



Grace Njeri Warukenya & 3 others v Mutiga & another (Environmental and Land Originating Summons 130 of 2017) [2024] KEELC 547 (KLR) (8 February 2024) (Judgment)

Neutral citation: [2024] KEELC 547 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 130 OF 2017
LN GACHERU, J
FEBRUARY 8, 2024**

BETWEEN

**GRACE NJERI WARUKENYA 1ST PLAINTIFF
MARGARET NYAKERU WAWERU 2ND PLAINTIFF
MARY WANGECHI MWANGI 3RD PLAINTIFF
FLORA NJOKI THUO 4TH PLAINTIFF**

AND

**JOSEPH MUTIGA 1ST DEFENDANT
JANE NYAMBURA MWANGI (SUED AS THE LEGAL REPRESENTATIVE OF
THE LATE JOHN MWANGI) 2ND DEFENDANT**

JUDGMENT

1. The Plaintiffs herein took out this Originating Summons dated 8th August 2016, brought under Order 37 Rule 1 of the *Civil Procedure Act*; Articles 27 and 28 of the Kenya Constitution 2010; Sections 66 and 67 of the *Land Registration Act*, and Section 126 of the *Land Act*, and sought for the following prayers:
 - I. That Joseph Mutiga and the late John Mwangi, be declared to be jointly holding all that parcel of land measuring 5.3 Acres, known as LOC13/Karung'e/1036, in trust on their own behalf and on behalf of all the children of the late Kirogi Gathira, the Plaintiffs and Defendants herein.
 - II. That all that parcel of land known as LOC 13/Karung'e/1036, be surveyed and adjudicated by a Government surveyor or such other surveyor as the Court may appoint to demarcate and subdivide the parcel of land into portions for each and every beneficiary of the trust.



- III. THAT the land register relating to Land title No. LOC 13/Karung'e/1036, be rectified in such a manner as will reflect the plaintiffs herein as beneficiaries of the registered owner of the said parcel of land.
 - IV. THAT such other questions as may be pertinent to the case be determined and appropriate directions and order be given.
 - V. THAT the costs of these proceedings be borne by the Defendants.
2. The Originating Summons is premised on the grounds set out on the face thereof and the Supporting Affidavit sworn by Grace Njeri Warukenya, the 1st Plaintiff herein dated 8th August 2016.
 3. The Plaintiffs averred that both the Defendants and themselves are siblings by virtue of being children of Kirogi Gathira (deceased), who passed on in year 1967, leaving behind two widows, each with children as follows: the four Plaintiffs are daughters of the late Kirogi Gathira by his first wife, Susan Wangare Kirogi, while the 1st Defendant is a son to the deceased through his second wife, Dorcas Wairimu Kirogi, the 2nd Defendant is the widow of the deceased's son John Mwangi, with his second wife and is sued in her capacity as the Legal Representative of her late husband John Mwangi.
 4. The Plaintiffs also averred that following the demise of their father, Kirogi Gathira in 1967, the deceased's two sons Joseph Mutiga and John Mwangi, were registered jointly as successors of the deceased land parcel No. Loc 13/ Karung'e/1036, by virtue of being sons of their father Kirogi Gathira, under the Kikuyu Customary Law, despite the fact that the deceased's two widows were then living and residing on the suit property.
 5. The Plaintiffs contended that the Defendants were registered jointly as proprietors of the suit property LOC. 13/Karung'e/1036, as trustees of the entire beneficiaries and dependents of the late Kirogi Gathira, but not to hold absolutely for themselves.
 6. The Plaintiffs further averred that by causing the registration of this suit land that belonged to late Kirogi Gathira, to their names only as absolute owners, rather than as trustees on their own behalf and on behalf of the Plaintiffs, the Defendants "connived" to disinherit the Plaintiff's from their late father's land, despite the fact that their mothers and some of the Plaintiffs still resided on the suit land.
 7. The Plaintiffs also averred that upon the demise of their mother Susan Wangari Kirogi, the Defendants chased the Plaintiffs away from the suit property, insisting that the property belonged to the Defendants absolutely and that there is no trust in existence regarding the suit property.
 8. The Plaintiffs alleged that they attempted to resolve the dispute with the Defendants out-of-Court by asking the area Chief in charge of the location wherein the suit property LOC. 13/Karung'e/1036, is situated to mediate, but that those attempts at mediation were rebuffed by the Defendants, and they remained uncooperative and abusive to the Plaintiffs.
 9. The Plaintiffs contended that all attempts to resolve the matter amicably have been rejected by the Defendants leading to the filing of the instant suit, and prior to filing of this suit, she had lodged a caution over the suit property to protect their interests.
 10. The Plaintiffs also averred that the only reason for the Defendants' reluctance to accommodate the Plaintiffs' claim over their late father's land is because the Plaintiffs are females; a fact which, in the eyes of the Defendants, should disentitle the Plaintiffs from their birthright and thus contrives their constitutional rights.



