



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CIVIL CASE NO. 1647 OF 1984

JOSEPH GITHINJI GATHIBA..... PLAINTIFF

VERSUS

CHARLES KINGORI GATHIBA.....DEFENDANT

JUDGMENT

The plaintiff, Joseph Githinji Gathiba, filed this suit against his younger brother Charles Kingori Gathiba, praying for an “order restraining the defendant, his employee, servant or agents from trespassing or and doing any act towards the land no Thegenge/Kihora/1”. He also prayed for damages, interest thereof, and any other relief that this Court may deem just and fit to grant.

The defendant does not accept the plaintiff’s claim and therefore prays that the Court dismisses the plaintiff’s suit and enter a declaration that the suit parcel of land no Thegenge/Kihora/1 belongs to both the plaintiff and defendant and that the same be sub-divided into two equal portions between the plaintiff and the defendant with separate titles.

The suit parcel of land is adjacent to another parcel of land registration no Thengenge/Unjiru/251 belonging to the family of both parties. In other words, there is no dispute that Thengenge/Unjiru/251 is family land. It is in a different adjudication section but there is no problem about that. Concerning the suit parcel of land Thengenge/Kihora/1, while the plaintiff claims that it is not family land because he personally bought it alone using his own money and that that is why it is registered in his name alone under the Registered Land Act, it is the defendant’s case that the suit parcel of land, like parcel no Thengenge/Unjiru/251 is family land.

The defendant contends that the land was bought by their father before their father died and that after their father had died it was decided by clan elders during land adjudication and consolidation that parcel no Thegenge/ Unjiru/251 be registered in the name of their eldest brother named Mugendi Gathiba to hold it on his own behalf and on behalf of Kariuki Gathiba, the third brother, while the suit parcel of land was to be registered in the name of the plaintiff to hold it on his behalf and on behalf of the defendant.

To support his case, the plaintiff called two witnesses. He told the Court that he is the sole owner of the suit parcel of land having bought the same between 1949 and 1956, a transaction which he claimed to have taken place before land demarcation. The date of first registration under the Registered Land Act was 14th August 1958. The suit parcel of land is 2.8 acres, according to a copy of the land register produced in this Court. The plaintiff told the Court that he had bought one portion from Kigai Mugo Muicua and another portion from Nyaitanga Mureithi and that the two portions were at the time of demarcation, consolidated together to form Thegenge/Kihora/1 which was registered in his name. He

produced exhibit no 1 being the title deed for the said land and also exhibit no 2 being a certified copy of the green card or land register for the same parcel of land both in his name.

The plaintiff claimed he solely paid for the purchase price for the said parcel of land and that neither the defendant nor any other member of the plaintiff's family assisted him to acquire the land. He told the Court that he allowed the defendant to use a small portion to plant some cabbages in 1979 and that that was the first time the defendant went to utilise the said parcel of land. He did not accept the defendant's claim that the defendant started utilising the parcel of land in 1956.

The plaintiff said that when he briefly went to a place called Mwega in 1984, he came back and found the defendant had buried one of his children in the suit parcel of land. He added that in total, the defendant has buried three members of his family in the suit parcel of land being two children and the defendant's wife whom the defendant buried in June 1999. In all cases the plaintiff protested. There is no dispute that the plaintiff is the only one living in the suit parcel of land as the defendant continues to live on parcel no Thegenge/ Unjiru/251 registered in the name of their eldest brother Mugendi Gathiba who gave evidence as DW2. Before he moved to live in the suit parcel of land in 1964, the plaintiff used to live in Thegenge/Unjiru/251. The plaintiff claimed that the defendant cultivates only a small portion of the suit parcel of land. However, there is no dispute that the plaintiff cultivates a bigger portion of the suit parcel of land. The defendant also cultivates parcel of land. Thegenge/Unjiru/251 where he lives and which the plaintiff claims is the only family land as it is the home of all his three brothers – plus the two widows of their father. One of the two widows, called Agata Wambui, is said to have died and was buried in parcel no Thegenge/Unjiru/251.

The plaintiff did not therefore accept that he is holding the suit parcel of land Thegenge/Kihora/1 in trust for the defendant or for any other member of the family as he does not accept that this parcel of land is family land. The two witnesses brought by the plaintiff told the Court the he bought land from their paternal uncle called Kigai Mugo Muicuia (Kigai Mugo) who died in 1954. But these appear to be witnesses who may have come into this land sale transaction because there was still some money payable to the seller who had died. They did not impress me as having been involved in the sale prior to their uncle's death. Mugo Muburia, who gave evidence as PW2 and claimed to be 90 years old, told the Court that he was present when the plaintiff purchased land from his uncle who was unmarried and had no child and therefore treated PW2 and PW3 as his children. He said he witnessed payment of Shs 180/- by the plaintiff to the deceased seller before the deceased received Shs 300/- making a total of Shs 680/= which they claim was the purchase price. The two last instalments were made between 1956 and 1958. I have said PW2 and PW3 did not impress me as people who were involved in the land sale transaction by their uncle right from the start but both said in their evidence that it was the plaintiff, and not the plaintiff's father, who was buying land from their uncle. PW2 claimed there was a written agreement made between the uncle and plaintiff at the time of starting the transaction but his uncle's copy was destroyed by fire when the house of his uncle was burned. Later another agreement had to be prepared after the plaintiff paid the balance of the purchase price.

The plaintiff never produced his copy of the agreement although the seller's copy is said to have been burned in the house of the uncle of PW2 and PW3. Otherwise plaintiff exhibit no 3 appears to have been a much later document for the purpose of this suit. It has no date. It is the agreement said to have been written later and it was between the plaintiff on the one hand and PW2 and PW3 on the other. The plaintiff and the defendant said their father died in 1950. PW3 told the Court that the purpose of the rewritten agreement in 1985 (after this suit had been filed) was to harmonise the whole transaction and consolidate the purchase price paid by the plaintiff to Kigai Mugo before he died and the later payment made by the plaintiff to PW2 and PW3 of Shs 500/- being the balance of the purchase price.

The defendant on the other hand told the Court he is the youngest of the four sons of his father. He claimed his father's family, the family of Gathiba, had two parcels of land being Thegenge/Unjiru/251 registered in the name of Mugendi Gathiba, their eldest brother, and Thegenge/ Kihora/1 registered in the name of the plaintiff, their second eldest brother.

The defendant therefore maintained that the suit parcel of land had been acquired by their father and that

it was originally made up of eight small portions acquired from about six persons. He gave some names which included Kigai Mugo and added that his father died in 1950 leaving the scattered pieces of land being cultivated by his mother, step-mother who had no son, his eldest brother and the plaintiff. The defendant was young when those portions were acquired, but he saw them being cultivated by members of his family including his now 70 year, Joseph Githinji Gathiba, the plaintiff. The defendant was about 14 years when his father died and grew up knowing those pieces of land belonged to the family so that during the land demarcation, adjudication and consolidation later, he played an important role in seeing that the pieces of land were consolidated into Thegenge/Kihora/1 which was finally registered under the Registered Land Act on 14th August 1958. It is 2.8 acres as compared to Thegenge/ Unjiru/251 which is 2.6 acres and is to be shared between the defendant's eldest brother, in whose name it is registered, and the defendant's third brother called Kariuki Gathiba. The defendant explained he could not be registered as a proprietor of land because he was not married and Kikuyu customary law did not permit unmarried men to own land. That was why the plaintiff was registered alone but was so registered as a trustee for himself and for the defendant just as his eldest brother had been registered owner of Thegenge/Unjiru/251 in trust for himself and for their third brother Kariuki Gathiba who was not registered. That was a decision of the family and clan elders. The defendant's contention that it was only himself, his mother, his step mother and paternal uncle that were involved in the collection of portions of land that formed parcel no Thegenge/Kihora/1 and that the plaintiff was not involved because he was working at Nyeri Town is hotly opposed by the plaintiff who said that Nyeri was not very far and that as a married man with family he would not have been keeping away during all that time the land demarcation, adjudication, consolidation and registration was taking place. I think the plaintiff has a point there as he must have been going to his home to attend to problems which may have included problems related to the demarcation, adjudication, consolidation and registration of the suit parcel of land although he may have been leaving most of the land problems to be attended to by the defendant and other adult members of Gathiba family at home. As to the various payments during the whole process, they cannot be ruled out and they can be of various types even if the payer is not paying the price for the land. Collection, adjudication, consolidation and registration involves moving from place to place, dealing with various people and requiring various people some of whom may not accompany you unless you meet all their travelling expenses. No doubt there would be some expenditure. Some sellers would even become stubborn and some money would have to be coughed out to appease them.

As to why the defendant did not build a residential house on the suit parcel of land, he said he may not have found it urgent since where he lived was hospitable and the suit parcel of land was adjacent. But he also told the Court that the plaintiff was not welcoming and the manifestation of that face are these litigations. The defendant said, and it appears so from the evidence, that during the land demarcation, adjudication, consolidation and registration his elder brothers were employed away from home and he took over the duty of collecting the various parcels of land assisted by his mothers. The Court was told that the defendant's third eldest brother is dumb.

The defendant went on to say that although Mugendi Gathiba (DW2) the eldest brother has agreed to share the land, Thegenge/Unjiru/251, registered in his name with their third brother Kariuki Gathiba, the plaintiff herein has refused to share the suit parcel of land with him (the defendant).

Their eldest brother, Mugendi Gathiba supported the defendant's case thereby corroborating the defendant's evidence as to the origin and ownership of the suit parcel of land and how the family and clan elders decided that Mugendi Gathiba and the plaintiff be registered as owners of the two family parcels of land for themselves and on trust for the other members of the family.

Then there was the evidence of Solomon Mwangi Njau (DW3) who told the Court that he participated in the cases between the plaintiff and the defendant when the cases were before elders and the District Officer. He was writing minutes when the case was before elders. Before the District Officer, Tetu, DW3 went as a witness to produce copy of the minutes of the proceedings before elders. Before this Court he produced same.

After land demarcation and adjudication, consolidation and registration, each one of the four brothers could cultivate anywhere on the two parcels of land the family now owned. The defendant says he started

cultivating the land immediately after land registration. He told the Court that this dispute with the plaintiff has been before clan elders starting with clan elders, sub-chief, chief and ending up with elders under the chairmanship of the District Officer, Tetu Division, whose decision followed decisions of earlier groups of elders that the suit parcel of land be shared equally between the plaintiff and the defendant and that the defendant pays Shs 1150/- to the plaintiff so that they share the land equally. PW3 Simon Muthomi was one of the DO's elders and the decision is said to have been unanimous.

