



**Ruingi & another (Suing on their own behalf and on behalf of Kenneth Wagatu Kimani, Simon Kagece Kimani, Peter Gichuri, Susan Waceke and Teresia Wanjiku) v Waruingi & 4 others (Environment and Land Case Civil Suit 570 of 2011) [2022] KEELC 14742 (KLR) (10 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 14742 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND CASE CIVIL SUIT 570 OF 2011  
SO OKONG'O, J  
NOVEMBER 10, 2022**

**BETWEEN**

**MUTHONI KIMANI RUINGI ..... 1<sup>ST</sup> PLAINTIFF  
PETER GICHURI KIMANI ..... 2<sup>ND</sup> PLAINTIFF  
SUING ON THEIR OWN BEHALF AND ON BEHALF OF KENNETH WAGATU  
KIMANI, SIMON KAGECE KIMANI, PETER GICHURI, SUSAN WACEKE  
AND TERESIA WANJIKU**

**AND**

**FRANCIS KIMANI WARUINGI ..... 1<sup>ST</sup> DEFENDANT  
JOSPHAT NJENGA NJUGUNA ..... 2<sup>ND</sup> DEFENDANT  
JAMES WARUINGI KIMANI ..... 3<sup>RD</sup> DEFENDANT  
MATHARA HOLDINGS LIMITED ..... 4<sup>TH</sup> DEFENDANT  
SAMMY MUITA MUREITHI ..... 5<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. At all material times to this suit, the 1<sup>st</sup> plaintiff was the wife of the 1<sup>st</sup> defendant while the 2<sup>nd</sup> plaintiff, the 3<sup>rd</sup> defendant and the other persons on whose behalf the suit has been brought were the children of the 1<sup>st</sup> plaintiff and the 1<sup>st</sup> defendant. At all material times, the 1<sup>st</sup> Defendant was the registered proprietor of all that parcel of land known as Title No. Kiambaa/Waguthu/1207 measuring 0.60 hectares (hereinafter referred to as “the suit property”). The suit property is a subdivision of Title No. Kiambaa/Waguthu/727 (Title No. 727). Parcel No. 727 was owned by the 1<sup>st</sup> defendant’s father, Waruingi Gichuri.



2. The 1<sup>st</sup> defendant acquired the suit property from his father on 23<sup>rd</sup> January 1996 when his father distributed Title No. 727 which measured 5.56 hectares amongst his eight (8) sons. The 1<sup>st</sup> defendant settled on the suit property with his family. The 1<sup>st</sup> defendant's adult sons some of whom are the plaintiffs herein also put up their homes on the suit property.
3. The plaintiffs brought this suit on 21<sup>st</sup> October 2011 initially against the 1<sup>st</sup> and 2<sup>nd</sup> defendants only. The plaintiffs averred that the 1<sup>st</sup> defendant having inherited the suit property from his own father, the suit property was ancestral land and as such the 1<sup>st</sup> defendant held the same in trust for his entire family. The plaintiffs averred that the suit property was not the 1<sup>st</sup> defendant's personal property. The Plaintiff's averred that as a trustee of the suit property, the 1<sup>st</sup> defendant had no power or legal authority to dispose of the property without the consent of the beneficiaries of the trust which included the plaintiffs.
4. The plaintiffs averred that the 2<sup>nd</sup> Defendant acquired the suit property on or about 20<sup>th</sup> June 2011 from the 1<sup>st</sup> defendant without the knowledge, consent or authority from the plaintiffs. The plaintiffs averred that the acquisition of the suit property by the 2<sup>nd</sup> defendant from the 1<sup>st</sup> defendant was wrongful, illegal, irregular and fraudulent. The plaintiffs averred that the 2<sup>nd</sup> defendant did not get a good title to the suit property.
5. The plaintiffs averred that the 1<sup>st</sup> defendant's family have resided on the suit property throughout their life time and were still in occupation of the property as at the time of filing suit. The plaintiffs averred that after selling the suit property, the 1<sup>st</sup> defendant demolished the 1<sup>st</sup> plaintiffs house on the property and had been threatening to evict the plaintiffs and the other children of the 1<sup>st</sup> defendant with the 1<sup>st</sup> plaintiff from the suit property so that he could hand over possession of the suit property to the 2<sup>nd</sup> Defendant. The plaintiffs averred that they would suffer irreparable harm if the 1<sup>st</sup> defendant had his way. The plaintiffs sought several reliefs against the two defendants who were the only parties to the suit.
6. There were some developments on the suit property while this suit was pending hearing that necessitated amendment of the plaint on 17<sup>th</sup> June 2013. Together with the original plaint, the plaintiffs had filed an application for interlocutory injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> defendants from any further dealing with the suit property. On 27<sup>th</sup> October 2011, the court issued an order restraining the 2<sup>nd</sup> defendant from disposing of or interfering with the title of the suit property in any manner.
7. In their amended plaint dated 17<sup>th</sup> June 2013, the defendants averred that despite the existence of the said order, the 2<sup>nd</sup> defendant in defiance thereof proceeded to subdivide the suit property on 14<sup>th</sup> November 2011 into four portions namely; Titles Nos. Kiambaa/Waguthu/3429, 3430, 3431 and 3432. The plaintiffs averred that the 2<sup>nd</sup> defendant transferred Title No. Kiambaa/Waguthu/3432 to the 3<sup>rd</sup> defendant on 16<sup>th</sup> December 2011 and that on 10<sup>th</sup> January 2012, the 2<sup>nd</sup> defendant consolidated Titles Nos. Kiambaa/Waguthu/3429, 3430 and 3431 which consolidation gave rise to Title No. Kiambaa/Waguthu/3455. The plaintiffs averred that the 2<sup>nd</sup> defendant thereafter transferred Title No. Kiambaa/Waguthu/3455 to the 4<sup>th</sup> defendant on 13<sup>th</sup> February 2013.
8. The plaintiffs averred that the aforesaid actions by the 2<sup>nd</sup> defendant were unprocedural, illegal and fraudulent. The plaintiffs averred that the 2<sup>nd</sup> defendant was cited for contempt of court with regard to his dealings with the suit property subsequent to the issuance of the said order, found guilty and sentenced to pay a fine of Kshs. 500,000/- on 6<sup>th</sup> May 2013. He was also ordered to deposit in court a sum of Kshs. 4,500,000/- that he received from the 4<sup>th</sup> defendant as the purchase price for Title No. Kiambaa/Waguthu/3455.



9. The plaintiffs averred that after acquiring Title No. Kiambaa/Waguthu/3432 without consideration in collusion with the 2<sup>nd</sup> defendant to assist him in the eviction of the plaintiffs from the suit property, the 3<sup>rd</sup> defendant proceeded to transfer Title No. Kiambaa/Waguthu/3432 to the 5<sup>th</sup> defendant on 29<sup>th</sup> May 2012 after his attempt to evict the plaintiffs from the suit property through a fraudulently obtained court order failed.
10. In their amended plaint, the plaintiffs sought judgment against the defendants for among others;
- a. A declaration that the 1<sup>st</sup> defendant held the suit property in trust for his entire family and the plaintiffs in particular.
  - b. A declaration that the 2<sup>nd</sup> defendant acquired the suit property illegally, wrongfully, fraudulently and unprocedurally and that the title held by the 2<sup>nd</sup> defendant in respect of the suit property and the titles for the subsequent subdivisions and amalgamations namely; Titles Nos. Kiambaa/Waguthu/3429, 3430, 3431 and 3432 and Kiambaa/Waguthu/3455 and transfer thereof to the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants were illegal, null and void.
  - c. An order that the title for the suit property do revert to the name of the 1<sup>st</sup> defendant and that the same be registered in the name of the 1<sup>st</sup> defendant as holding the same in trust for the plaintiffs.
  - d. An injunction restraining the 1<sup>st</sup> defendant from disposing of and/or in any way interfering with the title of the suit property in a manner prejudicial to the interests of the plaintiff in the property.
  - e. An order for the 1<sup>st</sup> defendant to subdivide and transfer to the plaintiffs their proportionate respective portions of the suit property that they occupy and/or entitled to out of the suit property.
  - f. Costs of the suit.
11. I have not seen on record statements of defence if any filed by the 1<sup>st</sup> and 3<sup>rd</sup> defendants. The 2<sup>nd</sup> defendant filed a statement of defence on 1<sup>st</sup> July 2013 to the amended plaint. The 2<sup>nd</sup> defendant averred that he purchased the suit property from the 1<sup>st</sup> defendant who was the registered owner thereof and that the members of the 1<sup>st</sup> defendant's family consented to the sale. The 2<sup>nd</sup> defendant averred that the suit property was lawfully and procedurally transferred and registered in his name.
12. The 2<sup>nd</sup> defendant denied knowledge of any order that was issued by the court restraining him from dealing with the suit property. The 2<sup>nd</sup> defendant denied that the plaintiffs had any proprietary interest in the suit property and that the issue of customary trust could not arise as the property was registered in the name of the 1<sup>st</sup> defendant as the owner thereof. The 2<sup>nd</sup> defendant denied all the allegations of collusion and fraud made against him.
13. The 4<sup>th</sup> defendant filed its statement of defence on 29<sup>th</sup> July 2013. The 4<sup>th</sup> defendant admitted that it purchased Title No. Kiambaa/Waguthu/3455 from the 2<sup>nd</sup> defendant. The 4<sup>th</sup> defendant averred that it purchased the said property for valuable consideration without notice that the sale was being conducted by the 2<sup>nd</sup> defendant in breach of a court order. The 4<sup>th</sup> defendant averred that it was not a party to the illegalities, collusion and fraud that the 2<sup>nd</sup> defendant was said to have committed during the amalgamation of various parcels of land that gave rise to Title No. Kiambaa/Waguthu/3455.
14. The 4<sup>th</sup> defendant admitted that the 2<sup>nd</sup> defendant was cited for contempt, found guilty and sentenced to pay a fine in addition to being ordered to deposit in court the payment that he had received from the