11. It was the Plaintiffs further contention that they are also dependents of their deceased father, and they urged the Court do make a declaration of trust in respect of the suit property so as to secure the Plaintiffs' interests.
12. The Originating Summons is contested by the Defendants herein, and consequently, the 1st Defendant, Joseph Mutiga, filed a Replying Affidavit dated 22nd August 2016, in opposition to the Plaintiffs' Originating Summons. The 1st Defendant admitted that all the four Plaintiffs are his elder step-sisters, by his father, the late Kirogi Gathira and Susan Wangare Kirogi, but who are all married daughters.
13. The 1st Defendant contended that he was registered as joint owner of the suit land, together with his brother John Mwangi, in 1977, through a Succession proceedings in respect of the estate his father, the late Kirogi Gathira, who had died in 1967, and he annexed the Green Card as JM1.
14. The Deponent further averred that as is evident from the entries in the Green Card, which he had annexed to his Replying Affidavit, ownership of LOC.13/Karung'e/1036, changed hands from the late Kirogi Gathira to Joseph Mutiga, and John Mwangi, through Succession proceedings, that were conducted at Kangema Law Courts, and the title deed marked JM2, had no description of the proprietors as trustees.
15. It was the further contention of the Defendants/ Respondents that the registration of John Mwangi and Joseph Mutiga, as proprietors of LOC.13/KARUNG'E/1036, clearly identified the Defendants as beneficiaries and not as trustees as alleged by the Plaintiffs.
16. Further, it was averred that at the time of the demise of Kirogi Gathira in 1967, the applicable law with regard to distribution of estates of deceased persons was Kikuyu Customary Law, which provided that married daughters could not inherit the estate of their late father.
17. It was also averred that at the time of the demise of Kirogi Gathira in 1967, all four Plaintiffs were married women, which fact is evidenced by their surnames as they appear on the face of their pleadings, and that being the case, the Plaintiffs could not inherit from the estate of their late father according to the Kikuyu Customary Law in place as at 1967.
18. The Deponent further contended that if the Plaintiffs were dissatisfied with the distribution of the estate of their late father, the appropriate legal recourse available to them was to seek for revocation of the Grant that was issued in the Succession Proceedings of their deceased father's estate, rather than seeking for a declaration of trust over the same property, as is the basis of the instant suit, since there was no evidence of existence of trust.
19. In regard to the distribution of the estate of their late father, it was his contention that there has been no discrimination on grounds of gender against the Plaintiffs as alleged by them, since the Succession Court that distributed the estate of the late KIROGI GATHIRA (deceased), complied with all applicable laws then in force at that particular time, which was Kikuyu Customary Law.
20. The Defendants also contended that the Plaintiffs were not residing on the suit property prior to the death their mother as claimed by them, and it was asserted that each of the Plaintiffs herein was and is still a resident at their respective husbands' abode since their marriages and they have always lived away from the suit land, with their respective husbands.
21. The Defendants/ Respondents refuted that the Plaintiffs have ever been evicted by the Defendants from the suit property, as the Plaintiffs were residing with their husbands in other locations at the time of death of the Plaintiffs' mother.



22. It was claimed that the caution registered by the Plaintiffs in respect of the suit property lacks any legal basis and same ought to be vacated by the Court and the Plaintiffs ordered to pursue the appropriate legal channels to vindicate their claim.
23. The 1st Plaintiff filed a Further Affidavit dated 1st December 2016, wherein she averred that there was never a succession proceeding in respect of the estate of the late KIROGI GATHIRA, as claimed by the Defendants and that the Defendants did not present to the Court any Grant or related succession documents, demonstrating the existence of a Succession proceedings relating to the estate of late KIROGI GATHIRA.
24. The 1st Plaintiff further averred that the Kikuyu Customary Law recognizes “houses” in terms of division of a deceased person’s property, and because the Plaintiffs’ mother was a co-wife to the Defendants’ mother, the Plaintiffs are therefore, entitled to half-a-share of their late father’s estate on their mother’s account.
25. The 1st Plaintiff also averred that the Defendants have been hostile and unaccommodating to the Plaintiffs with the intention to disinherit the Plaintiffs from getting their rightful share of their father’s estate.
26. The 1st Plaintiff further averred that there exists no Grant of letters of Administration in respect of the estate of the late Kirogi Gathira, which could be revoked by this Court as claimed by the Defendants.
27. The 1st Plaintiff also averred that the Kikuyu Customary Law does not consign the females of a household to destitution, and that the Plaintiffs’ mother was living as a squatter on her husband’s land because of the hostile actions by the Defendants.
28. The 1st Plaintiff contended that some of the Plaintiffs were residing in the suit property from which they were forcibly evicted by the Defendants upon the death of the Plaintiffs mother.
29. The suit proceeded by way of viva voce evidence, wherein, the Plaintiffs called one witness, Grace Njeri Warukenya, who testified on her own behalf and on behalf of the other three Plaintiffs. The Defendants gave evidence through Joseph Mutiga, the 1st Defendant, who denied all the allegations made by the Plaintiffs in regard to existence of Customary trust.
30. The 1st Defendant later passed on during the pendency of these proceedings, and he was substituted by his wife, Jane Anna Wambui Mutiga, vide a court order issued on 30th November 2021.
31. PW1, testified that she is a farmer in Gatundu area, and that she was giving evidence on her behalf and that of 2nd-4th Plaintiffs. She adopted her witness statement as her evidence in chief and also produced the bundle of documents as PEXBTS. It was her evidence that the Defendants are holding the suit land in trust for themselves and the Plaintiffs, and that there was no Succession Cause filed on behalf of their father’s estate.
32. She also stated that when their father died, he left behind two wives who lived on the suit property, and that the Defendants never consulted anyone when they got themselves registered as proprietors of the suit land, and they did not involve the other family members.
33. She alleged that one of her sisters by the name of Wangeshi, was chased out of the suit land by the Defendants, and that PW1 had to involve the village elders to resolve the case. It was her claim that Kirogi Gathira(deceased) had 11 children, and they should all get equal shares, from their father’s land.
34. In cross exam by counsel for the Defendants, she admitted that she is married in Gatundu, where she has been since 1986. She confirmed that all the other Plaintiffs are married and they do not live on