The decision of the District Officer and his elders was filed in magistrate's Court at Nyeri and I had to insist on the proceedings in that Court respecting the matter being made known to me, to know whether these proceedings before me are proper or not.

The result is that the decision of clan elders dated 5th April 1984 was produced as defendant's exhibit 4. The proceedings before elders under the chairmanship of the District Officer, Tetu Division, Mr T K Sirma, was produced as defendant's exhibit no 2. The defendant's exhibit no 4, the clan elder's decision, had been produced before the Tetu Division District Officer's arbitration panel as an exhibit and was therefore taken into consideration in what they termed

"Arbitrator's Award" dated 23rd November 1984. It stated:

"The land in dispute Thegenge/Kihora/1 should be subdivided into two portions between the following people Joseph Githinji Gathiba (defendant) and Charles Kingori Gathiba (1st plaintiff). Both parties should maintain the second plaintiff Mrs Malata Wanjiru Gathiba who is their mother.

The elders further decided that the first plaintiff Mr Charles Kingori Gathiba should refund the defendant Mr Joseph Githinji Gathiba one thousand and one hundred fifty shillings only (1150/-) so that they share the land equally."

That award was signed by the two members of the arbitration on the side of the plaintiff and the two members of the arbitration on the side of the defendant plus the chairman of the arbitration who was also the District Officer.

It is apparent that when the plaintiff before me in this suit, Joseph Githinji Gathiba, saw that things were not working well for him before clan elders and could remain the same before the arbitrators under the chairmanship of the District Officer, Tetu Division, he came to the Court and filed this suit on 14th June 1984. The plaint was filed together with a chamber summons under order XXXIX rule 1 of the Civil Procedure Rules and section 3A of the Civil Procedure Act for a temporary injunction granting prayers similar to the prayers for an injunction in the plaint.

Although it is claimed the chamber summons were served upon the defendant for hearing on the 19th October 1984, on that date the plaintiff's advocate appeared in Court alone and obtained an interim injunction to stand until 19th December 1984.

Thereafter nothing happened as the plaintiff appears to have been satisfied with that interim order and did not even bother to serve the defendant with summons to enter appearance until the 28th February 1991 when the summons were issued and I presume the plaint was served subsequent to that date resulting in the filing of the Memorandum of Appearance by the defendant's advocate on 8th August 1991 and the defence on 19th August 1991.

This is a case which parties are prosecuting in two different Courts and I get the impression that the parties do not want any of these Courts to know that the case is also in the other Court. On my side, it was only unintentional that information came out, through evidence, that the dispute between the parties had reached the Court at Nyeri. No party was ready to disclose more and I had to insist that I be given more evidence on that before exhibit number 3 was subsequently produced by the defendant with the consent of the plaintiff. That exhibit shows the arbitration award by the elders under the chairmanship of the District Officer, Tetu Division was filed in the Senior Resident Magistrate's Court at Nyeri as Award Civil Case No 5 of 1985 and the award was read to the parties on 17th June 1985 after which it was set down for

mention 30 days from the date of reading.

The 30 days must have been given to allow a party who was dissatisfied with the award to file an application to set aside the award – which, as I said earlier, had been made by the arbitrating elders on 23rd November 1984. A year had expired. Both parties were fully participating – in the proceedings Joseph Githinji Gathiba the plaintiff also banking on this High Court case before me now.

As can be seen from the defendant's exhibit no 3, the impression given is that proceedings in the case in the Senior Resident Magistrate's Court at Nyeri never went further than what took place on 17th June 1985 the day the award was read to the parties. That is what the parties want me to believe after I had told them that I wanted to know the exact stage at which the Nyeri case stands today. They only add that the case is still pending. Going through papers filed in this case file, however, I discover that Joseph Githinji Gathiba on 17th July 1985 filed a notice of motion, under order XLIV rule 5 and order L rules (1) and (3) of the Civil Procedure Rules, and section 9(3) of the Magistrate's Court's Act as amended by the

Magistrates Jurisdiction (Amendment) Act No 14 of 1981, to set aside the arbitration award.

It is about 15 years now. The parties have not allowed me to know the fate of that application as they did not even want me to know the application was there.

Parties who do not want to lay everything on the table for justice to take its course, may be parties who would like to obtain inconsistent, if not contradictory, court orders to make the administration of justice difficult. May be they do not care about the principle of *res judicata*. Otherwise why do they do what they are doing? In any case, I have heard evidence in this matter and should decide the case before me assuming that the information the parties have given me that the Nyeri case is still pending is correct. They have not bothered to have it consolidated with this case or to have it terminated. They know what to do with it.

The clan elders were clear in their decision that parcel of land Thegenge/ Kihora/1 belonged to Gathiba the father of the parties in this suit. The panel of elders arbitrating under the District Officer, Tetu Division, was not so categorical as to whether that parcel of land belonged to the father of the parties, but like the clan elders decided that the parcel of land be shared between the plaintiff and the defendant. Although clan elders had added the name of Marata (Malata) Wanjiru, ex-step mother, it was known she was only going to have a life interest and the panel of elders under the District Officer, Tetu Division, came out to say that the plaintiff and the defendant should maintain her. Briefly those are the fact on both sides in this suit. Mr Ndurumo, counsel for the plaintiff has submitted that the defendant has made no formal counter-claim in his defence and that a trust is not pleaded and that therefore the evidence of a trust which has been adduced by the defendant should not be accepted. Mr Ndurumo has gone further to say that since there is no evidence that the trust claimed is contained in an instrument declaring the trust and was therefore not entered in the relevant land register with the words "as trustee", the evidence on record is not sufficient for the Court to accept the claim for a trust. He has submitted that the Court should not follow the case of *Alan Kiama v Ndia Mathunya and nine others*, Civil Appeal No 42 of 1978 (unreported) and the case of *Gatimu Kinguru v Muya Gathangi* (1976) KLR 253 because the defendant did not put formal pleadings in the defence for a counter-claim based on a trust.

Since both counsel in this matter elected, with the approval of the Court, to file written submissions, Mr Gichachi, counsel for the defendant, has not specifically replied what Mr Ndurumo said as recorded above. However, Mr Gichachi said:

"In the instant case we have no instrument of trust *per se* but we are saying the plaintiff was registered as the proprietor of the suit land through an understanding between the members of the family and in concert with the custom that being the 2nd eldest son in the family he was to be registered as the caretaker of the suit premises on his behalf and on behalf of the defendant. This family understanding and the tradition in itself can be inferred to be the instrument of trust in this case and therefore the plaintiff holds the land subject to the conditions of that mutual understanding between the family that he will release a half of the portion of land in question to the defendant." While, with due respect, I do not subscribe to the statement

that the family understanding and the tradition can be inferred to be the instrument of trust, if that is meant to be “the instrument of acquisition” in section 126(1) of the Registered Land Act, the position as I see it is that the issue of the defendant’s counterclaim based on a trust has been fully canvassed in this suit, evidence having been adduced and tested and I doubt whether the parties would have done better had the defendant’s defence been framed in a more formal way setting out the counterclaim of a trust. The defence filed clearly brings out the defendant’s case, the defendant denying the allegation of trespass on the basis that the suit parcel of land is family land shared between himself and the plaintiff since the time of demarcation and that the defendant had been in occupation since 1956 sharing the land in equal proportion with the plaintiff. The defendant therefore prays for a declaration that the land belongs to both parties in equal shares and for an order for sub-division and equal sharing.

The word “trust” or other related terms may not have been used in that defence but if it has been used in the evidence and in written submissions, then it is a correct term describing what the defendant is saying in his filed defence and causes no prejudice to the plaintiff who must all along have known that the defendant means to claim that there is a trust in his favour and has therefore vigorously cross-examined the defendant and his witnesses on that issue and fully canvassed the issue in the plaintiff’s written submissions.

Otherwise, this is one issue or situation where section 3A of the Civil Procedure Act can be properly invoked so that mere technicalities do not defeat the cause of justice.

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

Apparently, however, the decision of the Court of Appeal in the case of *Alan Kiama v Ndia Mathunya and nine others* has created some confusion so that in this matter, while Mr Ndurumo fears that decision on the ground that it was based on a resulting trust, Mr Gichachi is relying on that decision rightly, pointing out that the decision was based on overriding interest under section 30(g) of the Registered Land Act but he does not show how that overriding interest turns out to be a trust to assist his client, the defendant before me, in the counter-claim for a declaration of a trust. In that case Madan, JA, as he then was, actually overruled Muli, J, as he then was, on the question of a resulting trust, although the end result was that both judgments, that is the High Court’s and the Court of Appeal’s ordered a rectification of the relevant land register in favour of the defendants/respondent. I show this below.

The position was that one Karura Kiragu had transferred the land to the appellant, Alan Kiama who subsequently filed a suit to eject the respondents, Ndia Muthenya and nine others, on the ground that the respondents were trespassers. The respondents counter-claimed the land on the ground that the land belonged to their clan called Agaciku/Kabareki and therefore they prayed for a declaration that the appellant held the land in trust for the respondents and, alternatively, the respondents wanted a declaration that the appellant held the land subject to rights of possession, occupation and cultivation of the respondents under section 30(g) of the Registered Land Act.

The Court of Appeal refused to grant a declaration of trust, which had been granted by the High Court, Muli, J, and this was despite the fact that there was evidence that during land adjudication and registration, the suit parcel of land was registered in the name of Karura Kiragu so that he could later transfer the land to the rightful owners after the rightful owner’s had been released from detention. Some of their relatives were apparently on the land during land adjudication and registration. Karura Kiragu, who had been registered as an absolute owner on a first registration without the words “as trustee” having been entered on the relevant land register, had secretly transferred the land to the appellant. In refusing a

declaration of a trust, the Court of Appeal stated that it had not been proved by expert evidence that Kikuyu customary law contains the concept of a resulting trust within the jurisprudence as demanded by section 48 and 51 of the Evidence Act.

The Court of Appeal therefore went ahead to order rectification of the land register in favour of the respondents on the basis of overriding interest under section 30(g) of the Registered Land Act. The High Court, on the other hand, had ordered a rectification of the land register in favour of the respondents on the basis of a resulting trust. This High Court order was set aside by the Court of Appeal because the Court of Appeal did not accept there was a resulting trust. But the end result was that the appellant's appeal was dismissed and the respondents retained the land they had obtained through the set aside High Court order.