- 4<sup>th</sup> defendant as the purchase price for Title No. Kiambaa/Waguthu/3455. The 4<sup>th</sup> defendant averred that it was a *bona fide* purchaser for value of Title No. Kiambaa/Waguthu/3455 without any notice of the defect in the title that was held by the 2<sup>nd</sup> defendant in respect of the said property.
15. The 5<sup>th</sup> defendant filed his defence on 5<sup>th</sup> July 2013. The 5<sup>th</sup> defendant averred that it acquired Title No. Kiambaa/Waguthu/3432 legally, regularly and procedurally from the 3<sup>rd</sup> defendant. The 5<sup>th</sup> defendant averred that he was not aware that the property was a subject of an ongoing court case. The 5<sup>th</sup> defendant averred that the 3<sup>rd</sup> defendant was a beneficiary of the suit property and that it was his share in the property that was transferred to him and subsequently to the 5<sup>th</sup> defendant. The 5<sup>th</sup> defendant denied that the transfer of Title No. Kiambaa/Waguthu/3432 to him was illegal and unlawful.
  16. The 5<sup>th</sup> defendant denied that he was involved in fraud and collusion in the acquisition of Title No. Kiambaa/Waguthu/3432. The 5<sup>th</sup> defendant averred that he purchased the property from the 3<sup>rd</sup> defendant at Kshs. 900,000/- of which he paid Kshs. 301,000/- and the balance of Kshs. 599,000/- was to be paid upon the 3<sup>rd</sup> defendant delivering vacant possession of the property.
  17. At the trial, the 1<sup>st</sup> plaintiff gave evidence as PW1. PW1 adopted her witness statement dated 19<sup>th</sup> October 2011 as part of her evidence in chief. PW1 stated that the 1<sup>st</sup> defendant sold the suit property without her consent and that she had registered a caution on the title of the property. PW1 produced the documents attached to the plaintiffs' list of documents dated 19<sup>th</sup> October 2001 and supplementary list of documents dated 17<sup>th</sup> June 2013 as PEXH. 1 and PEXH. 2 respectively.
  18. PW1 stated that she had kept the original title deed for the suit property and still had it as at the time of giving evidence. PW1 stated that the title deed was not lost as the 1<sup>st</sup> defendant had claimed. PW1 stated that it was her children and she who were living on the suit property and that although the suit property was alleged to have been subdivided and sold to the other defendants by the 1<sup>st</sup> defendant, no one had come to the ground. PW1 stated that the suit property belonged to her and her children.
  19. PW1 stated that the 3<sup>rd</sup> defendant was not staying on the suit property. She stated that the 1<sup>st</sup> defendant gave him a piece of land that he sold and moved out of the suit property. She stated that she was not involved in the transaction.
  20. In cross-examination, PW1 stated that she was in occupation of the suit property as at the time the property was sold by the 1<sup>st</sup> defendant to the 2<sup>nd</sup> defendant. PW1 stated further that the suit property was initially owned by the 1<sup>st</sup> defendant's father and that after it was transferred to the 1<sup>st</sup> defendant, the 1<sup>st</sup> defendant held it in trust for his family. PW1 stated that the caution that she registered against the title of the suit property was removed by the 1<sup>st</sup> defendant. PW1 stated that the 4<sup>th</sup> defendant had attempted to evict them from the suit property.
  21. The 2<sup>nd</sup> plaintiff gave evidence as PW2. PW2 adopted his witness statement as part of his evidence in chief. PW2 told the court that they had occupied the suit property for a long time and that one day the 2<sup>nd</sup> defendant came to the property and claimed that he had purchased the suit property. PW2 stated that the 2<sup>nd</sup> defendant told them that he had already paid Kshs. 100,000/- to the 1<sup>st</sup> defendant for the property. PW2 stated that they offered to refund to the 2<sup>nd</sup> defendant the said sum of Kshs. 100,000/- but he declined the offer.
  22. He stated that they then decided to file the present suit. He stated that the suit property was subsequently transferred to the 4<sup>th</sup> and 5<sup>th</sup> defendants. He stated that they were not involved in the sale of the suit property and were not even summoned to appear before the Land Control Board to give their consent.



23. On cross-examination, PW2 stated that the 2<sup>nd</sup> defendant was their neighbor for a long time and as such he was known to him. PW2 stated that the 1<sup>st</sup> plaintiff and the 1<sup>st</sup> defendant were his mother and father respectively while the 3<sup>rd</sup> defendant was his brother. He stated that the suit property was ancestral land although registered in the name of the 1<sup>st</sup> defendant. He stated that they were residing on the suit property and had nowhere to go if the land was sold. He stated that the 1<sup>st</sup> defendant left the suit property after selling the same and that the 3<sup>rd</sup> defendant was also not residing on the property.
24. PW2 stated further that when he obtained documents regarding the sale of the suit property by the 1<sup>st</sup> defendant to the 2<sup>nd</sup> defendant, he took them to one James Karugu who was a neighbor and a director of the 4<sup>th</sup> defendant and who is a former Attorney General of Kenya for advice. He stated that it was the 4<sup>th</sup> defendant's said director who advised him to file a suit. He stated that he did not know when the 4<sup>th</sup> defendant purchased a portion of the suit property. He stated that he had shown the said director of the 4<sup>th</sup> defendant a copy of the first order that was issued by the court herein. He stated that the 4<sup>th</sup> defendant through its said director was aware of their complaint against the sale of the suit property.
25. PW2 stated that he was born in 1983 on the suit property where they lived as a family with his mother, father and his siblings. PW2 admitted that the suit property was registered in the sole name of the 1<sup>st</sup> defendant and that it was not indicated in the register that the 1<sup>st</sup> defendant held the same in trust for his family. He reiterated that the 1<sup>st</sup> defendant left the suit property in 2007 after selling the same and had not come back.
26. On examination by the court, PW2 stated that a part from the suit property, the 1<sup>st</sup> defendant had no other parcel of land. PW2 stated further that a part from the 3<sup>rd</sup> defendant all his brothers were staying on the suit property. He stated that as at the time the suit property was sold by the 1<sup>st</sup> defendant, he(PW2) was married and had a house on the suit property.
27. The 2<sup>nd</sup> defendant was the first to give evidence after the close of the plaintiffs' case. He gave evidence as DW1. He told the court that he was a land developer. He adopted his witness statement filed in court on 29<sup>th</sup> May 2015 as part of his evidence in chief and produced the documents attached to his list of documents as DEXH.1. He stated that he purchased the suit property from the 1<sup>st</sup> defendant at Kshs. 1,000,000/- and the same was transferred to his name after the 1<sup>st</sup> defendant had obtained consent of the Land Control Board. He stated that he thereafter subdivided the suit property into 4 portions one of which he transferred to the 3<sup>rd</sup> defendant at the request of the 1<sup>st</sup> defendant. He stated that at the request of James Karugu, he amalgamated the remaining three portions and sold the same to the 4<sup>th</sup> defendant at Kshs. 4,500,000/-. He stated that he deposited the said sum of Kshs. 4,500,000/- in court following a court order requiring him to do so. He stated that he was not interested in the suit property and that what he was seeking was a refund of the sum of Kshs. 1,000,000/- that he paid to the 1<sup>st</sup> defendant for the suit property. He stated that the 4<sup>th</sup> defendant was at liberty to collect from the court the said sum of Kshs. 4,500,000/- that he deposited in court.
28. In cross-examination, DW1 stated that before purchasing the suit property, he owned a parcel of land adjacent to it. He stated that James Karugu was also staying in the neighbourhood. He stated that he asked James Karugu whether he was interested in the suit property and he responded in the affirmative. He stated that it was after that that he sold a portion of the suit property that was already registered in his name to the 4<sup>th</sup> defendant.
29. He stated further that when purchasing the suit property, he went to the property with the 1<sup>st</sup> defendant who told him that his house had been burnt down. He stated that he saw the 1<sup>st</sup> defendant's