- the suit land, but they live in various places of their marriage. She also confirmed that John Mwangi is deceased, but she had no evidence that the 2nd Defendant was his Legal Representative.
35. She conceded that the Defendants were registered as proprietors of the suit land on 1st December 1977, but she was not aware whether her mother participated in the said registration. She also confirmed that she lodged a caution on 14th March 2015, after the death of both of their mothers. That she has tried to go to the suit land to farm and build a house, but was denied by the Defendants. It was her prayers that each child of their father should get a share of their father's land.
 36. DW1(Joseph Mutiga), also adopted his witness statement dated 25/4/2017, and confirmed that together with his brother John Mwangi, they were registered as proprietors of the suit land in 1977. That John was around 19 years old at the time of transmission, as he was born in 1958, and DW1, was around 12 years old, as he was born in 1965.
 37. That it came to his knowledge that he was registered as such, from his mother, who told him that there was a succession proceeding, that had been filed at Kangema law courts. He confirmed that his father died in 1967.
 38. In cross exam, he confirmed that Kirogi Gathira had 11 siblings, and that during registration of the suit land, he was not present as he was a minor, and he was informed by his mother that he was registered so, because he was one of the sons of the deceased. He also confirmed receiving demand letter from his sisters, which he did not respond to. Later, the Chief of the area summoned him, and he confirmed to the chief that his sisters had no land. He also denied that his mothers were squatters on the said parcel of land.
 39. After the close of viva voce evidence, parties were directed to file written submissions. However, the Defendants applied to re-open their case, so that they could produce the succession proceedings in respect of the estate of Kirogi Gathira, but that application was denied. An Appeal was lodged against that Ruling, and a stay of proceedings was issued. However, on 24th March 2023, counsel for Defendants informed the court that the filed Appeal was dismissed, and thus this suit was set down for further actions. Meanwhile, Joseph Mutiga, had passed on by then, and he was substituted accordingly.
 40. After the substitution of the 1st Defendant and revive of the suit after the conclusion of the Appeal, parties proceeded to file their respective written submissions, which this Court has carefully read and considered.
 41. The Plaintiffs filed their written submissions dated 29th June 2017, on 11th July 2023, through the Law Firm of Ishmael & Co Advocates, and set out four issues for consideration by the Court.
 42. It was the Plaintiffs' submissions that the suit land belonged to Kirogi Gathira, who died intestate and left behind two wives. Further, that according to Kikuyu Customary Law, land was registered in the names of the firstborn son or sons to be held as "Muramati" or trustee and that is exactly what happened in the registration of John Mwangi and Joseph Mutiga, 1st Defendant, as the proprietors of land parcel number LOC.13/Karung'e/1036.
 43. Further, the Plaintiffs submitted that they had fulfilled all or most of the elements which qualify a claimant to be adjudged the beneficiary of a Customary trust, as was set out by the Supreme Court in the case of *Isack M'inanga Kiebia V Isaaya Theuri M'lintari & Another* [2018] e KLR., where the court held: we now declare that customary trust , as long as the same can be proved to subsists , upon a first registration, is one of the trusts to which a registered proprietor , is subject under the proviso to section 28 of the Registered [Land Act](#).