In my humble opinion, looking at the leading judgment as delivered by Madan, JA on 26th January 1981, the Court of Appeal judgment did four important things. Firstly, the Court of Appeal, at the end, ordered rectification of the register which the Court seems to have said that should not have been ordered by the High Court because the appellant was a purchaser for valuable consideration – without notice. This is in the last paragraph on page 7 of the judgment where it is stated:

“Secondly, because of the provisions of sections 126 and 143 of the Act the register could not be rectified so as to effect the title of the appellant as he acquired the land for valuable consideration from Karura Kiragu who held it under a first registration and who, for the purpose of a registered dealing, was deemed to be the absolute proprietor thereof”

Since the parcel of land in question had been transferred from Karura Kiragu to the appellant Alan Kiama the registration in the name of Alan Kiama was not a first registration and therefore section 143(1) of the

Registered Land Act did not apply and a rectification could be made. Otherwise, a first registration should not and cannot be rectified as section 143(1) preventing such a rectification is mandatory and absolute. No rectification under any circumstances and I do not accept the view that section 28 of the Registered Land Act is authority for interfering with a first registration. On the contrary, that section safeguards not only the rights of a proprietor who acquired title on a first registration but also the rights of a proprietor who acquired title to a first registration. The registered proprietor is either an absolute owner or, where he is registered in a fiduciary capacity, he is a trustee.

Secondly, the judgment tried to overturn what was said in the case of *Obiero v Opiyo and others* (1972) EA 227, and the case of *Esiroyo v Esiroyo* (1973) EA 388, that:

“Rights under customary law are not over-riding interests under section 30 of the Registered Land Act”, and what was said in the case of *Esiroyo v Esiroyo* (*ibid*) that:

“Customary law rights in land are extinguished upon registration of that land under the Registered Land Act.”

Those two are, in my view, good and correct statements of the law. Perhaps it will be better to look at the facts of the two cases. But let me first bring out what the Court of Appeal said.

On the issue of extinguishing rights under customary law, the judgment does not entirely agree that customary law rights are extinguished once a piece of land is registered under the Registered Land Act. This is seen from page 10 of the judgment last paragraph where the case of *Esiroyo v Esiroyo* is mentioned in relation to the meaning of section 30(g) of the Registered Land Act. The Court was of the view that the overriding interests which existed under section 30(g) were equitable rights entitled to protection even if “they have a customary law flavour.”

That Court was not therefore accepting that rights under customary law are not overriding interests and as the possession and actual occupation of the suit piece of land by the respondents had been done under customary law before registration of the land under the Registered Land Act, the Court held that that

possession and actual occupation was under section 30 (g) and went on to order rectification of the land register in favour of the respondents because the overriding interests of the respondents had amounted to equitable rights. That actually meant that the Court of Appeal ordered rectification of the land register in favour of the respondents because of their customary law rights which the Court baptised: “Customary law flavour”.

If that were not so, the Court could not have found the respondents entitled to ownership until, perhaps, the respondents would have instituted fresh proceedings under section 30(f) claiming adverse possession after qualifying to do so under the law of limitation of actions.

The Court of Appeal having proceeded in the way I have outlined above therefore, rejected the finding of the High Court, by Mathew Muli, J, as he then was, that it was a resulting trust which existed and that that trust entitled the respondents to a share of the suit parcel of land. In rejecting the High Court’s finding, the Court of Appeal, as already stated elsewhere, gave the reason that it had not been established by expert evidence that the concept of a resulting trust was known in Kikuyu customary law. Following that statement, the Court of Appeal elevated or enhanced overriding interests under section 30(g) of the Registered Land Act to the level of proprietorship of the suit parcel of land. I now go back to the case of *Obiero* and the case of *Esiroyo*. In *Obiero*’s case, the plaintiff was a widow of someone called Opiyo who died in 1938-39 and the defendants were sons of her co-wives. She was the registered proprietor of a parcel of land in Gem Location. She claimed damages for trespass against the four defendants and an injunction to restrain them from continuing or repeating the acts of trespass. The defendants admitted in their defence that they were in possession of the land in dispute and had cultivated it for a long time past. But they claimed to be the owners of the land in dispute under customary law and denied the plaintiff’s title to the land. These claims had been heard and determined in the plaintiff’s favour by a Land Adjudication Committee and the defendants were having no appeal against the decision from the land adjudication process.

Bennett J, as he then was, was not satisfied on the evidence that the defendants ever had any right to the land under customary law. Holding that rights under customary law are not overriding interests under section 30 of the Registered Land Act, he added:

“Had the legislature intended that the rights of a registered proprietor were to be subject to the rights of any person under customary law, nothing could have been easier than for it to say so.”

The widow was therefore able to eject the four defendants, sons of her deceased husband by her co-wife, from the disputed land although they had been in possession and actual occupation and cultivated the land and claimed title under customary law as sons of the deceased. Their claim under customary law was rejected

In *Esiroyo v Esiroyo*, the plaintiff was the registered proprietor of the land in dispute under the Registered Land Act. He wanted the Court’s order for the ejection of the defendants from the land. He also wanted damages for their trespass on the land for the past two years and an injunction to restrain them, their wives and children or servants from continuing or repeating any acts of trespass.

The defendants, being natural sons of the plaintiff in East Bunyore Location of present Vihiga District, claimed they are entitled to certain portions of the plaintiff’s land and to occupy and cultivate those portions because it is land which came to their father from his father and grandfather and so forth. They claimed their rights were well founded under Luhya customary law.

It was held that rights under customary law are not overriding interests under section 30 of the Registered Land Act. The Court seems to have gone on to say that although rights under customary law are not overriding interests under section 30, the defendants had had the rights under customary law as natural sons of the plaintiff and that the disputed piece of land having been registered under the Registered Land Act, the plaintiff was no longer bound by that customary law as the provisions of the Act had taken the matter in dispute out of the purview of customary law. Sections 28 and 30 of the Registered Land Act were referred to. That has been interpreted to mean that customary law rights are extinguished upon

registration of land under the Registered Land Act. As the learned judge was at that stage talking about succession, I think that statement of the law, at that time, needed to be qualified to state that:

“Customary law rights (other than rights under section

120) are extinguished upon registration of land under the Registered Land Act.”

I say, “at that time” because at the moment the need to have the words in brackets is no longer there and the position has turned out to be exactly what the judge in that case is interpreted to have said stating:

“Customary law rights are extinguished upon registration of land under the Registered Land Act.”

I say so because at the time the case of *Esiroyo* was decided, the present Law of Succession Act, cap 160, had not come into effect. Succession matters affecting land registered under the Registered Land Act were being governed by section 120 of the Registered Land Act which clearly and specifically stipulated that customary law was to apply. The learned judge in *Esiroyo*'s case was not concerned with section 120 and therefore said nothing about it. But the position at that time was that customary rights under section 120 were not extinguished. However, those rights were only exercisable by parties, like the defendants in that case, after the death of their father. The defendants in that case were not, therefore, entitled to making their claim the way they were doing *inter vivos* in that suit and their father was not, in the circumstances, bound by customary law to give them the land they demanded as section 120 was not yet available to them and the dispute was therefore out of the purview of customary law. Section 120 of the Registered Land Act was repealed when the present Law of Succession Act came into operation in 1978 and I am not aware of any present provisions of the Registered Land Act allowing the application of customary law to defeat the absolute ownership of a registered proprietor of a piece of land or even to be an encumbrance to the absolute ownership of a registered proprietor of land.

The Court of Appeal, in a latter case, *Elizabeth Wangari Wanjohi and two others v Official Receiver and Interim Liquidator (Continental Credit Finance Limited)*, Civil Application No 140 of 1988, endorsed and affirmed the statement of law as stated in the case of *Obiero* and the case of *Esiroyo* with regard to rights under customary law not being overriding interests under section 30 of the Registered Land Act and also with regard to the extinguishing of customary law by the registration of land under the provisions of the Registered Land Act. In that case, the applicants were the widows of two brothers by name, Samuel Wanjohi Ngatha and Thomas Wanjohi. The two departed brothers were the registered proprietors of two parcels of land in Nyeri, namely Tetu Unjiru 808 and 809. They had charged the two parcels of land and obtained a loan from Continental Credit Finance Company. The chargors remained in occupation of the parcels of land and cultivated the parcels with their families including the applicants. There was default in the repayment of the loan and the company, which was then in liquidation, acted by its interim liquidator to realise the security by threatening to exercise its statutory power of sale under section 74 of the Registered Land Act. The applicants were not in funds to make repayment. But to stave off the exercise of the chargees statutory power of sale, the applicants mounted an action in the High Court and sought a declaration

that they were in actual occupation of the two parcels of land within the meaning of section 30(g) of the Registered Land Act and that the charge in favour of the respondent company was subject to their overriding rights.

They also prayed for perpetual injunction restraining the liquidator from selling or otherwise dealing with the suit land prejudicial to their interest. While that suit was pending in the High Court, the applicants, by chamber summons, sought a temporary injunction restraining the respondents from selling, disposing or otherwise interfering with their peaceful possession and enjoyment pending the determination of the suit. That application was dismissed.

The applicants having filed a notice of appeal to the Court of Appeal, proceeded to pray for an interim injunction pending the final determination of the intended appeal.

During the hearing of the prayer for an interim injunction, the Court of Appeal, Gachuhi, JA, Apaloo, JA and Kwach Ag JA as he then was, went on to examine the legal concept of overriding interest upon which the applicants were relying and section 28 and section 30(g) of the Registered Land Act were considered. It was held among other holdings:

“That customary rights as to the occupancy of the suit lands as the applicants had were not overriding interests within the meaning of section 30(g) of the Registered Land Act”

and that

“rights under customary law are extinguished upon registration of land under the Registered Land Act.”

