



REPUBLIC OF KENYA



KENYA LAW
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**Kabiri v Githinji & another (Environment and Land Appeal
E09 of 2021) [2024] KEELC 637 (KLR) (8 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 637 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT AND LAND APPEAL E09 OF 2021
LN GACHERU, J
FEBRUARY 8, 2024**

BETWEEN

PETER NGUGI KABIRI APPELLANT

AND

ESTHER WANGARI GITHINJI 1ST RESPONDENT

FLORA WANJIKU GITHINJI 2ND RESPONDENT

*(Being an Appeal from the Judgement and Decree of the Senior Principal Magistrate's
at Kigumo of the Hon. K. Sambu delivered on 13th May 2021 in ELC No. 20 of 2018)*

JUDGMENT

1. The Appeal herein emanates from the Judgement of the trial Court in Kigumo MELC No. 20 of 2018, which was formerly Nyeri ELC 413 of 2014, and formerly Murang'a ELC No 36 of 2018. The Appellant herein was the Plaintiff in the said suit wherein he filed a suit at Nyeri High Court No. 111 of 2010, wherein he had sought for various prayers against the Defendants; among them a prayer that the Defendants are the registered owners of LR Maragua Ridge/559 and 560, in trust for the Plaintiff as to one third of the share thereof, and that the Defendants should divide the said land and transfer one third thereof measuring 5 acres, to the Plaintiff(Appellant herein), failure of which the Deputy Registrar of the Court be authorised to execute all the transfer forms to effect the said transfer.
2. The said suit was resisted by the Defendants vide their Statement of Defence dated 15th October 2010, wherein they denied all the allegations made in the Plaint and prayed for dismissal of the Plaintiff's suit with costs.
3. The matter proceeded via vivo voce evidence before the SPM'S Court at Kigumo Law courts, on various dates. The trial Court had even visited the locus quo, and on 13th May 2021, the said Court entered a Judgement in favour of the Defendants (Respondents) wherein the Court found that the Plaintiff's (Appellant's), suit had no merit and dismissed the entire suits with costs.



4. The Appellant (Plaintiff) was aggrieved by the said Judgement and vide a Memorandum of Appeal dated 7th June 2021, he filed the instant Appeal wherein he sought for orders that the trial Court's Judgement dated 13th May 2021, be set aside and that the Appellant's claim in his Plaint of 16th September 2010, be allowed with costs to the Appellant.
5. It was the Appellant's (Plaintiff's) case at the trial Court that the Defendants (Respondents) are the widows of his late brother Githinji Kabiri, who was the registered owner of LR No. Maragua/Ridge/18, measuring 6.3 ha, which the said Githinji Kabiri held as a trustee for himself, the Plaintiff (Appellant) and their mother, the late Mary Njoki Kabiri.
6. The Appellant had also alleged that the land was given to their late mother Mary Njoki Kabiri, being landless by the Government of Kenya in 1962, which Government was allocating land to resettle the landless in 1962. He alleged that since Mary Njoki Kabiri did not have an ID Card; as women never used to hold ID Cards then, the land was registered in the name of Githinji Kabiri(deceased), as a trustee for the family of the late Mary Njoki Kabiri and the said family settled therein. Further that the loan to Settlement Fund Trustees, the entity that was used to allocate and resettle the landless in Maragua Ridge, was repaid with the sale of farm produce or harvest from the suit land Maragua/Ridge/18, which land was cultivated by the whole family members of Mary Njoki Kabiri, Githinji Kabiri and the Appellant included.
7. It was also the Appellant's claim that Githinji Kabiri died in 1992, and the Respondents who are his widows, secretary filed a Succession Cause - being Succession Cause No. 174 of 1994 (Nairobi) in respect of the estate of Githinji Kabiri, wherein they obtained letters of administration, then the Grant was confirmed and the Original land Maragua Ridge/18, was subdivided into two portions being Maragua Ridge/ 559 and 560 respectively, which subdivisions were registered in favour of each of the Respondents herein. The Appellant also averred that he had lived on the original suit property from 1963, and had been utilizing about 5 acres from thereon.
8. The Appellant and his brother Githinji Kabiri(deceased), and later the Respondents herein, had been involved in a number of litigations through court cases since 1986.
9. The Appellant had enumerated these suits as;
 - a. R M Arbitration No. 26 of 1986, at Murang'a between Peter Kabiri vs Githinji Kabiri, wherein the elders award was to the effect that Githinji Kabiri should get 10.5 acres and Peter Kabiri, should get 5 acres.
 - b. RMCC No. 26 of 1990(Thika) being Githinji Kabiri vs Peter Ngugi Kabiri, wherein the Plaintiff's claim and the Defendants Counter-claim were dismissed with costs.
 - c. HCC No. 213 of 1992 (Nairobi), which was an Appeal by the two Respondents herein on behalf of Githinji Kabiri(deceased).