44. It was also their submissions that there was no evidence that a Succession Cause was ever filed over the estate of Kirogi Gathira, and therefore, it was not clear how the suit property devolved to the defendants, and that the defendants did not produce the original title deed, which would have shown existence of a trust.
45. On whether the Plaintiffs were entitled to a share of the suit land, it was submitted that the Plaintiffs failed to be given a share of the suit land since they were daughters, and that was discriminatory based on gender, and was contrary to Article 27 of the Constitution 2010. Therefore, the Plaintiffs are entitled to a share of their father's parcel of land, based on the sense of social security in the property of their late father.
46. In conclusion, the Plaintiffs urged the court to find that under Kikuyu customs, the sons were registered in place of their father or where the father was deceased, for purposes of holding the land in trust for the entire family, and therefore, the suit land should be shared by all the siblings of Kirogi Gathira.
47. On their part, the Defendants filed their written submissions dated 29th August 2023, through the Law Firm of R.M. Kimani & Co. Advocates, and submitted that the 2nd Defendant lacks capacity or Locus standi to be sued as the Legal Representative of the late John Mwangi, since she had not taken out Letters of Administration in respect of the estate of her deceased husband.
48. They also submitted that in the Succession Cause concerning the estate of late Kirogi Gathira, the Plaintiffs' mother agreed in the said proceedings not to be given any land, resulting into the registration of the said land parcel number LOC.13/Karung'e/1036, between the two sons of the deceased, Kirogi Gathira, John and Joseph.
49. They also submitted that the succession proceedings in respect of the estate of late KIROGI GATHIRA, could not be produced during the hearing of the Defense case as the Defendants had been informed by a Court official at Kangema Court, that the said proceedings were destroyed, and hence not available during the hearing. However, the said proceedings were later availed, and the Defendants filed an application dated 16th November 2017, seeking to re-open the Defendants' case.
50. The Defendants, also submitted that a Customary Law trust is proved by leading evidence on the history of the suit property and the relevant customary law on which the purported trust is based, and that the Plaintiffs failed to discharge their burden of proof. Reliance was placed on Section 28 of the Registered Land Act, Cap 300(repealed), which provides that a registered proprietor's title is free from all other interests and claims whatsoever subject to leases, charges and encumbrances shown in the register and such overriding interests not quoted in the register and; Further that rights arising under customary law are not listed under the said Section 28 of the Registered Land Act (repealed) as overriding interests.
51. It was further submitted that although the Plaintiffs alleged that the Defendants are holding the suit property on behalf of the Plaintiffs, the Plaintiffs have not claimed that the trust to which they refer arises from Customary Law. Further, that the Plaintiffs claimed that the Defendants connived to register the suit property as their own absolutely, but the Plaintiffs failed to lead evidence at the hearing to demonstrate that the Defendants were registered as owners of the suit property through fraud.
52. The Defendants, also submitted that their registration as proprietors of the suit property was not a first registration, and therefore, the suit land was passed over to the Defendants through succession, and there was no prove of existence of Customary trust.



53. The Defendants further submitted that the Plaintiffs' cause of action is time-barred pursuant to Section 20(1) and (2) of the *Limitation of Actions Act*; and therefore, the Plaintiffs ought to have challenged the registration done in favor of the Defendants within six (6) years of the said registration, and consequently, the present suit amounts to an abuse of the court process. The Defendants prayed that suit herein be dismissed with costs.
54. The Court has carefully considered the available evidence and the rival written submissions and the relevant provisions of law and finds the issues for determination are: -
1. Whether the suit herein is time barred, as provided by *Limitation of Actions Act*.
 2. Whether the 2nd Defendant has capacity to be sued.
 3. Whether there is a customary trust in existence herein.
 4. whether the Plaintiffs are entitled to the prayers sought in the Originating Summons.
 5. Who should pay costs of the suit.
55. Before delving into the disputed facts, the Court finds that it is not in dispute that the parties herein are related. They are Sons and Daughters of the late Kirogi Gathira, who was married to two wives, Susan Wangari Kirogi and Dorcas Wairimu Kirogi. The Plaintiffs are the Children of Susan Wangari Kirogi, who had no Sons. The initial Defendants were the Sons of Dorcas Wairimu Kirogi, and Kirogi Gathira. The two Sons are now deceased and are represented in this suit by their wives.
56. It is evident that the suit property was initially owned by Kirogi Gathira (Njoki), the father to the parties herein. He was registered so on 10th October 1964, and that was a first registration.
57. It is also evident that Kirogi Gathira, died in 1967, and he left behind his two wives and their Children. It is also evident from the Green Card, that the suit property Loc.13/Karung'e/1036, was registered in the name of John Mwangi and Joseph Mutiga, who are the Sons of Kirogi Gathira in 1977.
58. The said registration was done through Succession. The two sons are the Defendants herein. The Plaintiffs have alleged that after the death of their father, Kirogi Gathira, there was no Succession proceedings, and thus John Mwangi and Joseph Mutiga, were registered fraudulently, through connivance, and without having gone through succession proceedings.
59. The Defendants had alleged that they got registered as the proprietors through transmission after the succession proceedings over the estate of their father, Kirogi Gathira were finalized. The Plaintiffs had requested the Defendants to produce evidence of the said Succession proceedings during the hearing of the matter. The Defendants failed to produce on allegation that the said documents could not be produced since they could not be retrieved them from the Court Registry at Kangema Court, even after making numerous requests for the same.
60. However, after the close of Defence case, the Defendants vide an application dated 16th November, 2017, had sought to re-open the Defendants case and so that they could produce the documents requested in the Notice to produce by the Plaintiffs. In the said application, the Defendants had attached various documents such as the proceedings of Kangema Court for 26th July 1977, wherein the succession proceedings for the estate of Kirogi Gathira were attached.
61. There were other documents such as the Application for Certificate of Succession for the estate of Kirogi Gathira Njoki, who died in 1967, and the parcel of land was identified as Loc. 13/ Karung'e/1036, the letter from the Chief which gave the names of the possible heirs and the letter from



the District Officer Kangema, indicating that the deceased Kirogi Gathira, had died intestate and his succession was subject to the Customary law.