On the proper interpretation of the provisions of the Registered Land Act, therefore, and on the basis of the authorities above cited, *Obiero, Esiroyo and Elizabeth Wangari Wanjohi*, which are by no means the only authorities, the correct position today, after the repeal of section 120 of the Registered Land Act is that

“Rights under customary law are not overriding interests under section 30 of the Registered Land Act” and that

“Customary law rights in land are extinguished upon registration of that land under the Registered Land Act.” The case of *Alan Kiama v Ndia Mathunya and nine others* is not therefore with all due respect, a good authority on those two issues. Consequently, the position under the Registered Land Act is different from the position under the Land Consolidation Act or the Land Adjudication Act where the application of customary law is prominent. Customary law has to apply when rights and interests of person in land are being ascertained and adjudicated during the land adjudication process. That is what sections 20 and 23 of the Land Adjudication Act, for example are about. That having been done exhaustively, it would appear the legislature, reasonably, felt it undesirable to allow the same trend continue after land adjudication work had been declared final under section 27 of the Land Adjudication Act and the relevant records subsequently registered under the Registered Land Act. There must be an end to litigation based on customary law rights after the land adjudication process, under the Land Consolidation Act and the Land Adjudication Act, had granted Kenyans all the indulgences as has been done. In my humble view, that rule is reasonable and should be maintained if this country is to have certainty as to the place and application of customary law, where land is registered under the Registered Land Act, so as not to be an obstacle to the social and economic development of the country aimed at benefiting the people, unless the Government has forgotten that it was the intention of the Government not only to bring all land under the Registered Land Act, but also to simplify land transactions including conveyancing to the extent that the ordinary man on the street could convey and deal with his own land without much ado. While at the same time registered land is readily accepted as good security in the business and commercial world. Alas! That was noble Government policy which should never be abandoned or forgotten. With that conclusion, I now move to the third important thing done by the Court of Appeal judgment in the case of *Alan Kiama*. That judgment rejected what the High Court had said that:

“a resulting trust existed under customary law when the members of the clan allowed Karua Kiragu to hold the land”. and that that resulting or implied trust

“was not defeated by a subsequent registration of the suit land in the name of Karura Kiragu”, who therefore transferred that land to the appellant, Alan Kiama, with the resulting trust. I have said that the Court of Appeal decided that suit on the basis of overriding interests under section 30(g) of the Registered Land Act.

As the next part of this judgment is going to focus on trusts (including a resulting trust), and overriding interests in relation to customary law which I have started discussing, I do not think there is need to say more here with regard to a resulting trust. Instead, I will move on to the next stage.

The fourth important thing in the Court of Appeal judgment in the case of *Alan Kiama* is that the

judgment elevated or enhanced overriding interests under section 30(g), to ownership or proprietorship of the affected parcel of land. Overriding interests were enhanced from mere non-registrable and therefore unregistered

“rights of a person in possession or actual occupation of land to which he is entitled in right only of such possession or occupation” to the substantial rights of ownership or proprietorship which are registrable. The Court refused to follow Judge Muli’s finding of a resulting trust which I think was better founded than the basis of overriding interest. The Court said that overriding interests of possession and actual occupation which arise

“In right only of such possession and occupation” without legal title are equitable rights which are binding on the land and therefore on the registered owner of that land. It said:

“Under section 30(g), they possess legal sanctity without being noted on the register; they have achieved legal recognition in consequence of being written into statute; they are not subject to interference or disturbance such as by eviction save when inquiry is made and they are not disclosed.”

The Court went on to say:

“In this case the respondents were in possession and actual occupation of the land and they also cultivated it to the knowledge of the appellant. He made no inquiry and inquiry by him would have been superfluous; he had himself lived on the land together with the respondents for a time and knew that they cultivated it. Overriding interests which so exist or are so created are entitled to protection because they are equitable rights even if they have a customary law flavour for the concomitant aspect of cultivation, which is not listed in section 30. Equity always protects the just rights of the oppressed. Equity always prevents an injustice being perpetrated. Equity sanctifies the administration of justice. Cultivation of land is incidental and an appurtenance of an overriding interest in right only of possession or actual occupation. There is nothing repugnant about the economic exploitation of land. That is what land is for.” Having made the above remarks, the learned judge concluded by deciding the case on the basis that the land had been transferred to the appellant subject to the respondent’s existing rights under section 30 (g) rather than subject to a resulting trust under section 28 and section 126. That is beautifully put and I admire it. But with all due respect, it raises a few questions in my humble mind. I do not see, for example, why the same cannot be said of other people enjoying overriding interests under other paragraphs of section 30 if the qualification is that the interests are overriding. We have paragraphs (a) to (h) in section 30. If paragraph (g) can give the beneficiary ownership of the affected parcel of land, then each one of the paragraphs should also entitle the beneficiaries to the acquisition of ownership of the affected parcels of land which I do not think is proper.

There is need to look at the paragraphs of section 30 to see the calibre or the nature of the interests the section had intended to protect. The rights of way or water or air under paragraph

(a). The natural rights of light or air or water under paragraph

(b). Leases or agreements for leases for a term not exceeding two years, periodic tenancies under paragraph

(d). These are leases which do not qualify to be in section 28 (a). Even rights of compulsory acquisition, resumption, entry, search and user conferred by written law under paragraph (c) are not in a better position.

I do not need to mention all the paragraphs. Do any of those interests qualify the beneficiary to instant equitable rights of ownership, without consideration, in the affected parcel of land, as was accorded to *Ndia Mathunya and nine others* in that case, thereby entitling them to an instant court order for rectification of the land register in their favour?

A look at the ladder upon which the interests protected under the provisions of the Registered Land Act

are arranged will show the proper position of the interests in section 30. Start with absolute proprietorship or absolute ownership under section 27(a). These stand at the top.

Next come proprietors or owners registered in fiduciary capacities. These are trustees and therefore not absolute proprietors or absolute owners.

They are found in the proviso to section 28.

The group standing third on the ladder is that of leaseholders identified in section 27(b). Their leases are registrable and must be registered.

The fourth group consists of interests described as charges and other encumbrances and conditions as well as restrictions shown in the register. These are in section 28(a) and I do not include leases here because they are also in section 27(b) which has given them a higher place than the place given to the other interests mentioned in section 28(a). This category of interests must be shown or entered or registered in the register.

The fifth and, not only the last, but also the least in degree, are the overriding interests as spelled out in section 28(b) read together with section 30 of the Registered Land Act. These are the only interests which are not registered or entered in relevant land registers. If any have to be noted in the land register, a land registrar must first direct such entry. The fact that this is the position in a statute which emphasizes the importance of the registration or noting in the register of transactions or dealings with registered land is a clear manifestation of the very low rating these rights, interests and liabilities have been given. A question therefore arises that if beneficiaries in higher degrees like lease holders, chargees or other encumberancers or restrictors in section 27 (b) and section 28 (a) cannot qualify and be entitled to instant equitable rights of proprietorship without consideration in the affected parcels of land as would enable them obtain instant Court orders for rectification of relevant land registers in their favour, how is it that beneficiaries under section 30

(g) with very inferior interests, are able to obtain all that? If the reason is that beneficiaries under section 30(g) are in possession or in actual occupation and do cultivate the land; is that favour not including licensees, trespassers and others with similar rights or persons with rights under paragraphs (f) of section 30, namely

“rights acquired or in the process of being acquired by virtue of any written law relating to the limitation of actions?”

Indeed, there can be licensees and trespassers and people otherwise unqualified for equitable rights, under section 30(g) as that section has not specified and has no means of ensuring that only persons with equitable rights are covered. That is why the Court encountered such people in the cases of *Obiero*, *Esiroyo* and *Elizabeth Wambui Wanjohi*. There the claimants were also in possession and or in actual occupation and therefore cultivated the disputed pieces of land. Their respective claims failed even under section 30 (g), in the case of *Elizabeth Wambui Wanjohi*.

I submit that the meaning of the words:

“overriding interests” be taken from the context of the Registered Land Act, Cap 300 Laws of Kenya. It should not be taken in the same way as the meaning of the words

“overriding trust” which means

“a trust which takes precedence of other trusts previously declared.”

Using the definition from *A Concise Law Dictionary* by P G Osborn, who relied on the English Land Registration Act 1925, I would say that overriding interests as found in the Registered Land Act sections 28(b) and 30, are simply

“the encumbrances, interests, rights and powers not entered on the register, but subject to which registered dispositions take effect.”

I would think of an example of natural rights of light. A purchaser of premises buys the property when it is subject to overriding rights known as natural rights of light. He would buy the property subject to those rights. But it does not mean that the beneficiary of the natural rights to light would be entitled to become the owner of the sold property or any part of the property.

A similar situation arises when a purchaser purchases property subject to a lease or subject to a tenancy in terms of section 28(a). The lessee or the tenant does not turn out to be the owner of the property on the mere basis of being a lessee or a tenant. The same situation obtains in respect of a person enjoying overriding interests under section 30(g) of the Registered Land Act which, as is relevant, state:

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

(g) 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, save where inquiry is made of such person and the rights are not disclosed.”

There is a proviso at the end of the section stating:

“Provided that the Registrar may direct registration of any of the liabilities, rights and interests herein before defined in such manner as he thinks fit.”

My interpretation of those provisions, as supported by what I have been saying, is that section 30 of the Registered Land Act is talking about interests or rights which, as I have already shown elsewhere, are subordinate and inferior to the rights or interests of a registered proprietor of land whether the registered proprietor has an absolute proprietorship or is registered as a trustee. It should not be forgotten that registered proprietors are protected by section 27(a) and the opening paragraph of

section 28. Their rights are:

“Rights not liable to be defeated except as provided in this Act, and shall be held by the proprietor together with all privilege and appurtenances belonging thereto, free from all other interests and claims whatsoever.”

If the registered proprietor acquired those rights on a first registration, section 143(1) adds weight to his protection. The title of a registered proprietor is therefore indefeasible and is only subject to (and not defeated by) the rights, interests and liabilities set out in section 28(b) as read with section 30 just as that same title is subject to (and not defeated by) the rights, interests and liabilities mentioned in section 28(a), the leases, charges and other encumbrances and to conditions and restrictions.

In other words, although the title is subject to those rights, interests and liabilities under paragraphs (a) and (b) of section 28, that title remains only subject thereto. Those rights, interests and liabilities do not take precedence over the proprietorship of the registered owner and do not, *per se*, entitle the beneficiary as the lessee or chargee or encumbrancer or restrictor or user of water or user of natural light or user of electricity or telephone or as possessor or occupier, to challenge the title of the registered proprietor. In other words further, a lessee cannot just stand up one fine morning and say :

“because I am a lessee, I demand a share in the title or the whole title is mine.”

He will be in possession or occupation also. But in a better position than a person claiming rights under section 30(g) because in addition to possession or occupation, the lessee will also be entitled as a lessee.

The person entitled under section 30 (g) on the other hand will be “entitled in right only of such possession or occupation.” Nothing more. If therefore the lessee cannot, under such circumstances, be entitled to ownership of the leased property yet he has a more superior interest than the interest of a person under section 30(g), how is it that the latter can claim and obtain proprietorship or a share in the proprietorship of the property? In other words, if beneficiaries under section 28(a) cannot, on the basis of their registered interests as lessees, chargees, encumbrancers, conditioners and restrictors obtain instant equitable rights of ownership without consideration, in the affected parcels of land, thereby entitling them to instant Court orders for rectification of land registers in their favour, how do beneficiaries under section 30 (g), succeed? In short, the position as I see it is that sections 27 and 28, and where applicable, section 143(1) of the Registered Land Act are protecting the rights of a registered proprietor “subject”

1. to the interests mentioned in section 28(a), if any; and
2. to the interests mentioned in section 28(b) as read together with section 30, if any.