- children on the suit property but he did not bother with them. He stated that he had no objection to the court releasing the sum of Kshs. 4,500,000/- that he deposited in court to the 4<sup>th</sup> defendant.
30. DW1 stated further that he had known the 1<sup>st</sup> defendant for a very long time and that they were in school together. He stated that he knew that the 1<sup>st</sup> defendant had a family and that the family was living on the suit property. He admitted that the 1<sup>st</sup> defendant's family was not involved in the sale of the suit property and that they did not attend the Land Control Board meeting at which consent to sell the suit property was issued. DW1 admitted that he was found in contempt of court for subdividing and selling out portions of the suit property and that he paid a fine. He stated that since the 1<sup>st</sup> defendant had agreed to refund to him the purchase price that he paid for the suit property, he was willing to take the refund. He stated that he came to learn later that a caution had been registered against the title of the suit property. He stated that the agreement he entered into with the 1<sup>st</sup> defendant was dated 1<sup>st</sup> January 2011 while the caution on the property was removed on 6<sup>th</sup> April 2011. He stated that there was no evidence that a provisional title was issued to the 1<sup>st</sup> defendant before the suit property was transferred to him.
  31. Since the 1<sup>st</sup> and 3<sup>rd</sup> defendants neither entered appearance nor filed a defence, they did not give evidence at the trial. The next witness was Victoria Karugu(DW2). She told the court that she was a director of the 4<sup>th</sup> defendant. She adopted her witness statement dated 24<sup>th</sup> September 2021 as her evidence in chief and produced the 4<sup>th</sup> defendant's bundle of documents dated 29<sup>th</sup> July 2013 as DEXH. 2.
  32. On cross-examination, DW2 stated that the 4<sup>th</sup> defendant had not been given possession of the suit property. She stated that the portion of the suit property that was purchased by the 4<sup>th</sup> defendant was vacant. She stated that she had never met the plaintiffs and did not know who occupies which portion of the property. She stated that she was a daughter of James Karugu and that Karugu's residence was not far from the suit property. PW2 stated that the 4<sup>th</sup> defendant was willing to surrender the Title for Kiambaa/Waguthu/3455 on certain conditions.
  33. The last to give evidence was the 5<sup>th</sup> defendant, Sammy Mwita Mureithi(DW3). DW3 adopted his witness statement filed in court on 5<sup>th</sup> July 2013 as part of his evidence in chief. He stated that he purchased Title No. Kiambaa/Waguthu/3432 from the 3<sup>rd</sup> defendant at a consideration of Kshs. 900,000/- which was the open market price for the property. He stated that a search that he conducted at the time of purchasing the suit property showed that the same was registered in the name of the 3<sup>rd</sup> defendant.
  34. He stated that when he was purchasing the suit property in 2012, he was not aware that this suit had been filed and was pending in court. He stated that he owned another parcel of land in the neighbourhood of the suit property that he purchased at the same time when purchasing the suit property. DW3 produced his bundle of documents dated 5<sup>th</sup> July 2013 as DEXH.3.
  35. On cross-examination, DW3 admitted that it was a condition of the agreement that he entered into with the 3<sup>rd</sup> defendant that the 3<sup>rd</sup> defendant was to remove all semi-permanent structures that were standing on Title No. Kiambaa/Waguthu/3432. He stated that when he visited the said property when purchasing the same, there were about 3 to 4 houses thereon. He stated that he could not remember the occupants of the houses. He stated that he was not privy to the Kiambu case where the 3<sup>rd</sup> defendant was the plaintiff. He stated that when he went to the suit property, he did not venture inside. He stated that he did not care to find out who was in occupation of the houses on the property. He stated that he thought that the 3<sup>rd</sup> defendant was the occupant of the said houses. He stated that he paid the balance of the purchase price despite the fact that he was not granted vacant possession.



36. On examination by the court, DW3 stated that he had not occupied the suit property and that he was served with a court order. DW3 stated further that he assumed that it was the 3<sup>rd</sup> defendant who was occupying the suit property. He stated that he paid the balance of the purchase price in 2013.
37. After the close of evidence, the court directed the parties to make closing submissions in writing. The plaintiffs filed their submissions dated 27<sup>th</sup> January 2022. The 4<sup>th</sup> defendant filed its submissions dated 14<sup>th</sup> March 2022 while the 5<sup>th</sup> defendant filed his submissions dated 14<sup>th</sup> February 2022. The other defendants did not file submissions.
38. The plaintiff framed a total of seven issues for determination on which he submitted on. On whether the 1<sup>st</sup> defendant held the suit property in trust for the plaintiffs, the plaintiffs submitted that they had placed sufficient evidence before the court in proof of the trust. The plaintiffs submitted that they had proved that the suit property was acquired by the 1<sup>st</sup> defendant from his father, Waruingi Gichure who was the 1<sup>st</sup> plaintiff's father in law and the grandfather of the other plaintiffs. The plaintiffs submitted that their rights as beneficiaries of a customary trust was recognized under section 30(g) and 28 of the Registered Land Act, Chapter 300 Laws of Kenya (now repealed). The plaintiffs cited several authorities in support of this submission notable ones being; the Court of Appeal case of Mbui v Mukangu Mutwiri Mbui, C.A No. 281 of 2000, where the court stated that customary trust is a concept of intergenerational equity where the land is held by one generation for the benefit of succeeding generations and that possession and occupation were necessary elements of customary trust. The plaintiffs also cited Isack M'Kiebia v Isaaya Theuri M'lintari & another [2018]eKLR where the Supreme Court clarified the law on customary trusts and stated that customary trusts fall within the ambit of Section 28 of the Registered Land Act while the rights of a person in possession or actual occupation were overriding interests and fall within the ambit of Section 30(g) of the Registered Land Act. The court further confirmed the holding by the High Court and the Court of Appeal that to prove the existence of a trust in land, one does not need to be in actual physical possession and occupation of the land.
39. On whether the 2<sup>nd</sup> defendant acquired the suit property illegally, unprocedurally and fraudulently, the plaintiffs submitted that the 1<sup>st</sup> plaintiff registered two cautions against the title of the suit property and that both were removed without her knowledge and without a notice from the land registrar as required by law. The plaintiffs submitted further that the suit property was transferred to the 2<sup>nd</sup> defendant without the original title deed that was in the 1<sup>st</sup> plaintiff's possession and remains in her possession. The plaintiffs submitted that no evidence was placed before the court that any provisional title was issued to the 1<sup>st</sup> defendant.
40. The plaintiffs submitted further that the 2<sup>nd</sup> defendant was aware that the 1<sup>st</sup> defendant did not have the original title deed. The plaintiffs submitted that it was illegal for the 2<sup>nd</sup> defendant to cause the suit property to be registered in his name without surrendering to the land registrar the original title in the name of the 1<sup>st</sup> defendant. The plaintiffs submitted that the purported application for a provisional title by the 1<sup>st</sup> defendant was fraudulent since the 1<sup>st</sup> defendant was aware that the original title for the suit property was with the 1<sup>st</sup> plaintiff. The plaintiffs submitted that the title that was issued to the 2<sup>nd</sup> defendant was a nullity the same having been issued unprocedurally and on the basis of a consent of the Land Control Board that was issued without giving them a hearing. The plaintiffs submitted that the 2<sup>nd</sup> defendant owned up to the irregularities in his acquisition of the suit property in his evidence and agreed to surrender the suit property and refund the money that he received from the 4<sup>th</sup> defendant.
41. On the validity of the subsequent subdivision of the suit property, amalgamation of some of the portions thereof and transfer of the same to the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants, the plaintiffs submitted



that having established that the 2<sup>nd</sup> defendant did not have a valid title to the suit property, all his dealings with the property were null and void. The plaintiffs submitted that all those dealings should be cancelled and the title of the property restored to the 1<sup>st</sup> defendant as a trustee of the same on behalf of the plaintiffs. The plaintiffs submitted that the 4<sup>th</sup> defendant was aware that the 2<sup>nd</sup> defendant held an invalid title since its director lived in the neighbourhood of the suit property and knew that the plaintiffs were in occupation of the suit property. The plaintiff submitted that the 4<sup>th</sup> defendant's said director was also informed of the illegal sale of the suit property by the 1<sup>st</sup> defendant to the 2<sup>nd</sup> defendant and that he was the one who advised the plaintiffs to challenge the sale in court. The plaintiffs submitted that the 4<sup>th</sup> defendant was not an innocent purchaser of the suit property. The plaintiffs submitted that the 4<sup>th</sup> defendant had even admitted that the transaction that he entered into with the 2<sup>nd</sup> defendant was a nullity. The plaintiffs submitted that the 4<sup>th</sup> defendant also admitted that it came to learn that the 2<sup>nd</sup> defendant transferred the portions of the suit property to it in breach of a court order. The plaintiffs submitted that the 4<sup>th</sup> defendant can recover the purchase price that it paid to the 2<sup>nd</sup> defendant that was deposited in court.