62. Though the said application for re-opening the Defendants' case was dismissed by the Court vide its Ruling of 8th March 2018, this court takes Judicial Notice of the fact that indeed, there was a succession proceeding over the estate of Kirogi Gathira, which succession proceedings culminated in the suit property being registered in the names of the John Mwangi and Joseph Mutiga both deceased.
63. Further, it is not in doubt that Kirogi Gathira, died in 1967 and the succession proceedings were done in 1977. That was prior to 1981, when the [Law of Succession Act](#), Cap 160, was enacted.
64. Therefore, the applicable law then was the Customary law and in this case it was the Kikuyu Customary Law of succession.
65. The Plaintiffs have brought this suit which challenges the registration of the suit land in favour of John Mwangi and Joseph Mutiga. The Plaintiffs are not seeking for revocation of Grant or Certificate of Succession issued in 1977, but are claiming that the two registered proprietors, John Mwangi and Joseph Mutiga, were registered as such to hold the said land in trust for themselves and the other siblings of Kirogi Gathira. The Defendants have denied the existence of such trust.
66. The above being the undisputed facts, the Court will now deal with the issues identified for determination.

Whether the suit herein is time barred, as provided by [Limitation of Actions Act](#)?

67. The Defendants in their submissions had submitted that the Plaintiffs' suit is time barred and therefore, it cannot stand. The Plaintiffs relied on Section 20(1) & (2) of the [Limitation of Actions Act](#) which provides;

“

- “1) None of the periods of limitation prescribed by this Act apply to an action by a beneficiary under a trust, which is an action—
 - (a) in respect of a fraud or fraudulent breach of trust to which the trustee was a party or privy; or
 - (b) to recover from the trustee trust property or the proceeds thereof in the possession of the trustee or previously received by the trustee and converted to his use.
- (2) Subject to subsection (1), an action by a beneficiary to recover trust property or in respect of any breach of trust (not being an action for which a period of limitation is prescribed by any other provision of this Act) may not be brought after the end of six years from the date on which the right of action accrued: Provided that the right of action does not accrue to a beneficiary entitled to a future interest in the trust property, until the interest falls into possession”

68. It was their submissions that the Plaintiffs ought to have recovered the suit property, within Six (6) years, from the time the Defendants got registered as proprietors of the suit property if indeed there was any trust.
69. The Plaintiffs did not respond to these allegations, but the Court is obligated to determine this issue. The issue of limitation goes to the root of suit because if the suit is time barred, then this Court will



have no option but to strike it out. See the case of *Bosire Ogero vs Royal Media Services (2015) ekr*, where the Court held;

“The issue of limitation goes to the jurisdiction of Court to entertain claims and therefore if a matter is statute barred, the Court has no jurisdiction to entertain the same. And even if the issue of limitation is not raised by a party to the proceedings, since it is a jurisdictional issue, the Court cannot entertain a suit.”

70. The rationale behind the provision of the law on Limitation of Actions is to prevent stale claims from being brought before Court. It is evident that once the Limitation of action period for a matter lapses, no matter how crystal clear one’s case may be, the Court will have no option but to decline to hear such a matter on ground that the suit is statute barred. However, there are exceptions on different issues and their limitations. Further in the above quoted case of *Bosire Ogero(Supra)* the Court held;

“The law of Limitation of Actions is intended to bar the Plaintiffs from instituting claims that are stale and aimed at protecting Defendants against unreasonable delay in the bringing of suits against them.”

71. From the above description therefore, if the Plaintiffs suit is found to be statute barred, the Court will have no option but to strike it out. See the case of *Iga vs Makerere University (1972) E.A*, where the Court held: -

“A Plaint which is barred by limitation is a Plaint barred by laws. Reading- these Provisions together, it seems clear that unless the applicant in this case had put himself within the limitation period by showing grounds upon which he could claim exemption, the Court shall reject his claim. The limitation Act- does not extinguish a suit or action itself, but operates to bar the claim or remedy sought for and when a suit is time barred, the Court cannot grant the remedy sought”

72. The claim herein is based on a Customary trust. The suit property was registered in the name of John Mwangi and Joseph Mutiga in 1977. The suit herein was filed in 2017, and that was more than 40 years after registration. The Plaintiffs averred that as provided by Section 20(2) of the *Limitation of Actions Act* Cap 22, the Plaintiffs ought to have filed their suit within a period of 6 years after the registration of the Defendant.