Anything outside those two should not be allowed to interfere with the enjoyment, by the proprietor, of the rights of a registered proprietor of land. Furthermore, the existence of the interests, stated in section 28(a) and (b) as read with section 30 do not qualify the beneficiaries thereon to be registered as proprietors of the affected parcels of land. This is because the registered proprietors remain absolute owners in terms of section 27(a),

their absolute ownership only being “subject” to the subordinate and inferior interests covered in section 28(a) and (b) as read with section 30.

True section 28 says that those rights

“shall be rights not liable to be defeated except as provided in this Act” but those words do not refer or apply to any of the inferior interest covered in paragraphs (a) and (b) of section 28 as read with section 30 *per se* and those words constitute no authority for beneficiaries, under those provisions, to claim absolute proprietorship in the affected parcels of land. Those words only apply in situations where the absolute ownership of a registered proprietor can be defeated, for example, when a binding contract of sale by him to a plaintiff is enforced, or where the absolute ownership of a registered proprietor can be defeated by a chargee exercising his statutory power of sale when the absolute registered proprietor, as a chargor, has defaulted in paying off a loan secured by the parcel of land

the chargee is selling, or where a *cestui que trust* wants an absolute proprietor who is a trustee transfer to him (*the cestui que trust*) the trust parcel of land.

I am fully aware that I am looking at a decision of the Court of Appeal. It is a decision I am bound to follow. But what do I do when I strongly feel there are other decisions of the High Court and the Court of Appeal, not consistent with that decision, and better than that decision? The elevation or enhancement of overriding interests under section 30(g) to the level where the beneficiaries are, by virtue of that interest only, equated to the absolute registered proprietor of the affected parcel of land, is being too generous to the beneficiaries under section 30(g) and may open a way to a sea of injustice through Courts. If a possessor or an occupier, and therefore a cultivator, under section 30 (g) feels he must file suit because he is entitled to proprietorship of the affected parcel of land, let him wait until he qualifies under section 30 (f) to file proceedings based on adverse possession. Otherwise a better approach in cases like *Alan Kiama v Ndia Mathunya and nine others; Obiero v Opiyo* and *Elizabeth Wangari Wanjohi v Official Receiver and Interim Liquidator (ibid)*; would be for the beneficiary claiming proprietorship to proceed on the basis of a trust and for the Court to proceed the way Muli, J, approached *Alan Kiama*, also on the basis of a trust.

A trust so raised, and as has been raised in the case before me, is a trust emanating from customary law. Sometimes it has been doubted whether customary law exists, and where it exists, it has been doubted whether the concept or notion of a trust is found in that customary law.

At this stage, it may be useful to note what was said by the Court of

Appeal in the case of *Ernest Kinyanjui Kimani v Muiru Gikanga and another* (1965) EA 753.

From a general statement that customary law is a part of the Law of Kenya, Duffus, JA, as he then was, went on to say that customary law could be established as facts before the Courts, in some cases by the Court taking judicial notice of the customs without further proof as for instance in cases where the particular customary law is set out in a book or document of reference as provided in subsection (2) of section 60 of the Evidence Act where it is provided that the Court may resort for its aid to appropriate books or documents of reference. He said that usually in the High Court or in a Magistrate's Court, the relevant customary law will, as a matter of practice and of convenience, have to be provided by witnesses called by the party relying on that particular customary law in support of his case. The learned judge noted that under section 87(1) of the Civil Procedure Act, the Court has a discretionary power to summon to its assistance one or more competent assessors but added that this did not cast the burden of proof in establishing customary law on the Court and not on the litigant himself.

Subsections (1), (2) and (3) of section 60 of the Evidence Act and section

87(1) of the Civil Procedure Act should be read together with section 13(a), (b) and section 51(1), (2) of the Evidence Act.

Crabbe, JA, as he then was, stated in the same case in his dissenting judgment that since customary law is part of the Laws of Kenya, and under section 59 of the Evidence Act, the Court is bound to take judicial notice of it, a person relying on it need not prove it, except when the custom relied upon is a peculiar one. He said:

“The legislature, having recognised the existence of African Customary Law, enjoins that in all cases, civil and criminal, to which Africans are parties, every Court should be guided by the relevant customary law, unless it is repugnant to justice and morality or inconsistent with any written law. To enable the Courts give effect to this provision the legislature has again, in its wisdom, provided for the assistance of assessors. The function of the assessors is to assist the Court in forming an opinion of the customary law which is applicable to the case before it, and which the Court is required to take judicial notice of.”

The Court must possess itself of whatever information is necessary for the purpose.

“Some judges may have it already because of their previous experience. Others may have to acquire it for the first time. But in either case the information they glean is not evidence strictly so called. When an assessor explains the technicalities, he does not do it on oath, nor can he be cross-examined. And no one ever calls the author of a dictionary to give evidence. All that happens is that the Court is equipping itself for its task by taking judicial notice of all such things as it ought to know in order to do its work properly.”

The emphasis is on the Court taking judicial notice of the customary law. On the general observations made by Duffus, JA that in civil claims native law and custom must be proved in a Magistrate's Court or in the High

Court, Crabbe, JA was again of a different view. He pointed out that the rule that the customary law must be proved was stated by the Privy Council in the Ghana case of *Angu v Attah* (PC 1874 1928, 43), where it was stated as follows:

“As is the case with all customary law, it has to be proved in the first instance by calling witnesses acquainted with native customs until the particular customs have by frequent proof in the Courts, become so notorious that the Courts take judicial notice of them.”

The learned judge went on to make remarks which I think are quite pertinent. He said:

“Proof of a particular customary law in one previous decision only was not considered to be frequent proof in the Courts so that the courts could take judicial notice of the alleged customary law rule. But this rule which was applied only in the British Courts originated from the fact that most of the early judges in the British Colonial territories in West Africa were Europeans, who were unacquainted with the various rules of the customary law. The Courts therefore insisted on the proof of rules of the customary law. The rule was not however always allowed, for in deciding questions of native law and custom, the existence or content of a rule of customary law was in some cases determined by reference to any book or manuscript recognised as a legal authority, and the Court could also call to its assistance chiefs or other persons who the Court considered to have special knowledge of native law and custom. The rule in itself is fast becoming out of date and I think it is too late in the day to extend its application to East Africa. It may be a convenient rule in the present circumstances of Kenya”, (the judgment was delivered towards the end of 1965) “but I do not think that sections 59 and 60(1)(a) and (2) justify a rigid adherence to the rule in *Angu v Atta*. The position in Kenya, it seems to me, is well-explained in *Stephen’s Digest of the Law of Evidence* (12th Ed), Article 62 as follows:

No evidence of any fact of which the Court will take judicial notice need be given by the party alleging its existence, but the judge, upon being called upon to take judicial notice thereof, may, if he is unacquainted with such fact, refer to any person or to any document or book of reference for his satisfaction in relation thereto, or may refuse to take judicial notice thereof unless and until the party calling upon him to take such notice produces any such document or book of reference.”

The learned judge proceeded to conclude:

“I am satisfied that if it were the intention of the Kenya Parliament that the customary law should be proved several times before the Courts could take judicial notice of it it would have said so in plain language. In my view the fact that Parliament has made provisions, such as the summoning of assessors and resorting to appropriate books or documents of reference for the purpose of ascertaining the customary law militates against an inference that the customary law must necessarily be proved. No evidence need be given of facts, which according to sections 59 and 60(1), judicial notice is taken, for when a Court takes judicial notice of a fact it declares that that fact exists, even though the existence of the fact has not been established by evidence.”

The learned judge quoted a passage from a judgment in an English case *Commonwealth Shipping Representative v P&O Branch Service* (1923) AC 191 at page 212 where Lord Sumner, distinguished evidence in the ordinary sense from information on which judicial notice is based saying:

“Judicial notice refers to facts, which a judge can be called upon to receive and to act upon, either from his general knowledge of them, or from inquiries to be made by himself for his own information from sources to which it is proper for him to refer.”

So that when a judge hears evidence on matters which attract section 59, he is not taking evidence in the strict sense; the witnesses are simply assisting him to form a view of matters of which he is supposed to have complete knowledge.

All that was being said in 1965. Here we are in the High Court in the year 2001, the new millennium, still taking evidence to establish customary law. It may be because what Crabbe, JA said, though in my opinion very reasonable and appropriate, was in a dissenting judgment and therefore what Duffus, JA said prevails. But I think, with all due respect that Madan, JA was pushing the clock very much behind in so far as he demanded expert evidence in the case of *Alan Kiama v Ndia Mathunya and nine others*.

I have heard evidence on the issue of a trust in this suit from both sides and as I pointed out elsewhere, there is no dispute between the parties that there is Kikuyu customary law which contains the concept of a trust.

The dispute is whether such a trust was created in the matter in this suit. However, from that evidence and from my own experience as a “native” judge in this country, I think I am entitled to take judicial notice of the fact, not only of the existence of Kikuyu customary law, but also of the existence of other African customary laws in Kenya and of the fact that generally African customary laws in Kenya have the “concept of a trust within the jurisprudence as demanded by sections 48 and 51 of the Evidence Act” which should be read together with section 13(a), (b); section 59 and section 60 of the same Act as well as section 87(1) of the Civil Procedure Act – if we have to put the law in its proper perspective.

In case that statement of mine is not acceptable or in case I am doubted, I add the following authorities which are by no means exhaustive. Eugene Cotran, a former judge of the High Court of Kenya, in his book: *Restatement of African Law 2: The Law of Succession*, shows that the concept of a trust is found in customary law of many tribes in this country.

They include the Kikuyu, the Kamba, the Meru, the Luhya, the Kisii, the Kuria, the Giriama, the Digo, the Duruma, the Taita, the Taveta, the Nandi – Kipsigis, the Elgeyo-Marakwet – Tugen, the Pokot or Suk, the Teso, the Masai and the Luo.

Of the Kikuyu, the book says that a person with the title “*Muramati*” in Kikuyu language is what is known in probate and administration as an

“administrator”. He is either nominated by will or appointed by the family and clan elders where there is intestacy.