42. The plaintiffs submitted that the 3<sup>rd</sup> defendant did not defend the suit despite service. The plaintiffs submitted that the 3<sup>rd</sup> defendant did not explain the circumstances under which a portion of the suit property was transferred to him by the 2<sup>nd</sup> defendant. The plaintiffs submitted that the transfer of a portion of the suit property to the 3<sup>rd</sup> defendant was illegal. With regard to the 5<sup>th</sup> defendant, the plaintiffs submitted that while purchasing a portion of the suit property from the 3<sup>rd</sup> defendant, he was aware that the property was occupied but he did not bother to find out those who were in occupation. The plaintiffs submitted that the 5<sup>th</sup> defendant whom according to the agreement for sale was to pay the balance of the purchase price upon getting vacant possession claimed to have paid the same before possession was granted and while this suit was pending. The plaintiffs submitted that the 5<sup>th</sup> defendant was part of the fraudulent scheme to dispossess the plaintiffs of the suit property. The plaintiffs submitted that since the 3<sup>rd</sup> defendant had no valid title to the portion of the suit property that was transferred to him by the 2<sup>nd</sup> defendant, he had no title to transfer to the 5<sup>th</sup> defendant. On the contention that the 5<sup>th</sup> defendant was an innocent purchaser of the suit property, the plaintiff cited [\*Godfrey Gitbinji Kamiri v Attorney General & 4 others\*](#) [2019] eKLR in which the court cited [\*Chemey Investment Ltd. v A.G & 2 others\*](#) [2018] eKLR where the Court of Appeal stated as follows:

“We have noted that the Ekima Junior Academy never took possession of the suit property. It therefore means that when the appellant purported to purchase the same, the suit property was in the same condition it was when it was initially allocated, namely in use for public purposes. We ask ourselves, which innocent purchaser, without notice, would accept to purchase a property that is being used for public purposes, just next to the provincial headquarters and the law courts, without any form of inquiry”. As this court stated in *Arthi Highway Developers Limited v West End Butchery Limited & 6 others* (supra), only a foolhardy, and we may add, a careless or fraudulent investor would purchase land such as the suit property “with the alacrity of a potato dealer in Wakulima Market”. And further in *Flemish Investments Ltd v Town council of Mariakani*. CA No. 30 of 2015, in an appeal where the appellant who had fraudulently obtained registration of public property in his name but claimed to be an innocent purchaser for value without notice, this court stated:-

A *bona fide* purchaser exercising due diligence would be expected to inspect the property he is buying, to ascertain its physical location, person, if any, in occupation, developments, buildings and fixtures thereon, among others. If indeed the appellant honestly believed that plot no. 34 and the cattle dip on it were part of the suit property, he would have rehabilitated



the cattle dip as his property, or simply demolished it, not to pester the respondent for its relocation. For a party who was buying a commercial property rather than a ranch, the presence of a cattle dip on the property should have rang alarm bells”.

43. The plaintiffs submitted that they had made out a case for the cancellation of the titles for the portions of the suit property that were transferred to the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants. The plaintiffs submitted further that they had made out a case for the injunction sought against the 1<sup>st</sup> defendant from interfering with the title of the suit property in any manner prejudicial to the plaintiffs. The plaintiffs submitted that they had established that the 1<sup>st</sup> defendant was unreliable person and that he was ill bent in disinheriting them of the ancestral land.
44. The plaintiffs submitted further that they had established that the 1<sup>st</sup> defendant had acted in breach of trust in relation to the suit property that he was to hold on behalf of the family. The plaintiffs submitted that the 1<sup>st</sup> defendant having breached the trust in which he held the suit property, it was desirable that the trust be determined so that the plaintiffs could get their entitlement in the ancestral land. In support of this submission, the plaintiffs cited *Loise Kanyokora Warui v Gladys Njeri Muriuki* [2021]eKLR.
45. In its submissions, the 4<sup>th</sup> defendant similarly framed several issues for determination. The 4<sup>th</sup> defendant opened its submissions by citing *Jemutai Tanui v Juliana Jeptepkeny & 5 others* [2013]eKLR where the court held that there was no law that says that where a parent holds land then he holds the same as a trustee for any children that he/she has. On the issue of trust, the 4<sup>th</sup> defendant submitted that the 1<sup>st</sup> defendant did not hold the suit property in trust for the plaintiffs. The 4<sup>th</sup> defendant submitted that the suit property was a portion of Title No. Kiambaa/Waguthu/727 (Title No. 727) that the 1<sup>st</sup> defendant acquired from his father Waruinge Gichure. The 4<sup>th</sup> defendant submitted that Waruinge Gichure was registered as the owner of Title No. 727 on 13<sup>th</sup> April 1992 and that he held the property absolutely and not in trust for anyone. The 4<sup>th</sup> defendant submitted that Waruinge Gichure was free to deal with Title No. 727 and that he chose to subdivide the same and to transfer portions thereof to his children one of whom was the 1<sup>st</sup> defendant who received the suit property. The 4<sup>th</sup> defendant submitted that while transferring the suit property to the 1<sup>st</sup> defendant, Waruinge Gichure did not impose any condition as to how the 1<sup>st</sup> defendant was to deal with the suit property. The 4<sup>th</sup> defendant submitted that the title held by the 1<sup>st</sup> defendant did not indicate that he held the property in trust.
46. The 4<sup>th</sup> defendant submitted that the plaintiffs did not prove that prior to the registration of Title No. 727 in the name of the 1<sup>st</sup> defendant’s father, the land was ancestral land and as such he held the same under customary trust. The 4<sup>th</sup> defendant submitted that Wauruinge Gichure may have purchased the property. The 4<sup>th</sup> defendant submitted further that there was also no evidence that before the registration of the suit property in the name of the 1<sup>st</sup> defendant, customary or traditional rites were being performed on the land or that the land was reserved for future generations. The 4<sup>th</sup> defendant submitted that the suit property was not at any point in time held in trust by the 1<sup>st</sup> defendant for the benefit of the plaintiffs.
47. On the issue as to whether the 2<sup>nd</sup> defendant acquired a valid title from the 1<sup>st</sup> defendant and whether the 4<sup>th</sup> defendant was a bona fide purchaser of a portion of the suit property for value from the 2<sup>nd</sup> defendant, the 4<sup>th</sup> defendant submitted that that was the case. The 4<sup>th</sup> defendant submitted that since there was no overriding interest burdening the suit property, the 1<sup>st</sup> defendant held an absolute and indefeasible title in respect thereof and as such he was within his right to deal with the property as he pleased. The 4<sup>th</sup> defendant submitted that there was no evidence that the 2<sup>nd</sup> defendant acquired the suit property illegally or fraudulently. The 4<sup>th</sup> defendant submitted that no element of fraud or irregularity in the acquisition of the suit property was proved against the 2<sup>nd</sup> defendant and as such the