73. However, this Court will be guided by the decision in the case of *Macharia Kihari vs Ngigi Kihari C.A. Civil Appeal No. 170 of 1993*, where the Court held; -

“Limitation period prescribed in Section 20 (2) of the *Limitation of Actions Act* will not apply to a trust coming into existence under customary law. Under customary law, the land even after the right of action has accrued, is held in trust even for decades before any step is contemplated for a formal transfer or division. Limitation does not apply in customary law”.

74. Though the Plaintiffs alleged that the Defendants connived, to have the suit property registered in their names, they did not plead fraud, but alleged that the Defendants were trustees holding the suit property which initially belonged to their father in trust for themselves and the other family members of Kirogi Gathira, but they have declined to allow the Plaintiffs to use and build on the suit land. Section 20(1) (b) of *Limitation of Actions Act*, provides that such a claim cannot be time barred and therefore, this Court finds that this being a claim for Customary trust, then it is not time barred.



75. The Court having found that the suit herein is not statute barred, will now move on to determine the next issue.

Whether the 2nd Defendant has capacity to be sued?

76. The Defendants had alleged and submitted that the 2nd Defendant though wife to John Mwangi (deceased), had not taken out letters of Administration on the estate of John Mwangi and therefore had no capacity to be sued. The Plaintiffs also did not respond this claim, and it is clear on the Plaintiff's supporting Affidavit in Para 3, the Deponent had alleged that the 2nd Defendant is her sister in law being the wife of his late brother John Mwangi, and has taken out Letters of Administration over the estate of his late brother and is therefore sued as Legal Representative of the late John Mwangi.

77. The said letters of Administration were not produced by the Plaintiffs. The 2nd Defendant denied that she is the Legal Representative of the estate of John Mwangi. The Plaintiffs are the ones who have alleged, and therefore had the onus of proving their allegations. See Section 107 of the Evidence Act which provides;

“(1) Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person”

78. The Plaintiffs did not produce that evidence, the 2nd Defendant is the Legal Representative of the estate of John Mwangi. It is evident that for one to be sued as legal Representative of the estate of a deceased person, he/she needs to have taken letters of Administration. See the case Julian Adoyo Ongunga –vs- Francis Kiberenge Abano Migori Civil Appeal No.119 of 2015, the Court had this to say on the issue of a party filing a suit without having obtained a limited grant.

“Further, the issue of locus standi is so cardinal in a civil matter since it runs through to the heart of the case. Simply put, a party without locus standi in a civil suit lacks the right to institute and/or maintain that suit even where a valid cause of action subsists. Locus standi relates mainly to the legal capacity of a party. The impact of a party in a suit without locus standi can be equated to that of a Court acting without jurisdiction, since it all amounts to null and void proceedings. It is also worth noting that the issue of locus standi becomes such a serious one where the matter involves the estate of a deceased person since in most cases the estate involves several other beneficiaries or interested parties.”

79. Letters of Administration grant one locus standi to represent the estate of the deceased. See the case of Trouistik Union International & Another v Jane Mbeyu & Another (2008) IKLR (G&F) 730 where it was held that:

“To determine who may agitate by suit any cause of action vested in the deceased at the time of his death, one must turn to section 82 (a) of the law of succession Act. That section confers that power on personal representatives and on them alone”

Further, it is also evident that locus standi signifies a right to be heard and for a party to have locus standi in a matter, he ought to show that his own interest has been prejudiced. See the case of Law



Society of Kenya ...Vs...Commissioner of Lands & Others, Nakuru High Court Civil Case No. 464 of 2000, the Court held that;

“Locus Standi signifies a right to be heard, a person must have sufficiency of interest to sustain his standing to sue a in court of law”.

80. Before the 2nd Defendant could be sued, she ought to have taken letters of Administration as provided by Section 82(a) of the [Law of Succession Act](#) which provides;

“to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arising out of his death for his personal representative;”

81. Without any evidence that the 2nd Respondent is has taken out letters of Administration on behalf of the estate of John Mwangi, then she has no locus standi or capacity to be sued on his behalf. The 2nd Defendants pleaded that she is not a personal representative of the estate of John Mwangi, and this Court cannot hold that though she is the wife of John Mwangi, she is the Personal representative of the deceased as provided by Section 3 of the [Law of Succession Act](#), which defines a personal representative to include the executor or administrator of a deceased person. Without evidence of the 2nd Defendant being such a personal representative of John Mwangi, then she could certainly not have locus standi to be sued. See the case of Alfred Njau & Others vs City Council of Nairobi (1982-88) IKAR 229, where the Court of Appeal held;

“To say he has no Locus standi means he cannot be heard; even on whether or not he has a case worth listening to”

82. It is trite that locus standi is a crucial point of law almost similar to the issue of jurisdiction and since and since there is no evidence that the 2nd Defendant is the administrator of the estate of John Mwangi (deceased), then she lacks capacity to be sued on behalf of the estate of the said deceased, who is one of the proprietors of the suit property herein.

83. Further, the Court finds and holds that the issue of locus standi being a point of law goes to the root of any suit and the absence of the renders the suit fatally defective.