“Although the deceased’s eldest son in age (not the eldest son of the senior wife) is normally appointed *Muramati*, it is possible for some other relative be nominated either by the testator, or by the elders in the case of intestacy.

The *Muramati* has three principle functions:

(I) to be the head of the family and, as such, to represent the family for all legal purposes;

(II) to be the guardian of the widow and children of the deceased in certain cases;

(III) to act as administrator of the deceased’s estate.” On the rights, duties, powers and liabilities of administrator, the book says, among other things, that the primary duty of an administrator is to assume control over the property to be distributed. He is responsible for the payment and recovery of the deceased’s debts. Pays funeral expenses. Has the duty to distribute the shares to the heirs, either in the way stipulated by the deceased’s will or according to rules of intestacy as directed by the “*Muhiriga*” elders. He is not entitled to vary this. In particular, he exercises overall supervision in the distribution in each house (when the deceased was a polygamist), and ensures that the eldest son in each house does not exploit his younger brothers.

About the property of minor heirs, the book says:

“The *muramati* acts as trustee of the property of minor heirs, until they attain majority, when their shares are distributed to them. Majority, for the purpose of inheritance, is the attainment of marriageable age. As trustee of the property of the minor heirs, the *muramati* may sell, lease, pledge, invest or otherwise deal with the land, livestock or other moveable property of the minor. Those powers may, however, be exercised only if they are necessary or beneficial to the minor, eg for payment of hospital fees or for his education.”

The book says further that the *muramati* is not personally liable for any debts or other claims against the estate. He is not entitled to any remuneration for his services as administrator. He may, however, get a slightly larger share of the inheritance if the elders consider that he is a good *muramati*.

For each tribe the book gives similar information about a trustee or administrator, the title “*muramati*”

assuming different tribal names:

“*Muungamii wa musyi*” by the Kamba, “*Mukuru Mwene Njaa*” by the Meru; “*Omulindi*” by the Luhya; “*Omogaka bwomochie*” by the Kisii;

“*Umurindi*” by the Kuria; the Giriama, the Digo, the Duruma, the Taita and the Masai each does not seem to have a specified word for an administrator but each has a person who acts as an administrator. The Taveta have “*Muhoja*”, the Nandi and Kipsigis have “*Ribindet*”, the Elgeyo, Marakwet and Tugen have “*Ribindet*” also while the Pokot have “*Mlin*”; the Teso have “*Lokedarani*” and the Luo have “*Jatelo*”.

As a result there is a cross section of cases which have been decided both by the High Court and the Court of Appeal on the basis that the notion of a trust is inherent in the relevant customary law. The cases include the following: *Edward Samuel Limuli v Mariko Sabayi*, HCCC 222 of 1978 (Nairobi) where Cotran J, as he then was, held that there was a trust under Maragoli customary law because the suit parcel of land was family land held by two brothers, Samuel and Marko, and that when the former died leaving two minor sons, Marko held their interests as a trustee under Maragoli Customary law, and when the parcel of land was subsequently registered during land adjudication and registration in the name of Marko, he was so registered as a trustee with regard to the interests of the two minors, though the registration under the Registered Land Act, indicated Marko was registered as an absolute owner in respect of the whole parcel of land. The learned judge stated:

“It is now generally accepted by the Courts of Kenya that there is nothing in the Registered Land Act which prevents the declaration of a trust in respect of registered land, even if it is a first registration, and there is nothing to prevent the giving effect to such a trust by requiring the trustee to do his duty by executing transfer documents.”

He then referred to similar cases: *Zephania Nthiga v Eunice Wanjira Nthiga and another*, HCCC No 1949 of 1976 (unreported); *Mugutha v Mugutha* (1971) KHCD 16; and *Wamathai v Mugweru*, HCCC No 56 of 1972 (Nyeri). In the first case, Marko had been registered on a first registration which therefore could not be rectified or cancelled by the Court pursuant to the provisions of section 143 of the Registered Land Act. The plaintiff, Edward, did not seek rectification. He wanted a declaration that Marko held part of the parcel of land on trust for him (Edward) and an order that Marko transfers to him half the parcel of land.

Another case is *Mwangi Muguthu v Maina Muguthu*, HCCC No 377 of 1968 at Nairobi which was repeated by the same learned judge Madan J, as he then was, in yet another case: *Gatimu Kinguru v Muya Gathangi* [1976] KLR 253.

In *Gatimu Kinguru's* case, he was the registered proprietor under a first registration of a parcel of land known as Githunguri/Ikinu/58. He claimed that the defendant, Muya Gathangi, had, without his consent since 1965, persistently trespassed on the land, erected a temporary dwelling – house thereon, and also cultivated a portion of it. The plaintiff wanted the Court to order the defendant to move out from the land, together with an order for a perpetual injunction restraining the defendant from trespassing, damages and costs.

The defendant admitted that the plaintiff was the registered owner of the suit parcel of land. But the defendant's case was that the land was inherited by him and the plaintiff, who was his real brother, from their father Kinguru Kibuu, to be held by them as tenants in common in equal shares; that the plaintiff become the registered owner of the land held in trust for the defendant while the defendant was away in detention during the emergency. The trespass was therefore denied by the defendant, who claimed that he had been in lawful possession of a half portion of the land since 1959 marked by a boundary separating it from the plaintiff's portion on which the defendant had built his home, developed a coffee plantation and effected other developments. In his counter-claim therefore, the defendant prayed, first, for a declaration that he was the owner of half of the land and, secondly prayed that an order for rectification of the register, to include his name as owner of half of the parcel of land, be made. In that case the defendant's counter-claim was based on two grounds. First, he relied on adverse possession. Secondly, he relied on a trust. He succeeded on both grounds. But for the purpose of this suit, I will confine myself to the ground

of a trust.

Repeating the case of *Mwangi Muguthu v Maina Muguthu* which he had decided, the learned judge recalled what he had said:

“As regards section 126, there was no need to register the defendant ‘as trustee’. He was registered as owner as the eldest son of the family in accordance with Kikuyu custom which has the notion of trust inherent in it. Ordinarily in pursuance of Kikuyu custom he would have transferred a half share in ‘Marango’ land to the plaintiff. In any event this section does not make registration ‘as trustee’ obligatory. It states a person may be described by that capacity.”

The learned judge went on to state in relation to the case of *Gatimu Kinguru*:

“Under section 143(1) a first registration may not be attacked even if it is obtained, made or omitted by fraud or mistake. It was not so obtained in this case. The registration was done in pursuance of custom which may be described as a custom of primogeniture holding and by consent of everyone concerned. The section does not exclude recognition of a trust provided it can be established. Parliament could not have intended to destroy this custom of one of the largest sections of the peoples of Kenya. It would require express legislation to enable the Court to so hold.”

I said I am confining myself to the ground of a trust but I think I must point out the fact that in the case of *Gatimu Kinguru* the arguments about section 6 of the Land Control Act (cap 302) as against section 143 of the Registered Land Act was, with all due respect, unfortunately precipitated by the fact that a rectification of a first registration was intended and was ordered. I do not see how section 6(3) of the Land Control Act overrides section 143(1) of the Registered Land Act which is clearly mandatory that a first registration cannot be rectified under any circumstances. This is disturbing because similar rectifications must have been obtained in other cases on the basis of the High Court judgment in that case. Another disturbing feature of that judgment is that it unnecessarily made two inconsistent orders both to be executed simultaneously. Under the prayer for adverse possession the plaintiff was ordered to subdivide the suit parcel of land and transfer the portion which was in the defendant’s possession and occupation to the defendant while under the prayer based on a trust, the Court ordered a rectification of the register, meaning there was going to be no sub-division to produce two titles. Otherwise the case is a good authority for saying that the concept of a trust is in Kikuyu customary law. Interestingly, it comes from the very learned judge, who subsequently in 1981 as a Court of Appeal judge, questioned the existence of that concept in the Kikuyu customary law in the case of *Alan Kiama v Ndia Mathunya and nine others* and went on to reject the resulting trust Muli, J, had, in my humble opinion, correctly found.

Other cases where a trust was found under customary law include: *Karanja v Kamara Muhia* (unreported); *Hosae v Njiru* [1974] EA 526; *In the Matter of the Estate of Njuguna Kibuthu*, HCCC No 1014 of 1993 (unreported); *Zabedee Madede and another v Arneafita & another*, Civil Appeal No 4 of 1986 (unreported) and *Wamalwa Wekesa v Patrick Muchwenge*, Civil Appeal No 107 of 1985, Kisumu.

There are more authorities which can be cited. But for the purpose of this judgment, I think what I have referred to is sufficient for me to conclude that the Court is justified to take judicial notice of the fact that the concept or notion of a trust is inherent in African customary law, including Kikuyu customary law, in Kenya.

Trust; according to *The Illustrated Oxford Dictionary*, is confidence placed in a person by making him the nominal owner of property to be used for another’s benefit.

According to *A Concise Law Dictionary* by P G Osborn, trust is:

“A relation or association between one person (or persons) on the one hand and another person (or persons) on the other, based on confidence, by which property is vested in or held by the one person, on behalf of and for the benefit of another. The holder of the property is the trustee, and the beneficial owner is the *cestui que trust*. The trustee has a right in *rem* in the property, the *cestui que trust* has a right in

personum against the trustee or those who take from the trustee with notice of the trust....”

No special form of words is necessary to create a trust, if that intention is shown or can be inferred, but the words must be so used that they are imperative; and the subject matter of the trust and the objects or persons intended to have the benefit of the trust must be certain.

Trusts may be express, ie created by clear words, or implied by law.”

An implied trust is defined as:

“A trust implied by law as founded upon the unexpressed but presumed intention of the party. It includes resulting trusts (qv) and constructive trusts (qv).”

Those are the characteristics of a trust whether that trust exists in the English, American or Indian law, or in African customary laws in Kenya or in Kikuyu customary law in particular. The concept of a resulting trust is therefore present as there is nothing to show that that concept cannot be there simply because the trust in question is found in Kikuyu customary law.

A resulting trust is defined as:

“An implied trust where the beneficial interest in property comes back, or results, to the person (or his representative) who transferred the property to the trustee or provided the means of obtaining it. The chief kinds are (1) where the expressed trusts do not exhaust the whole beneficial interest; but a resulting trust in the case of a voluntary conveyance is not implied for the grantor merely because the property is not expressed to be conveyed for the use or benefit of the grantee.

(2) where on a purchase property is conveyed into the name of someone other than the purchaser, there is a resulting trust in favour of he who advances the purchase money; but not where it would defeat the policy of the law, or where there is a presumption of advancement. (3) In cases of joint purchases or mortgages, on the death of one of the persons advancing a part of the money, there is always a resulting trust in favour of his representatives. (4) In case of mutual wills.”