- 2<sup>nd</sup> defendant acquired a good title from the 1<sup>st</sup> defendant which he transferred to the 4<sup>th</sup> defendant upon subdivision and amalgamation of portions of the suit property.
48. The 4<sup>th</sup> defendant submitted further that he was a bona fide purchaser of a portion of the suit property for value without notice of any defect in the title that was held by the 2<sup>nd</sup> defendant. The 4<sup>th</sup> defendant submitted that when it purchased the suit property from the 2<sup>nd</sup> defendant on 11<sup>th</sup> January 2012, it was not aware of the existence of this suit and was not notified of the same by the 2<sup>nd</sup> defendant. The 4<sup>th</sup> defendant submitted that it was until it was joined in the suit on 3<sup>rd</sup> September 2012 that he became aware of the plaintiffs' claim over the suit property. The 4<sup>th</sup> defendant submitted that it had an absolute and indefeasible title over the portion of the suit property registered in its name and that its title was protected by law. The 4<sup>th</sup> defendant submitted that no fraud or any other illegality had been proved against it that could result in the cancellation of its title.
49. On whether the plaintiffs were entitled to the orders sought, the 4<sup>th</sup> defendant submitted that they were not. The 4<sup>th</sup> defendant submitted that having established that the suit property was not held in trust for the plaintiffs, there was no basis upon which the orders sought by the plaintiffs could be granted.
50. The 4<sup>th</sup> defendant submitted that in the event that the court found for the plaintiffs, its claim against co-defendant (2<sup>nd</sup> defendant) dated 29<sup>th</sup> July 2013 brought pursuant to Order 1 rule 24 of the [Civil Procedure Rules](#) should be allowed. The 4<sup>th</sup> defendant submitted that the 2<sup>nd</sup> defendant should be held liable for breach of warranties that he had given in the agreement for sale between him and the 4<sup>th</sup> defendant and for misrepresentation to the 4<sup>th</sup> defendant that he was the legal and beneficial owner of the portion of the suit property known as Title No. Kiambaa/Waguthu/3455. The 4<sup>th</sup> defendant submitted that it was entitled to judgment for the purchase price in the sum of Kshs. 4,500,000/- paid to the 2<sup>nd</sup> defendant for Title No. Kiambaa/Waguthu/3455, the appreciated value of the property upon valuation and a sum of Kshs. 150,940/- being stamp duty and costs incurred in the transfer of the property together with costs.
51. The 5<sup>th</sup> defendant in his submissions submitted that he was a bona fide purchaser for value without notice of the irregularities, illegalities and fraud in the title that was held by the 3<sup>rd</sup> defendant in respect of the portion of the suit property known as Title No. Kiambaa/Waguthu/3432. The 5<sup>th</sup> defendant submitted that he became aware of this suit in 2013 when he was added as a party to this suit that the plaintiffs had filed in 2011. The 5<sup>th</sup> defendant submitted that before purchasing the property, he conducted a search as part of due diligence that showed that the 3<sup>rd</sup> defendant was the registered owner of the said portion of the suit property. The 5<sup>th</sup> defendant submitted that the allegations of fraud pleaded against him were not proved. The 5<sup>th</sup> defendant submitted further that being a *bona fide* purchaser for value, his title to the suit property was absolute and indefeasible. The 5<sup>th</sup> defendant submitted that no valid grounds had been put forward to warrant the cancellation of his title. The 5<sup>th</sup> defendant submitted that he paid the balance of the purchase price while this suit was pending because he did not want to be accused of breaching the sale agreement with the 3<sup>rd</sup> defendant. The 5<sup>th</sup> defendant urged the court to find that he was a *bona fide* purchaser of Title No. Kiambaa/Waguthu/3432 for valuable consideration without notice of any defect in the title and to dismiss the plaintiffs' suit with costs.
52. The 5<sup>th</sup> defendant submitted in conclusion that if the court found that he was not a *bona fide* purchaser of the said property and that the plaintiffs had proved their case against him, the court should order the 3<sup>rd</sup> defendant to indemnify him in respect of all the payments that he made in relation to the property together with interest.



53. I have considered the pleadings by the parties, the evidence tendered and the closing submissions. The following in my view are the issues arising for determination in this suit;
- a. Whether the 1<sup>st</sup> defendant held the suit property in trust for the plaintiffs.
  - b. Whether the transfer of the suit property by the 1<sup>st</sup> defendant to the 2<sup>nd</sup> defendant was lawful.
  - c. Whether the subdivision of the suit property by the 2<sup>nd</sup> defendant into four portions was lawful.
  - d. Whether the transfer of one of the portions of the suit property to the 3<sup>rd</sup> defendant was lawful.
  - e. Whether the consolidation of the three portions of the suit property and the transfer thereof to the 4<sup>th</sup> defendant was lawful.
  - f. Whether the subsequent transfer of the portion of the suit property that was transferred to the 3<sup>rd</sup> defendant to the 5<sup>th</sup> defendant was lawful.
  - g. Whether the 4<sup>th</sup> defendant holds a valid title in respect of Title No. Kiambaa/Waguthu/3455.
  - h. Whether the 5<sup>th</sup> defendant holds a valid title in respect of Title No. Kiambaa/Waguthu/3432.
  - i. Whether the plaintiffs are entitled to the reliefs sought in the amended plaint.
  - j. Whether the 4<sup>th</sup> defendant is entitled to the reliefs sought in the Notice to co-defendant served upon the 2<sup>nd</sup> defendant.
  - k. Who is liable for the costs of the suit?

**Whether the 1<sup>st</sup> defendant held the suit property in trust for the plaintiffs and whether the sale of the suit property to 2<sup>nd</sup> defendant was in breach of the said trust and as such unlawful.**

54. The suit property was registered under the [Registered Land Act](#), Chapter 300 Laws of Kenya (now repealed). The 1<sup>st</sup> defendant entered appearance but did not file a statement of defence. The effect of the 1<sup>st</sup> defendant's failure to file a defence to the plaintiffs' claim is that all the averments against the 1<sup>st</sup> defendant made in the amended plaint particularly that he held the suit property in trust for the plaintiffs were not controverted. The 4<sup>th</sup> and 5<sup>th</sup> defendants contended that there was nothing in the register of the suit property or in the title that was held by the 1<sup>st</sup> defendant showing that the 1<sup>st</sup> defendant held the suit property in trust for the plaintiffs or anyone else. I am in agreement with the submissions by the 4<sup>th</sup> and 5<sup>th</sup> defendants that the registration of the 1<sup>st</sup> defendant as the proprietor of the suit property conferred upon the 1<sup>st</sup> defendant absolute ownership of the suit property together with all the rights and privileges associated with such ownership and that such rights were not liable to be defeated save as was provided in the [Registered Land Act](#), Chapter 300 Laws of Kenya (now repealed).
55. That legal position is anchored on sections 27 and 28 of the [Registered Land Act](#). See also sections 24 and 25 of the [Land Registration Act](#), 2012. There is however a proviso to section 28 of the [Registered Land Act](#) which provides that the rights of a proprietor of land set out above are subject to any duty or obligation such proprietor may have as a trustee. In [Kanyi v Muthiora](#) [1984] KLR 712, Chesoni, Ag J.A stated as follows at page 723:

“Section 143 of the [Registered Land Act](#) did not apply as there was no question of rectification of the register but a transfer by a trustee to a beneficial owner. The registration of the suit



land in the name of Kanyi under the Registered Land Act did not extinguish Nyokabi's rights under Kikuyu customary law. Kanyi was not relieved from her duty or obligation to which she was a trustee to Mathiora's land: see proviso to section 28 of the Act and *Gatimu Kinguru v Muya Gathangi* [1976] KLR 253. There was overwhelming evidence of a trust in favour of Nyokabi."

56. In *John Gitiba Buruna & Another v Jackson Rioba Buruna*, Court of Appeal at Kisumu, Civil Appeal No. 89 of 2003, the court stated as follows:

"Although the rights of a registered proprietor of land are indefeasible under section 28 of the Registered Land Act, such registration does not as the proviso to section 28 states relieve a proprietor from any duty or obligation to which he is subject as a trustee."

57. In *Isack M'inanga Kiebia v Isaaya Theuri M'lintari & another* [2018] eKLR, the Supreme Court stated as follows on customary trusts:

"(37) Both exponents of colonial land policy and jurisprudence, either completely disregarded, or did not fully appreciate, the nature, scope, and complexity of African land relations. Land in a traditional African setting, is always the subject of many interests and derivative rights. The content of such interests and rights is often a complex area of inquiry. Such rights could be vested in individuals or group units. The rights and interests frequently co-exist with each other. For example, the rights of members of a family do not necessarily derive from the corporate rights of the family as such, but by operation of the applicable law and customs. Besides, the enjoyment of the rights is dependent on the fulfilment of certain conditions unique to the group unit. Several rights of the members could be inferior to, or co-terminus with, or indeed superior to the sum total of the rights of a group. Hence, customary law does not vest "ownership", in land in the English sense, in the family, but ascribes to the family the aggregate of the rights that could be described as "ownership." (Bennett 1995:3 and Cocker 1966: 30-33)."

58. In the same case, the court stated further as follows:

"(52) Flowing from this analysis, we now declare that a customary trust, as long as the same can be proved to subsist, upon a first registration, is one of the trusts to which a registered proprietor, is subject under the proviso to section 28 of the Registered Land Act. Under this legal regime, (now repealed), the content of such a trust can take several forms. For example, it may emerge through evidence, that part of the land, now registered, was always reserved for family or clan uses, such as burials, and other traditional rites. It could also be that other parts of the land, depending on the specific group or family setting, were reserved for various future uses, such as construction of houses and other amenities by youths graduating into manhood. The categories of a customary trust are therefore not closed. It is for the court to make a determination, on the basis of evidence, as to which category of such a trust subsists as to bind the registered proprietor. 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.

- (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 v 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*.
- (57) With the repeal of the *Registered Land Act* (Cap 300), Parliament enacted the Land Registration Act No. 3 of 2012. The provisions of Section 28 of the former, including the proviso thereto, were re-enacted as Section 25 of the latter; while the provisions of Section 30 of Cap 300 were re-enacted as Section 28 of the *Land Registration Act*. However, Parliament introduced two new categories of overriding interests, the first category is what are now called "spousal rights over matrimonial property"; while the second category is what are, rather curiously called "trusts including customary trusts". Even more curious, is the fact that "the rights of a person in possession or actual occupation of land to which he is entitled in right only of such possession or occupation," as earlier provided for under Section 30 (g) of the *Registered Land Act*, are no longer on the list of overriding interests under Section 28 of the *Land Registration Act*.
- (58) What are we to make of these changes? Several interpretations are plausible. It is now clear that customary trusts, as well as all other trusts, are overriding



interests. These trusts, being overriding interests, are not required to be noted in the register. However, by retaining the proviso to Section 28 of the *Registered Land Act* (now repealed), in Section 25 of the *Land Registration Act*, it can be logically assumed that certain trusts can still be noted in the register. Once so noted, such trusts, not being overriding interests, would bind the registered proprietor in terms noted on the register. The rights of a person in possession or actual occupation of land, as previously envisaged under Section 30 (g) of the *Registered Land Act*, have now been subsumed in the “customary trusts” under Section 25 (b) of the *Land Registration Act*. Thus under the latter Section, a person can prove the existence of a specific category of a customary trust, one of which can arise, although not exclusively, from the fact of rightful possession or actual occupation of the land.”