84. For the above reasons, the Court finds that the 2nd Defendant had no capacity to be sued on behalf of John Mwangi (deceased) and the suit against her is defective and the Court proceeds to strike out the suit against the 2nd Defendant herein.

Whether there is a customary trust in existence herein?

85. The Plaintiffs have contended that the Defendants herein are holding the suit property Loc 13/ Karung'e/1036, in trust for themselves, and on behalf of the family of Kirogi Gathira. The Defendants denied these allegations, and averred that there is no trust existing over the suit property.

86. The suit having been struck out against the 2nd Defendant, then claim herein is against the 1st Defendant. It is evident that Joseph Mutiga, died during the pendency of this suit, and he was substituted by his wife, Jane Anna Mutiga. The Defendants had denied existence of any Customary trust and it is evident that Customary trust is an encumbrance on land. These are non-registrable rights



which run with the land, and they are overriding interests, which subsists on the land. See the case of *Kanyi vs Muthiora* (1984) KLR 712, where the Court stated that;

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

87. The Plaintiffs are the ones who have claimed that there is existence of Customary trust herein and therefore the legal burden to prove the existence of such trusts rests with them, since they are the ones asserting a right under Customary trust.

88. Courts have consistently held that Customary trust is provided by leading evidence. Trust is a question of fact, which must be proved by whoever is claiming such a right under Customary trust.

89. It is trite that a trust can never be implied by the Court unless there was intention to create a trust. In the first place see the case of *Mbothu & others vs Waitimu & 11 others* (1986) KLR 171, where the Court held; -

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

90. Further on the issue of proving Customary trust, the supreme Court held as follows in the case of *Isack M'inanga Kiebia ...Vs...Isaaya Theuri M'lintari & another* [2018] eKLR:-

“Each case has to be determined on its own merits and quality of evidence. It is not every claim of a right to land that will qualify as a customary trust. In this regard, we agree with the High Court in *Kiarie v. Kinuthia*, that what is essential is the nature of the holding of the land and intention of the parties. If the said holding is for the benefit of other members of the family, then a customary trust would be presumed to have been created in favour of such other members, whether or not they are in possession or actual occupation of the land. Some of the elements that would qualify a claimant as a trustee are:

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

91. The Plaintiffs are the ones who alleged that there was Customary trust, and they needed to call sufficient evidence to prove their case.



92. It is evident that the suit property was registered in 1977, during the lifetime of the mothers to be parties. The Plaintiffs had alleged that the Defendants connived to have the suit land registered in their names. From the available evidence; the two brothers John Mwangi and Joseph Mutiga, were aged 19 years and about 12 years respectively, when the suit property was registered in their names. Joseph Mutiga, was a minor by that time. Could he have connived with anyone? Whoever alleges must prove. The plaintiffs ought to have availed the evidence of connivance. This court has not any such evidence.
93. Though the succession documents were not produced as exhibits in Court, the Court took Judicial Notice of their existence. The succession proceedings were done in the presence of the two wives of Kirogi Gathira, Susan Wangari and Dorcas Wairimu. The two wives consented to the suit property being registered in favour of the two Sons, John and Joseph. The registration of the suit property in favour of John and Joseph was not the first registration, but it was a 2nd registration done through transmission. For a trust to be created, the intention of the parties has to be very clear. Susan Wangari the mother to the Plaintiffs was present during the succession proceedings. She did not express any intention of the suit property being registered in trust for her daughters.
94. As the Court held earlier, the Succession proceedings and registration of the suit land was done prior to the commencement of the Succession Act as provided by Section 2(2) of the [*law of Succession Act*](#) which section reads;
- “The estates of persons dying before the commencement of this Act are subject to the written laws and customs applying at the date of death, but nevertheless the administration of their estates shall commence or proceed so far as possible in accordance with this Act.”
95. The deceased herein Kirogi Gathira died in 1967, and distribution of the suit land was done in 1977. That basically meant that the applicable law then was the Kikuyu Customary Law. The said Customary law provides that if the deceased is survived by a spouse or spouses together with Children, his estate is divided equally among the respective houses. See the case of Mbathi vs Mbathi (1976) KLR 120, and also Re-statement of African Law; by Eugene Cotran and “The Law of Succession 1969” (London, Sweet & Maxwell).
96. According to Eugene Cotran in Re-statement of African Law, according to Kikuyu Customary Law, the general principles is that Kikuyu law of inheritance is patrilineal, namely that there was equal distribution of the man’s property amongst his Sons, and his widow/widows would have a life interest. The daughters were normally excluded if they are married, but the unmarried daughters are given a part of the share of the estate.
97. However, in polygamous homesteads, the share of the estate was amongst the houses, each widow representing a house.
98. Kirogi Gathira(deceased), had two Sons and basically those were the heirs. However, Kirogo Gathira(deceased), had two wives and therefore his estate should have been shared between the houses. But from the succession proceedings, both wives agreed to have the suit property registered in the name of the two sons, and not according to houses. The 1st Plaintiff in her evidence confirmed that the four Plaintiffs herein are all married, and that is also evident from their Surnames, which show that they bear their husbands’ names. There is no evidence of whether there are unmarried daughters among the other daughters who were not parties to this suit.
99. Further, even if the estate of Kirogi Gathira(deceased), was not distributed equally between the “two houses”, that question or issue ought to have been addressed by the Probate Court. This Court has



been asked to determine the question of Customary trust. The Court held and found that Customary trust is proved by calling of evidence, and is proved by the person asserting it.