In that respect, it may be of interest also to give the definition of a constructive trust. It is:

“A trust which is raised by construction of equity in order to satisfy the demands of justice and good conscience without reference to any presumed intention of the parties, as in the following cases: (1) vendor’s lien for unpaid purchase money (2) purchaser’s lien for prematurely paid purchase money’ (3) where a person makes a profit in a fiduciary position or out of trust property; (4) where a stranger intermeddles in a trust

(5) where a mortgagee sells under his power of sale, he is a trustee of any surplus realised.”

A constructive trustee is the person deemed to be a trustee in the case of a constructive trust.

The position as I see it is therefore as follows: Correctly and properly, the registration of land under the Registered Land Act extinguishes customary land rights and rights under customary law are not overriding interests under section 30 of the Registered Land Act. But since the same registration recognises trusts in general terms as is done in the proviso to section 28

and section 126(1) of the Registered Land Act without specifically excluding trusts originating from customary law and since African customary laws in Kenya, generally, have the concept or notion of a trust inherent in them, where a person holding a piece of land in a fiduciary capacity under any of the customary laws has that piece of land registered in his name under the Registered Land Act with the relevant instrument of acquisition, either describing him or not describing him by that fiduciary capacity, that registration signifies recognition, by the Registered Land

Act, of the consequent trust with the legal effect of transforming the trust from customary law to the provisions of the Registered Land Act, because according to the proviso to section 28 of the Registered Land Act, such registration does not:

“relieve a proprietor from any duty or obligation to which he is subject as a trustee.”

That trust is therefore express if it is backed by the relevant instrument of a trust and has the words “as trustee” entered in the relevant land register to describe the registered proprietor. The trust is however an implied trust if it is not backed by the relevant instrument of a trust and the words “as trustee” are not entered in the relevant land register to describe the registered proprietor. The implied trust may either be, a resulting trust or a constructive trust.

That is the position despite what is stated in section 27(a) and the first part of section 28 because the proviso to section 28 comes last. Perhaps it is better to remind ourselves what those two sections say – starting with section 27(a)

“Subject to the provisions of this Act:

(a) the registration of a person as the 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 28:

“The rights of proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of Court shall be rights not liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject

(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register, and

(b) unless the contrary is expressed in the register, to such liabilities, rights and interest as affect the same and are declared by section 30 of this Act not to require noting on the register; provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee.”

It is also appropriate to quote section 143(1) here in relation to section

27(a) and section 28 quoted above. Section 143(1) states:

“Subject to subsection (2) of this section, the Court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake.”

Subsection (2) is about the effect of rectification upon the title of a proprietor who is in possession and acquired the land for valuable consideration. As I am not going to order rectification, I am not concerned with subsection (2).

But the point I am trying to make is that despite the safeguards the Registered Land Act has given to the registered proprietor of land in sections 27(a), 28 and in relation to a first registration, section 143(1), the same Act, in the proviso to section 28 says, and I repeat, that those safeguards shall not

“relieve a proprietor from any duty or obligation to which he is subject as a trustee.”

Further, section 28 tells us that the rights of registered proprietor can only be defeated in accordance with the provisions of the Registered Land Act – that is “as provided in this Act.”

Section 126 has therefore taken a step further by providing how a trust should be registered. It means a trust is registrable under the Registered Land Act. It is not therefore like the inferior overriding interests under section 30 of the Act which are declared not to require noting on the register. They do not deserve registration.

Sub section (3) of section 126 adds that where the proprietor of land is a trustee, he shall hold the same subject to any unregistered liabilities, rights or interests to which it is subject by virtue of the instrument creating the trust.

I have said that the trust will be express if backed with the instrument of acquisition showing the proprietor acquired the land in a fiduciary capacity and as a result the words “as trustee” are entered on the register. I have also said that the trust will be an implied trust if not backed by such an instrument and as a result the words “as trustee” have not been entered on the register.

It is regrettable that due to previous inconsistent judgments, the position with regard to section 126(1) of the Registered Land Act has not been clear and in many cases it has been intimated that the section made an entry of the words “as trustee” on the land register, mandatory in all cases of trusts.

In my humble view, the correct position is that the entry of the words “as trustee” is only mandatory where there is an instrument of acquisition showing that the proprietor acquired the land in a fiduciary capacity and describing the proprietor as such. Where such a person is not so described in the instrument of acquisition, even though he acquired the land in a fiduciary capacity, the entry of the words “as trustee” on the land register is not mandatory, although that situation creates an implied trust. This is because under section 126(1) it is not mandatory that a person acquiring land in a fiduciary capacity be described by that capacity in the instrument of acquisition. The section uses the word “may”. It says:

“A person acquiring land, a lease or a charge in a fiduciary capacity may be described by that capacity in the instrument of acquisition and, if so described, shall be registered with the addition of the words ‘as trustee’ but the Registrar shall not enter particulars of any trust in the register.”

That being the position the registration of land under the Registered Land Act should and does not extinguish a trust originating from customary law simply because due to a “technical default” during the registration, the words “as trustee” were not entered on the land register.

As it was said in the case of *Gatimu Kinguru (supra)*

“the absence of any reference to the 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 acquisition are not mandatory but merely permissive.”

And as Muli, J, properly said in *Alan Kiama v Ndia Mathunya*, this was a technicality many people did not understand. I add that these people included, not only land consolidation and land adjudication officials but mainly the drafters (Executive) and approvers (Parliament) of those two statutes, and as a result, it is the law that is in default.

That law is not the Registered Land Act. It is the Land Consolidation Act, Cap 283, and the Land Adjudication Act, Cap 283, Laws of Kenya. It is not the Registered Land Act because there land is merely registered, on first registrations, from records already prepared and as prepared under the Land Consolidation Act and Land Adjudication Act. The problem is with first registrations and there is no way a land registrar, administering the Registered Land Act, is going to enter the words “as trustee” on a land register from land consolidation or land adjudication records which do not show him that the proprietor of that particular parcel of land acquired it in a fiduciary capacity and is therefore described by that fiduciary capacity.

Problems arising from subsequent registrations are few and easily manageable. It is from first

registrations that the majority of cases came and even in the case of *Alan Kiama v Ndia Mathunya* the problem had been created through a first registration in the name of Karura Kiragu as the absolute owner and without the words “as trustee”.

There are no specific provisions under the Land Consolidation Act and the Land Adjudication Act to adjudicate and/or consolidate land in names of persons indicated as trustees or holders in fiduciary capacities. In that respect, let me look at those two Acts of Parliament a little more closer.

Under the Land Consolidation Act, section 15 of the Act deals with record of existing rights. The particulars outlined under section 15(2)(a), (b) and (c) are to be entered in part 1 of the record of existing rights. Section 15(2)(d) states that,

“in the case of any landowner or of any such person who is under a disability, whether by reason of age, unsoundness of mind or otherwise, the name of his guardian”.

Similar provisions are found under section 24 which deals with adjudication register. Under section 24(2), the form shall contain in respect of land which has been allocated to landowners:-

(a) “the name and description of the landowner under paragraph (d), “in the case of any landowner or of any such person who is under a dis”ability, whether by reason of age, unsoundness of mind or otherwise, the name of his guardian”.

That is all the sections say so that once the name of the person is entered, there is no requirement that the capacity in which he is acquiring the land be shown. The words “fiduciary capacity” or “as trustee” are not used under this Act. There is no requirement that the words “as guardian” be included.

Under the Land Adjudication Act, section 23 of the Act deals with preparation of adjudication record. Section 23(3) states the information to be contained in the adjudication record, and section 23(3) (b) (i) requires a record of the name and description of the owner of land with particulars of any restriction on his power of dealing with it. Under paragraph (d),

“if any owner or other person is under a disability, the name of his guardian, the nature of his disability and (if he is a minor) his age”. The words “fiduciary capacity” or “trustee” or “as trustee” are not used under this Act. Here again there is no requirement that the words “as guardian” be added to describe the proprietor. “Guardian” under the Land Consolidation Act means any person responsible (whether under native law and custom or otherwise) for protecting the interests of any person who is under disability, whether by reason of age, unsoundness of mind or any other cause.

Under the Land Adjudication Act “guardian” means a person responsible (whether under recognized customary law or otherwise) for protecting the interests of a person who is under a disability.

“Disability” means disability arising from minority or other incapacity.

The nearest those two statutes have moved to the trustee is the use of the term “guardian”. According to *A Concise Law Dictionary* by P G Osborn,

“guardian” is

“A person having the right and duty of protecting the person, property or rights of one who is without full legal capacity otherwise incapable of managing his own affairs.”

The term “fiduciary” on the other hand means

“The relationship of one person to another, where the former is bound to exercise rights and powers in good faith for the benefit of the latter; eg as between trustee and beneficiary”.

I have already given the definition of a trust and shown who a trustee is. The definition of the term “guardian” has just been given above. That being the position, I do not think the use of the term “guardian” in the two statutes meets the requirement in section 126(1) of the Registered Land Act.

Land adjudication and consolidation officials in the Department of Land Adjudication were and are under legal obligation to compile adjudication and consolidation records in accordance with the provisions of the Land Adjudication and Land Consolidation Acts. In turn Land Registrars, in the Department of Lands, a different department, are under legal obligation to make first registrations under the Registered Land Act in accordance with the records received from the Department of Land Adjudication. Records showing land proprietors registered, on a first registration, as trustees are therefore hardly seen and this is the area where Courts are getting many litigation on trusts in land. When adjudication registers are declared final under section 27 of the

Land Adjudication Act (section 27 of the Land Consolidation Act) and therefore handed over by the Chief Land Registrar in the Department of Lands, Land Registrars are, required by law to open land registers, during first registrations, in accordance with particulars in the adjudication registers received from the Director of Land Adjudication in the Department of Land Adjudication under section 27(3) (c) of the Land Adjudication Act. It follows that where no trust is recorded in records from the Department of Land Adjudication, no trust is recorded by the Land Registrar in the resulting land register, on a first registration, under the Registered Land Act although under that Act there are provisions in sections 28 and 126 recognising trusts and therefore allowing trustees to

be registered. In other words, the Registered Land Act is expecting registration of trustee proprietors whom the Land Consolidation Act and the Land Adjudication Act have completely ignored to the detriment of beneficiaries in first registrations.