59. It is clear from the foregoing cases that the 1<sup>st</sup> defendant’s title over the suit property could be impeached on account of any duty that he owed as a trustee to the plaintiffs. In *Mwangi Mbothu & 9 others v Gachira Waitimu & 9 others* [1986] eKLR, the court stated that:

“The law never implies, the court never presumes a trust but in case of absolute necessity. The court will not imply a trust save in order to give effect to the intention of the parties. The intention of the parties to create trust must be clearly determined before a trust will be implied.”

60. I am satisfied from the totality of the evidence placed before the court that the plaintiffs have proved the existence of a trust relationship between them and the 1<sup>st</sup> defendant in relation to the suit property. In *Njenga Chogera v Maria Wanjira Kimani & 2 others* [2005] eKLR, the Court of Appeal stated as follows on proof of trust:

“It was argued on behalf of the appellant that there was no sufficient evidence to prove customary law trust. On our own re-evaluation of the evidence we are satisfied that there was ample evidence of the history of the suit land and of the relevant customary law on which the learned judge could find as he did.”

61. As I have mentioned earlier, the 1<sup>st</sup> defendant did not defend the suit. The history of the suit property as given in the amended plaint and the evidence given by the plaintiffs was not controverted by the 1<sup>st</sup> defendant. The 1<sup>st</sup> defendant has not denied that the suit property was ancestral land. The 1<sup>st</sup> defendant has not denied that the suit property was transferred to him by his father, Waruinge Gichure in discharge of his customary obligation to his (Waruinge Gichure) children as part of his succession plan. The 1<sup>st</sup> defendant did not deny that the plaintiffs and he lived on the suit property as a family and that as at the time he was selling the suit property to the 2<sup>nd</sup> defendant, the 1<sup>st</sup> plaintiff had her matrimonial home on the suit property and that the 1<sup>st</sup> defendant’s sons with the 1<sup>st</sup> plaintiff who are some of the plaintiffs in the suit had built their own homes on the suit property.

62. In most African communities in Kenya, ancestral land is passed from one generation to the other. The plaintiffs and the 1<sup>st</sup> defendant are from the Kikuyu tribe and are therefore bound by Kikuyu Customary Law on traditional land tenure. This is clear from the 1<sup>st</sup> plaintiff’s witness statement dated 19<sup>th</sup> October 2011 in which she has stated that she was married by the 1<sup>st</sup> defendant under Kikuyu Customary Law and that the 1<sup>st</sup> defendant’s father transferred the suit property to the 1<sup>st</sup> defendant “in line with Kikuyu customs” and that they occupied the property “in terms of Kikuyu traditions and customs.”



63. I am persuaded that the suit property was transferred to the 1<sup>st</sup> defendant by his father, Waruinge Gichure in accordance with the Kikuyu customs and practices relating to ancestral land. The 1<sup>st</sup> defendant settled his family on the suit property. In accordance with the said customs and practices, the 1<sup>st</sup> defendant's adult male children occupied and built their homes on the suit property in the legitimate expectation that the same being ancestral land which was passed to the 1<sup>st</sup> defendant from his father, each will be given a share thereof by the 1<sup>st</sup> defendant during his lifetime or by the administrator of his estate after his death. The plaintiffs did not tender evidence of the existence of any custom or practice among the Kikuyu tribe imposing an obligation on a man to hold ancestral land he has acquired from his father in trust for his wife. Whether such custom or practice exists was therefore not established. However, whether such custom or practice exists or not, I am of the view that since the 1<sup>st</sup> plaintiff who was the 1<sup>st</sup> defendant's wife was in possession and occupation of the suit property, she had an overriding interest in the suit property pursuant to section 30(g) of the Registered Land Act and as such any dealing with the property was subject to that interest.
64. With regard to the 1<sup>st</sup> defendant's daughters, under Kikuyu Customary Law, only unmarried daughters or daughters who were married but divorced and came back home were entitled to ancestral land owned by their fathers. In this case, no evidence was led as to the marital status of the daughters of the 1<sup>st</sup> defendant on whose behalf this suit was brought. Since the 1<sup>st</sup> defendant did not challenge their claim to the suit property, I will presume that they were not married and as such had equal right with the 1<sup>st</sup> defendant's sons over ancestral land.
65. Due to the foregoing, it is my finding that the 1<sup>st</sup> defendant held the suit property in trust for the plaintiffs which trust arose under customary law and by virtue of the plaintiffs' occupation and possession of the suit property. Since the 1<sup>st</sup> defendant held the suit property in trust for the plaintiffs, he could not deal with the property without the consent of the plaintiffs. It follows therefore that the sale of the suit property by 1<sup>st</sup> defendant to the 2<sup>nd</sup> defendant that was undertaken without the consent of the plaintiffs was conducted in breach of the said trust. The sale was therefore illegal, null and void. The fact that the existence of the trust was not noted in the register of the suit property had no effect on the enforceability of the trust in favour of the plaintiffs.
66. In Muthuita v Wanoe [1982] KLR 166 at pages 169 and 170, Potter J.A stated that:
- “In Gatimu Kinguru v. Muya Gathangi [1976] KLR 253 Madan J(as he then was) held that the absence of any reference to a trust in the instrument of acquisition of the land does not affect the enforceability of the trust as the provisions of section 126(1) of the Registered Land Act as to the reference to the capacity as trustee in the instrument of the acquisition are not mandatory but merely permissive. That decision has been followed and in my respectful opinion it is correct. .... In the High Court the learned judge correctly directed himself as to the functions of a first appellate court and as to the relevant provisions of the Registered Land Act, and having carefully reviewed the evidence, found that the appellant was registered as proprietor of the suit premises as trustee for himself and the three plaintiffs. In my view there was ample evidence of the history of the suit land and of the relevant customary law on which the learned judge could find as he did. With respect I agree with the learned judge.”
67. It was not necessary for the plaintiffs' interest in the suit property as beneficiaries of a trust to be noted in the register of the suit property. The fact that the 2<sup>nd</sup> defendant's search on the register of the suit property did not reveal the existence of a trust cannot therefore defeat the plaintiffs' interest in the suit property that was sold to the 2<sup>nd</sup> defendant. The 2<sup>nd</sup> defendant admitted in evidence that he had



another parcel of land next the suit property which means that he was familiar with the area where the suit property is situated. The 2<sup>nd</sup> defendant admitted further that he visited the suit property before purchasing the same and found the 1<sup>st</sup> defendant's children in occupation of the property. The 2<sup>nd</sup> defendant told the court that he had known the 1<sup>st</sup> defendant for a very long time and that he was aware that he had a family. The 2<sup>nd</sup> defendant told the court that he did not bother with the 1<sup>st</sup> defendant's children who were in occupation of the suit property.

68. I am of the view that if the 2<sup>nd</sup> defendant had carried out adequate due diligence, he would have learnt that the suit property was ancestral land and that the 1<sup>st</sup> defendant was holding the same as a trustee on behalf of himself and the plaintiffs.

**Whether the subdivision of the suit property by the 2<sup>nd</sup> defendant into four portions was lawful.**

69. I have held that the sale of the suit property by the 1<sup>st</sup> defendant to the 2<sup>nd</sup> defendant was carried out in breach of trust and as such the same was void. Since the sale of the suit property to the 2<sup>nd</sup> defendant was void, the same was a nullity and could not confer a valid interest in the suit property upon the 2<sup>nd</sup> defendant. It follows therefore that the title held by the 2<sup>nd</sup> defendant in respect of the suit property was illegal, null and void. As a holder of a void title, the 2<sup>nd</sup> defendant had no right in law to deal with the suit property as he had no valid proprietary interest in the property. The subdivision of the suit property that was carried out by the 2<sup>nd</sup> defendant was in the circumstances a nullity as the same was done in perpetuation of the 1<sup>st</sup> defendant's breach of trust. The resultant titles having been tainted by the illegality are similarly null and void.

70. In *Macfoy v United Africa Co. Ltd.* (1961) 3 All E.R 1169, Lord Denning stated as follows at page 1172 concerning an act which is a nullity:

“if an act is void, then it is in law a nullity. It is not only bad but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without much ado, though it is sometimes convenient to have the Court to declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse”.