100. The Plaintiffs alleged that they have been chased out of the suit land by their brothers, who are the registered proprietors, and were registered so to hold the said land in trust for themselves and the Plaintiffs. The 1st Plaintiff testified that when the Defendants denied them the use of the land, and even chased one Wangeshi away, the matter was even reported to the Chief. The other sisters of the Plaintiffs were not called as witnesses to corroborate that evidence. Further the Chief of the area who had been called to mediate the matter was not a witness too.
101. Given that the suit property was registered in the names of the two proprietors in 1977, during the lifetime of their mothers and that their mothers did not assert a claim of Customary trust, during their lifetime and there was no evidence that there was an intention to create a trust during the registration of the suit property in 1977, the Court finds that as was held by the Supreme Court in the case of Isaack Kieba (Supra); each case has to be determined on its merit and quality of evidence, and it is not every claim of a right to land will qualify a Customary trust.
102. This Court finds that there is no evidence of existence of Customary trust herein, and this Court therefore cannot hold that John Mwangi and Joseph Mutiga were registered as proprietors of the suit property Loc. 13/Karung'e/1036 in 1977, to hold it in trust for themselves and the whole family of Kirogi Gathira(deceased), especially the Plaintiffs herein.

whether the Plaintiffs are entitled to the prayers sought in the Originating Summons.

103. The Plaintiffs in their Originating Summons have sought for various prayers among them a determination that there is a Customary trust and that Joseph Mutiga and John Mwangi were holding the land parcel No. Loc. 13/Karung'e/1036, measuring 5.3 acres, in trust for themselves and all the Children of Kirogi Gathira. The other prayers such as an order for survey and adjudicating of the suit land so that each child of Kirogi Gathira(deceased) can have a portion of the suit emanates from whether the court will determine the first prayer in favour of the Plaintiffs, on whether there is a Customary trust.
104. The Plaintiffs have brought this claim because they were dissatisfied with the mode of distribution of the estate of their father Kirogi Gathira(deceased), who died in 1967, and distribution of his estate was done in 1977. The Plaintiffs have alleged that they were discriminated because of their gender. They alleged that the said discrimination is contrary to Articles 27 and 28 of *the Constitution* 2010., which provides;
 27. Equality and freedom from discrimination
 - (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.
 - (2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.
 - (3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.
 28. . Human dignity
Every person has inherent dignity and the right to have that dignity respected and protected.”



105. The distribution of the estate was done in 1977, in accordance with the Kikuyu Customary Law in existence at that time, which emphasized that a man's estate was basically inherited by the Sons, and married daughters were not eligible to inherit.
106. According to the current Constitution 2010, that is indeed discriminatory, and cannot be allowed in the modern Kenyan society. However, the Plaintiffs are challenging the mode of distribution of the estate of their father, Kirogi Gathira(deceased), and that cannot be done by a claim for existence of a customary trust.
107. That challenge of the mode of distribution, could only be done in a Probate Court wherein the Plaintiffs either could have sought for revocation of grant or a Constitutional Petition alleging discrimination, on the basis of gender.
108. This Court has found and held that there is no evidence of existence of Customary trust, and for the above reasons, the Court finds and holds that the Plaintiffs have not proved their case on the required standard of balance of probabilities.
109. Consequently, the Court finds and holds that the Plaintiffs are not entitled to any of the prayers sought and their suit is dismissed entirely.

Who should pay costs of the suit?

110. As provided by Section 27 of the *Civil Procedure Act*, costs are granted at the discretion of the Court. However, costs normally follow the event and are granted to the successful litigants. The Defendants are the successful litigants, but the Court finds that the parties are related. For that reasons, the Court directs that each party meet his/her own costs.
111. In conclusion, the Court finds and holds that the Plaintiffs have failed to prove their case on the required standard and Consequently, the Plaintiffs suit herein is dismissed entirely, with an order that each party to meet its own costs.
112. There was evidence that the Plaintiffs had placed a Caution over the tittle of the suit property awaiting determination of this case. The suit has been determined, and the Court proceeds to direct that the caution lodged over the title herein by the Plaintiffs be and is hereby removed forthwith.

It is so ordered.

DATED, SIGNED AND DELIVERED ONLINE AT MURANG'A THIS 8TH DAY OF FEBRUARY, 2024.

L. GACHERU

JUDGE

Delivered virtually in the presence of;

Mr Tumu for the Plaintiffs

M/s Kimani for the Defendants

Joel Njonjo - Court Assistant

L. GACHERU

JUDGE