The problem here, therefore, is more than a mere technicality. It is a legal mistake. A legal omission or default in the Land Consolidation Act and the Land Adjudication Act which need amendment to avoid future similar problems where land is yet to be registered under the Registered Land Act unless the mistake or omission or default found in the Land Consolidation Act and the Land Adjudication Act were done intentionally to enable untrustworthy registered trustee proprietors, without the words “as trustee” against their names, swindle innocent and unsuspecting beneficiaries on the basis that there is no evidence that the said proprietors were registered as trustees and that therefore, they are absolute proprietors with no duty as trustees.

Courts, in their exercise of equitable jurisdiction, have been doing their best to assist genuine beneficiaries but it has in many cases been a difficult task because of a number of reasons including, not only the fact that some of the claims are not from genuine beneficiaries, but also, and this is more important, the fact that some doubt has existed in our Courts as to whether the concept or notion of a trust exists in customary law.

I have endeavoured in this judgment to show and I am satisfied that the concept or notion of a trust exists. Where a party in a case before the

Court has succeeded in proving a trust in his favour, the Court will grant a declaration of a trust if prayed for. For the declaration to finally settle the dispute and benefit the successful party, there has to be a further order to enable the successful party be registered as proprietor of the piece of land about which he has obtained the declaration of a trust.

In some cases parties will ask for rectification of the relevant land register. There is no problem if the relevant land register is not a first registration. As in the case of *Alan Kiama* there was no problem because the land register in the name of Alan Kiama was a second registration. Rectification of the register could be ordered without infringement to section 143 (1) of the Registered Land Act which

prevents rectification of a first registration.

If on the other hand the register is a first registration, section 143 (1) does not allow rectification in any circumstances. The words in brackets in that section make the prohibition mandatory and absolute. But what is rectification? *A Concise Law Dictionary* by P G Osborn gives the meaning of rectification as:

“The correction of an error in a register or instrumenton the ground of mutual mistake.”

When permitted, section 143(1) allows rectification on the ground of fraud or mistake. It is done on the same register. It is amending the register.

Ordering a transfer of the whole parcel to the claimant is not therefore rectification and section 143(1) does not prevent it. Ordering a sub-division of the suit parcel of land and a transfer of a portion thereof to the claimant is not rectification and section 143(1) does not prevent it. Accordingly Cotran, J has said in the case of *Limuli vs Marko Sabayi (ibid)* that;

“There is nothing in the Registered Land Act which prevents the declaration of a trust in respect of registered land, even if it is a first registration; and there is nothing to prevent giving effect to such a trust by requiring the trustee to execute transfer documents.”

In the case before me, the plaintiff was registered on a first registration. It is a first registration which is in question. The plaintiff was registered as an absolute proprietor with nothing showing, on the register and/or in the documents of acquisition that he acquired the land in a fiduciary capacity.

The words “as trustee” are not seen on the land register. But it has been shown and proved factually to my satisfaction, through evidence, that he was registered in respect of the suit parcel of land, not for himself alone, but also on behalf of the defendant. The defendant and his eldest brother DW2 have told the Court the suit land belonged to their deceased father and is therefore family land. It was during land demarcation, adjudication and consolidation that the family and the clan elders chose to register the suit parcel of land in the name of the plaintiff just as it was decided to register parcel number Thegenge/Unjiru/251 in the name of DW2. That registration was not meant to have both parcels of land vested solely into those who were registered in exclusion of those who were not registered from the family. The usage of the two parcels of land, even after registration, is a good manifestation of the family and elder’s intention. It is clear from the evidence of both sides that parcel of land Thegenge/Unjiru/251 although registered in the name of Mugendi Gathiba (DW2) has been used by all the other members of the family including the plaintiff before he moved to the suit parcel of land. Similarly evidence has been adduced in Court that the plaintiff and the defendant including their mother Martha Wanjiru have used parcel number Thegenge/ Kihoto/1 since the time of demarcation without any complaint from the plaintiff until 1984 when the defendant demanded to be given half share of the land and be registered as the proprietor thereof. The usage no doubt shows that the two parcels of land were family land and those who have been registered are therefore trustees.

Perhaps I should add something to what I said the defendant started demanding half a share in 1984. According to the plaintiff, the dispute arose in 1984 when he asked the defendant to move out of his land. But evidence has been adduced before me to the effect that on 5th April, 1984 clan elders arbitrated between the parties on the issue of ownership of land at the request of the defendant and Marata (Malata or Martha?) Wanjiru. The case was also heard on 21st November, 1984 before the District Officer, Tetu Division over the same issue the plaintiff once again being the defendant. As I have said elsewhere therefore, the plaintiff came to this Court to counter the decisions made by the clan and elders under the chairmanship of the area District Officer in order to appear to be the aggrieved. If the defendant had not asked for his share of the suit parcel of land before clan elders and the Provincial Administration, this suit may not have been brought.

From the totality of the evidence before me and on the balance of probabilities therefore, I hold the view that it was the father of the parties in this suit who initiated the purchase of the suit parcel of land, then still scattered in the original plots. He died before he completed paying the purchase price, at least for the

plot purchased from Kigai Mugo Mwicua and the plaintiff may have come in to clear the balance and whatever other charges that may have arisen. The defendant also played his part to ensure that the plots were consolidated into Thegenge/Kihora/1 in the absence of the plaintiff and cleared some of the charges which apparently kept on coming up although he was clearing them from property left by their deceased father.

The plaintiff may have taken advantage of the fact that he cleared the balance of the purchase price to say the land was his and he purchased it and therefore got registered without other members of the family knowing as had been suggested in some evidence or he may have been registered with the blessings of the entire family and clan elders as a trustee for the rest of the family as other evidence suggests and this second suggestion seems to be the most probable. But the fact remained that that piece of land belonged to the initial purchaser, the father of the parties and what the plaintiff and the defendant were doing, were doing it on behalf of their father who left the land to the family and therefore in accordance with the wishes of the family as revealed from the evidence of members who have given evidence, that land should be shared equally between the plaintiff and the defendant. That is why the panel of elders under the District Officer, Tetu Division, ordered the defendant to refund to the plaintiff the sum of Ksh 1150/- they found the plaintiff had spent to get the land retained by the family. I note the fact that both Mugo Muburia (PW2) and Simon Muthomi from their respective evidence, came to be involved in this transaction only when the plaintiff was paying them.

There may be no evidence in the land register or in the instrument of acquisition to show that the plaintiff acquired the suit parcel of land in a fiduciary capacity, and that is why the plaintiff is taking advantage of that fact. However, in the circumstances of this case, the absence of that documentary evidence does not mean there is no trust. I have pointed out elsewhere that section 28 of the Registered Land Act which makes the right of a registered proprietor indefeasible goes on to state in the proviso that same registered proprietor is not relieved from any duty or obligation to which he is subject as a trustee. Section 126(3) comes in to add that where the proprietor of land is a trustee, he shall hold the same subject to any unregistered liabilities, right, or interests to which it is subject by virtue of the instrument creating the trust.

The provisions of the Registered Land Act are saying all that; and the same Act in section 28 says that the rights of a registered proprietor, are indefeasible only to the extent of being defeated in accordance with the provisions of the Registered Land Act that is

“as provided in this Act.”

In the instant case, there is no instrument of trust as such, but there is evidence that the plaintiff was registered as the proprietor of the suit land through an undertaking between members of the family and in concert with the custom that being the second eldest son in the family, he was to be registered as the caretaker of the suit premises on his own behalf and on the behalf of the defendant. That family undertaking and tradition in itself was sufficient to result into an instrument of acquisition showing that the plaintiff was acquiring the suit parcels of land in a fiduciary capacity. As it was from the family and elders and these were the people land demarcation officers, land adjudication officers and land consolidation officers, including recorders of existing rights, were dealing with; it can be assumed those officers were given the information by the family and clan elders of the parties in this suit. But as I pointed out earlier, the Land Consolidation Act and the Land Adjudication Act are in default. They have no provisions for trusts or persons acquiring land in fiduciary capacities. The officials administering those two Acts of Parliament therefore failed to show this trust in the instrument of the plaintiff's acquisition of the suit parcel of land. That is why there is no documentary evidence of this trust. However, the fact, as evidence during the hearing of this suit has shown, is that there was a trust when the plaintiff was being registered as the proprietor of the suit parcel of land.

The family, the clan and the elders had done all in their power and what remained was to be done by the officers who were administering the Land Adjudication Act and the Land Consolidation Act which were in default and the officers could not therefore put the trust into the instrument of acquisition. Yet the trust was there in fact at the time of land adjudication, land consolidation and land registration under the Land

Consolidation and Adjudication Acts and the Registered Land Act respectively.

The Registered Land Act does recognise a trust whether evidenced through an instrument of acquisition or not. That Act recognises express as well as implied trusts. Since that is the position, why should the innocent beneficiary suffer loss when the default which caused the problem is beyond his control and it was made by people who had the duty to see that default does not occur; the drafters of the legislations; the enactors of the legislations and perhaps the administrators of the two statutes? And why should I allow the plaintiff in the suit, take advantage of that situation yet the law says he is not relieved from any duty or obligation to which he is subject as a trustee and holds the land subject to unregistered liabilities, rights or interests to which the land is subject?

I have said such a trust becomes an implied trust when the land is registered under the Registered Land Act which has provisions for trusts. His

Lordship Justice Mathew Muli analysed it into a resulting trust. I have no quarrel with that, and in conclusion therefore, it be and is hereby declared:-

- (a) That the suit parcel of land registration number Thegenge/Kihoto/1 belongs to both the plaintiff and the defendant as tenants in common in equal shares;
- (b) That the plaintiff as a proprietor, holds the said suit parcel of land registration number Thegenge/Kihoto/1 in trust on his own behalf and on behalf of the defendant; and
- (c) That therefore the defendant is not a trespasser on the said suit parcel of land.

Accordingly;-

- (a) The plaintiff's claim be and is hereby dismissed;
- (b) The plaintiff be and is hereby ordered to sub-divide the said parcel of land into two equal portions with two separate titles one of them containing the area, if any, occupied by the defendant and thereafter transfer the portion containing the area, if any, occupied by the defendant to the defendant. In default, the Deputy Registrar of this Court to execute all the relevant sub-divisional, transfer and other necessary, documents
for and on behalf of the plaintiff;
- (c) The defendant to refund to the plaintiff the sum of Kenya Shillings
one thousand one hundred and fifty (Kshs 1150/-) only;
- (d) The plaintiff to pay costs of this suit.

Dated and delivered at Nairobi this 15th day of January, 2001

J.M. KHAMONI

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JUDGE