71. In *Wambui v Mwangi & 3 others*, Civil Appeal 465 of 2019, [2021] KECA 144 (KLR) the Court of Appeal stated as follows:

“70. Sixth, the title was also tainted with nullity in that the court process on the basis of which the title to the suit property was anchored was subsequently declared null and void *ab initio*. The position in law as we have already highlighted above is that anything founded on nullity is also null and void and of no consequence. The title allegedly vested in the 3<sup>rd</sup> respondent and subsequently passed on to the appellant having stemmed from court proceedings that were subsequently declared null and void also stood vitiated by the same nullity and of no consequence. The Judge cannot therefore be faulted for stating the correct position in law in the manner done.

71. Seventh, section 80 of the *Act* is explicit that any title founded on irregularity, unprocedurally or a corrupt scheme stands vitiated. The title purportedly acquired by the 3<sup>rd</sup> respondent and subsequently passed on to the appellant having been demonstrably shown to have been tainted with fraud, deceit and nullity fits the description of title that has been acquired not only irregularly



and unprocedurally but also through a corrupt scheme. The corrupt scheme herein arises from the facts informing the vitiated High Court proceedings which we find no need to rehash but adopt as already highlighted above.

72. In light of all the above, we reiterate that the Judge's reasoning as to why appellant's title to the suit property was vitiated was well founded both in fact and in law and is therefore unassailable."

72. The subdivision of the suit property was also carried out in breach of a court order. Any act done in breach of a court order cannot confer a right on the contemnor. On 21<sup>st</sup> October 2011, Ougo J. gave an order herein on the following terms:

"That a temporary injunction be and is hereby granted restraining the 2<sup>nd</sup> defendant by himself his agents and or servants and or employees from alienation sale disposal and/or in any respect interfering with the title to the land parcel L.R No. Kiambaa/Waguthu/1207 for 14 days."

This order was extended from time to time until 18<sup>th</sup> January 2012 when Nyamweya J. extended the same until the hearing and determination of the suit. On the same date (18<sup>th</sup> January 2012), the judge made a further order of inhibition inhibiting the registration of any dealing with Title No. Kiambaa/Waguthu/1207(the suit property) until the hearing and determination of the suit or further orders by the court.

73. The 2<sup>nd</sup> defendant subdivided the suit property on 14<sup>th</sup> November 2011 during the pendency of the said orders that were made by the court on 21<sup>st</sup> October 2011. The 2<sup>nd</sup> defendant transferred one of the portions of the suit property; Title No. Kiambaa/Waguthu/3432 to the 3<sup>rd</sup> defendant on 16<sup>th</sup> December 2011 and consolidated the other three portions; Title Nos. Kiambaa/Waguthu/3429, 3430 and 3431 into Title No. Kiambaa/Waguthu/3455 on 10<sup>th</sup> January 2012 also during the pendency of the said order. The 2<sup>nd</sup> defendant thereafter transferred Title No. Kiambaa/Waguthu/3455 to the 4<sup>th</sup> defendant on 13<sup>th</sup> February 2012 during the pendency of the order that was made on 18<sup>th</sup> January 2012.

74. On 22<sup>nd</sup> November 2012, the court found the 2<sup>nd</sup> defendant in contempt of the said order of 21<sup>st</sup> October 2011. On 6<sup>th</sup> May 2013, the court ordered the 2<sup>nd</sup> defendant to deposit in court a sum of Kshs. 4,500,000/- being the proceeds of sale of Title No. Kiambaa/Waguthu/3455 that was sold to the 4<sup>th</sup> defendant in contempt of court pending the hearing and determination of the suit. The 2<sup>nd</sup> defendant was further sentenced to pay a fine of Kshs. 500,000/- in default of which he was to serve a prison term of 6 months.

75. In *Clarke and others v Chadburn & others* [1985] 1 All E.R. (PC) 211, it was held as follows:

"An act done in willful disobedience of an injunction or Court Order was not only a contempt of Court but also an illegal and invalid act which could not, therefore, effect any change in the rights and liabilities of others....I need not cite authority for the proposition that it is of high importance that orders of the courts should be obeyed. Willful disobedience to an order of the Court is punishable as a contempt of Court, and I feel no doubt that such disobedience may properly be described as being illegal. If by such disobedience the persons enjoined claim that they have validly effected some change in the rights and liabilities of others, I cannot see why it should be said that although they are liable to penalties for contempt of Court for doing what they did, nevertheless those acts were validly done ... but the legal consequences of what has been done in breach of the Law may plainly be very much affected by illegality. It seems to me on principle that those who defy a prohibition ought not to be able to claim that the fruits of their defiance are good, and not tainted with illegality



that produced them ... even if the Defendants thought that the injunction was improperly obtained or too wide in its terms, that provides no excuse for disobeying it. The remedy is to vary or discharge it.”

76. That decision was adopted with approval in *Kenya Tea Growers Association v. Francis Atwoli and 5 others* [2012] eKLR. An act done in disobedience of a court order is invalid and an invalid act is void for all intents and purposes. The subdivision of the suit property that resulted in the creation of Titles Nos. Kiambaa/Waguthu/3429, 3430, 3431 and 3432 was in the circumstances invalid null and void on account of lack of a valid title on the part of the 2<sup>nd</sup> defendant and also for having been undertaken in disobedience of a court order.

**Whether the transfer of one of the portions of the suit property namely, Title No. Kiambaa/Waguthu/3432 to the 3<sup>rd</sup> defendant was lawful.**

77. I have held that the 2<sup>nd</sup> defendant held no valid title over the suit property and that the subdivision of the suit property by the 2<sup>nd</sup> defendant that gave rise to among others; Title No. Kiambaa/Waguthu/3432 was illegal, null and void. I have also held that the titles that were illegally created as a result of the said subdivision were similarly void. Since the title that was held by the 2<sup>nd</sup> defendant in respect of Title No. Kiambaa/Waguthu/3432 was invalid, the transfer of the same to the 3<sup>rd</sup> defendant was a nullity. The 2<sup>nd</sup> defendant had no valid interest in Title No. Kiambaa/Waguthu/3432 that he could transfer and in any event the transaction that was conducted in breach of a court order and the *lis pendens* doctrine.
78. In *Kawaljeet Singh Rekhi v Peter Wainaina Kamau & 2 others* [2016] eKLR, the court stated as follows on *lis pendens* doctrine:

“...Mulla and Gour in their treatises on the *Indian Transfer of Property Act* explain the doctrine further that:

“.... Every man is presumed to be attentive to what passes in the courts of justice of the state or sovereignty where he resides. Therefore, purchase made of property actually in litigation, pendent lite, for a valuable consideration, and without any express or implied notice in point of fact affects the purchaser in the same manner as if he had such notice, and he will accordingly be bound by the judgment or decree on the suit.

The doctrine therefore bars dealing with landed property under litigation to the detriment of the parties to the pending litigation. A transfer, if undertaken in those circumstances will really amount to nothing, and this is the case here.”

**Whether the consolidation of the three portions of the suit property namely, Titles Nos. Kiambaa/Waguthu/3429, 3430 and 3431 into Title No. Kiambaa/Waguthu/3455 and the transfer of Title No. Kiambaa/Waguthu/3455 to the 4<sup>th</sup> defendant was lawful.**

79. I have held that the subdivision of the suit property was illegal. The consolidation of the subdivisions thereof was similarly unlawful. The sale of the consolidated portions was equally unlawful for the reasons that I have already given. While sentencing the 2<sup>nd</sup> defendant on 6<sup>th</sup> May 2013, the court found that the sale of Title No. Kiambaa/Waguthu/3455 to the 4<sup>th</sup> defendant was carried out in contempt of court. The sale was therefore null and void. I am satisfied from the evidence that was adduced by the plaintiffs that the 4<sup>th</sup> defendant’s director one, James Karugu was aware of the existence of this suit as at the time the 4<sup>th</sup> defendant acquired Title No. Kiambaa/Waguthu/3455 from the 2<sup>nd</sup> defendant. I am also persuaded from the proximity of the said 4<sup>th</sup> defendant’s director’s residence to the suit property



that he was aware of the plaintiffs' interest in the suit property. I find no merit in the 4<sup>th</sup> defendant's contention that it was an innocent purchaser of Title No. Kiambaa/Waguthu/3455 for value without notice. I am of the view that even of the 4<sup>th</sup> defendant had established that it was an innocent purchaser of the said portion of the suit property for value, such a defence cannot hold where the title of the property purchased innocently is void like in the present case. Such a defence cannot also defeat the doctrine of *lis pendens*.

