. 156 of 123 [\*Elizabeth Wambui Githinji & 29 others Vs Kenya Urban Roads Authority & 4 others\*](#) [2019] eKLR held;

“Under that system, the title of a bona fide purchaser for value without notice of fraud cannot be impeached; that the land register must mirror all currently active registrable interests that affect a particular parcel of land; that the Government, as the keeper of the master record of all land in Kenya and their owners, guarantees indefeasibility of all rights and interests



shown in the land register against the entire world; and that in case of loss arising from an error in registration, the Government guarantees the person affected of compensation”

68. Although there was no evidence of fraud on the part of the 2<sup>nd</sup> Defendant, the Court finds that the 1<sup>st</sup> Defendant did not have a good title due to irregularity and illegality in his registration. The 1<sup>st</sup> Defendant could therefore not pass a good title to the 2<sup>nd</sup> Defendant.
69. Having find that the 2<sup>nd</sup> Defendant though an innocent purchaser did not acquire a good title, his certificate of title is a candidate of cancellation.

#### **Whether 2<sup>nd</sup> Defendant’s title should be cancelled**

70. A certificate of title is conclusive evidence of ownership and is prima facie evidence that the registered proprietor is the owner. Whereas section 24 of the [Land Registration Act](#) gives the registered proprietor absolute rights over land, section 26 gives sanctity to title and makes provisions when such title can be cancelled or revoked. Cancellation maybe by a Court Order as provided under section 80 of the [Land Registration Act](#) or by an order of Land Registrar as provided by section 79 of the same Act. The said Section 80, provides;-

- “(1) Subject to subsection (2), the Court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.
- (2) The register shall not be rectified to affect the title of a proprietor, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.

71. Rectification by Court concerns one that goes to the cancellation or amendments of title, circumstances of which are provided above. This Court agrees with the sentiments of the Court in Kisumu Misc No. 80 of 2008 [Republic v Kisumu District Lands Officer & another](#) [2010] eKLR where the Court held;

“it is clear that it is only the Court that can cancel or amend if where the Court is of the view that registration has been obtained, made or omitted through fraud or mistake and only where it is not a first registration”.

72. Similarly the Court of Appeal in Mombasa Appeal No. 98 of 2016 [Super Nova Properties Limited & another v District Land Registrar Mombasa & 2 others; Kenya Anti-Corruption Commission & 2 others \(Interested Parties\)](#) [2018] eKLR agreed with the trial Court that “The only institution with mandate to cancel a title to land on the basis of fraud or illegality is a Court of law”.
73. It is noteworthy that the effect of cancellation or revocation of title will have far reaching consequences. But since irregularity has been established it follows therefore that cancellation will issue. The upshot of the above is that this Court finds and holds that the 2<sup>nd</sup> Defendant’s title having been tainted with irregularity is ripe for cancellation and proceeds to cancel the same.

#### **Who should pay costs**

74. Section 27 of the [Civil Procedure Act](#) requires that costs to follow event but the Court have the discretion to rule otherwise. The Court in Machakos ELC Pet No. 6 of 2013 [Party of Independent](#)



*Candidate of Kenya & another v Mutula Kilonzo & 2 others* [2013] eKLR quoted the case of *Levben Products v Alexander Films (SA) (PTY Ltd 1957 (4) SA 225 (SR)* at 227 held:

“It is clear from authorities that the fundamental principle underlying the award of costs is two-fold. In the first place the award of costs is matter in which the trial Judge is given discretion (*Frippus Gibbon & Co.*, 1913 AD D 354). But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could have come to the conclusion arrived at....In the second place the general rule that costs should be awarded to the successful party, a rule which should not be departed from without the exercise of good grounds for doing so.”

75. This Court notes the circumstances that led to the finding of this Court and shall exercise the discretion and direct that each party shall bear its own costs to the suit.
76. Having now carefully considered the available evidence, the Court finds that the Plaintiff herein has proved his case on the required standard of balance of probabilities. For the above reasons, the Court enters Judgement for the Plaintiff against the Defendants herein Jointly and Severally as prayed in the Plaint in terms of Prayers No. (a) (b) (c) (d) & (e).
77. Further, the Court directs that the **Customary Trust** herein be dissolved and the suit property should be shared equally among the brothers as represented by the three houses and/or their heirs.

Each party to bear his own costs.

**It is so ordered.**

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 23RD DAY OF JUNE, 2022.**

**L. GACHERU**

**JUDGE**

In the presence of; -

Joel Njonjo - Court Assistant

Plaintiff – Absent

Defendants – Absent

**L. GACHERU**

**JUDGE**