80. In *Bernadatte Wangare Muriu v National Social Security Fund Board of Trustees & 2 others* [2012] eKLR, the court cited *Fredrick Joses Kinyua and Peter Kiplangat Koech v G.N. Baird*, Nairobi HCCC No. 4819 of 1989 as consolidated with Nairobi HCCC No. 6587 of 1991 *George Neil Baird and Wanda Baird v Fredrick Joses kinyua and Peter Kiplangat Koech* in which G.S. Pall J. stated as follows:

“The doctrine of *lis pendens* under section 52 of *TPA* is a substantive law of general application. Apart from being in the statute, it is a doctrine equally recognized by common law. It is based on expedience of the court. The doctrine of *lis pendens* is necessary for final adjudication of the matters before the court and in the general interests of public policy and good effective administration of justice. It therefore overrides, section 23 of the *RTA* and prohibits a party from giving to others pending the litigation rights to the property in dispute so as to prejudice the other...”

It is my finding from the foregoing that the 4<sup>th</sup> defendant does not hold a valid title in respect of Title No. Kiambaa/Waguthu/3455.

#### **Whether the 5<sup>th</sup> defendant holds a valid title in respect of Title No. Kiambaa/Waguthu/3432.**

81. I have held that the 3<sup>rd</sup> defendant did not acquire a valid title from the 2<sup>nd</sup> defendant and as such its title to Title No. Kiambaa/Waguthu/3432 was null and void. It follows that the 3<sup>rd</sup> defendant did not have a valid title in Title No. Kiambaa/Waguthu/3432 that he could pass to the 5<sup>th</sup> defendant. The 5<sup>th</sup> defendant does not therefore have a valid title to Title No. Kiambaa/Waguthu/3432.

#### **Whether the plaintiffs are entitled to the reliefs sought in the amended plaint.**

82. I have set out earlier in this judgment the reliefs sought by the plaintiffs against the defendants in their amended plaint. Prayers (a) and (b) of the amended plaint are spent. From the findings I have made above, the plaintiffs are entitled to the declarations sought in prayers (c) and (d) of the amended plaint. The plaintiffs have also made out a case for the grant of prayers (e) and (f) of the amended plaint. With regard to prayer (g) of the amended plaint under which the plaintiffs are seeking their beneficial shares in the suit property, I am not persuaded that the plaintiffs are entitled to the same. The 1<sup>st</sup> defendant held the suit property under customary trust for his own benefit and for the benefit of the plaintiffs. The plaintiffs have not persuaded me that Kikuyu customary law under which the suit property is held in trust for them entitles them to have the trust under which the property is held by the 1<sup>st</sup> defendant determined during the lifetime of the 1<sup>st</sup> defendant and their beneficial shares in the suit property transferred to them. In other words, I am not convinced that under Kikuyu customary law to which the 1<sup>st</sup> defendant and the plaintiffs are subject, children and a wife of a man have a right to compel the man during his lifetime to share ancestral land that the man inherited from his father amongst them. I am of the view that unless the 1<sup>st</sup> defendant does it voluntarily, the plaintiffs must be content with the trust and hope that they will succeed the 1<sup>st</sup> defendant. That in my view is the customary way through which ancestral land is passed from one generation to the other save where it is transferred voluntarily inter vivos. Save as aforesaid, I am satisfied that the plaintiffs have proved their case against the defendants on a balance of probabilities.



**Whether the 4<sup>th</sup> defendant is entitled to the reliefs sought in the Notice to co-defendant served upon the 2<sup>nd</sup> defendant.**

83. The 4<sup>th</sup> defendant was required to move the court before the hearing of the suit under Order 1 rule 22 as read with Order 1 rules 24(2) of the *Civil Procedure Rules* by an application for directions on its Notice to co-defendant. Upon considering such application, the court was supposed to give directions whether there was any issue between the 4<sup>th</sup> defendant and the 2<sup>nd</sup> defendant to be tried by the court and if there was, whether it was to be heard together with the suit between the plaintiffs and the defendants or separately. In the absence of such directions, the court is unable to grant any relief to the 4<sup>th</sup> defendant on its notice to co-defendant. That said, the court has found that the 2<sup>nd</sup> defendant sold to the 4<sup>th</sup> defendant Title No. Kiambaa/Waguthu/3455 illegally and in breach of a court order. The court compelled the 2<sup>nd</sup> defendant to deposit the full purchase price in the sum of Kshs. 4,500,000/- that was paid to him by the 4<sup>th</sup> defendant in court. The 2<sup>nd</sup> defendant complied with the order. The 2<sup>nd</sup> defendant told the court at the trial that he had no objection to the monies deposited in court being released to the 4<sup>th</sup> defendant. The much the court can do for the 4<sup>th</sup> defendant is to have the said amount released to it.

**Who is liable for the costs of the suit?**

84. Cost is at the discretion of the court. As a general rule, costs follow the event. See, *Jasbir Singh Rai & Others v Tarlochan Singh Rai and 4 others* [2014]eKLR. No reason has been put forward by the parties to warrant a departure from the general rule on costs. In this case, the plaintiffs have succeeded in their claim against the defendants and as such are entitled to the costs of the suit. I will however not order costs against the 1<sup>st</sup> and 3<sup>rd</sup> defendants for the reason that they did not defend the suit. The plaintiffs' costs shall be paid by the 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants whom I have found to have acquired the suit property unlawfully and with the knowledge of the plaintiffs' interest in the same. The costs shall be paid in the ratios that I will set out in the final orders of the court.

**Conclusion:**

85. In conclusion, I hereby enter judgment for the plaintiffs against the defendants as follows;
- a. I declare that the 1<sup>st</sup> defendant held all that parcel of land known as Title No. Kiambaa/Waguthu/1207 (the suit property) in trust for himself and the plaintiffs.
  - b. I declare that the transfer of the suit property by the 1<sup>st</sup> defendant to the 2<sup>nd</sup> defendant was in breach of trust and as such illegal, null and void.
  - c. I declare that the title that was acquired by the 2<sup>nd</sup> defendant from the 1<sup>st</sup> defendant was illegal, null and void.
  - d. I declare that the subdivision of the suit property that gave rise to Title Nos. Kiambaa/Waguthu/3429, 3430, 3431 and 3432 was illegal, null and void.
  - e. I declare that the amalgamation or consolidation of Title Nos. Kiambaa/Waguthu/3429, 3430 and 3431 that gave rise to Title No. Kiambaa/Waguthu/3455 was illegal, null and void.
  - f. I declare that the transfer of Title No. Kiambaa/Waguthu/3432 by the 2<sup>nd</sup> defendant to the 3<sup>rd</sup> defendant and the subsequent transfer of the said property by the 3<sup>rd</sup> defendant to the 5<sup>th</sup> defendant was illegal, null and void.



- g. I declare that the transfer of Title No. Kiambaa/Waguthu/3455 by the 2<sup>nd</sup> defendant to the 4<sup>th</sup> defendant was illegal, null and void.
- h. I hereby cancel entry number 14 in the register of Title No. Kiambaa/Waguthu/1207.
- i. I hereby cancel the registration and titles issued in respect of Titles Nos. Kiambaa/Waguthu/3429, 3430, 3431 and 3432 and all the entries in the registers thereof.
- j. I hereby cancel the amalgamation of Titles Nos. Kiambaa/Waguthu/3429, 3430 and 3431.
- k. I hereby cancel the registration and title issued in respect of Title No. Kiambaa/Waguthu/3455 and all the entries in the register thereof.
- l. The Registry Index Map(RIM) for Kiambaa Waguthu Registration Section or Area shall be amended to remove Title Nos. Kiambaa/Waguthu/3429, 3430, 3431, 3432 and 3455 from the said Map and Title No. Kiambaa/Waguthu/1207 shall be restored.
- m. Title No. Kiambaa/Waguthu/1207 is restored to the name of the 1<sup>st</sup> defendant.
- n. The Land Registrar, Kiambu shall make an entry in the register of Title No. Kiambaa/Waguthu/1207 to the effect that the 1<sup>st</sup> defendant holds the same in trust for himself, his wife and children.
- o. The sum of Kshs. 4,500,000/- that was deposited in court by the 2<sup>nd</sup> defendant being the proceeds of sale of Title No. Kiambaa/Waguthu/3455 shall be released by the court to the 4<sup>th</sup> defendant through its advocates on record.
- p. The plaintiffs shall have the costs of the suit to be paid by the 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants in the ratio of 50% being borne by the 2<sup>nd</sup> defendant, 25% by the 4<sup>th</sup> defendant and the remaining 25% by the 5<sup>th</sup> defendant.

**DELIVERED AND DATED AT KISUMU THIS 10<sup>TH</sup> DAY OF NOVEMBER, 2022.**

**S.OKONG'O**

**JUDGE**

Judgment delivered through Microsoft Teams Video Conferencing platform in the presence of;

Ms. Chege for the plaintiffs

N/A for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants

Mr. Dondo for the 4<sup>th</sup> defendant

Mr. Odhiambo h/b for Mr. Nderitu for the 5<sup>th</sup> defendant

Ms. J. Omondi-Court Assistant