However, the two Appellants had not taken out letters of Administration.
 - d. HCP & A No. 174 of 1994 (Nairobi).

Estate of Githinji Kabiri (deceased) – Grant was issued and the Respondents were appointed Personal Representatives of the deceased and later Grant was confirmed wherein. Esther Wangari got 7.75 acres Florah Wanjiku got 7.7 acres.
 - e. HCCC No. 2061 (1990) Originating Summons in Nairobi between the Appellant herein against the Respondents. The said Originating Summons was dismissed for want of prosecution.



- f. SPMC LTD No. 23 /2010 in Murang'a between the Appellant (Peter Kabiri) vs the Respondents herein and the Court directed that both parties maintain the status quo.
10. The Appellant further averred that though the Respondents were the registered owners of land parcels No. Maragua Ridge/559 & 560 respectively, they were registered so in trust for themselves and the Appellant in equal shares, and he urged the Court to dissolve the Customary trust and divide the land into one third share of Plot No. Maragua Ridge 559 and 560, so that the Appellant can get his share.
 11. The Respondents vide their Defence dated 15th October 2010, denied the Appellant's suit, and averred that the suit was registered in their names on 20th April 1995, and they had obtained titles and therefore the Appellant's (Plaintiff), suit was time barred by virtue of Section 7 of the *Limitation of Actions Act* Cap 22 Laws of Kenya. They also denied holding their respective parcels of land Maragua Ridge 559 and 560, in trust for themselves and for the Appellant (Plaintiff before the trial Court).
 12. Before the trial Court, the Appellant gave evidence for himself and adopted his witness statement as his evidence in Chief. He also confirmed that Githinji Kabiri, was his brother and that the land parcel Maragua Ridge 18, which was registered in the name of Githinji Kabiri (now deceased), was allocated to him by the Government through Settlement Fund Trustees(SFT) in 1962. He had also reiterated his claim that he entered into the suit land in 1962, with his mother Mary Njoki Kabiri and Githinji Kabiri(deceased).
 13. That his late brother Githinji Kabiri, was married to the two Respondents, and they lived on the suit property, wherein the Appellant was also using the said land. That the Appellant got married in 1968, and he continued to live on the suit land, utilizing 5 acres, and his late brother Githinji Kabiri, and his family was utilizing 10 acres. However, a dispute arose in 1986 and the two families have been involved in various Court cases.
 14. He had also testified that when his brother died in 1992, the Respondents as his widows filed a Succession Cause No. 174 of 1994, and they did not inform him and after their Grant was confirmed, each one of them was given 7.75 acres, out of the suit land. He later filed a case at Nyeri High Court being HCCC No. 111 of 2010. In cross-examination he confirmed that the land was initially in the name of Githinji Kabiri (deceased), but it was not indicated or noted on the title that the said Githinji Kabiri(deceased), was holding the said land in trust for the Appellant and/or other person.
 15. On their part, the Respondents (Defendants before the trial Court) called two witnesses to dispute the Appellant's claim.
 16. DW1 Mwangi Gatheyu, who was among the first settlers at Maragua Ridge confirmed that the suit land was allocated to the late Githinji Kabiri(deceased), absolutely and not to hold in trust for his family. He also told the Court that according to the Kikuyu Customs, a brother cannot inherit from his brother.
 17. DW 2, Flora Wanjiku Githinji, the 2nd Respondent, testified that she got married to Githinji Kabiri(deceased), in 1962 and that they had settled on the suit property in 1962. Then the Appellant joined them in 1963, and was allocated or given a small portion of land to cultivate as a licensee. She also testified that the suit land had been allocated to Githinji Kabiri solely, and it was Githinji alone who paid the loan to SFT, in instalments. She also testified that her mother-in-law Mary Njoki Kabiri, was also given a small portion of land to utilise. She relied on her written statement and bundle of documents as her evidence in chief and exhibits
 18. After analysing the available evidence before it, the trial Court found that the Appellant had failed to prove his case on the required standard of balance of probabilities, and dismissed his suit with costs to the Respondent.



19. The instant appeal was canvassed by way of written submissions.
20. The Appellant – Peter Ngugi Kabiri, filed his written submissions on 20th June 2023, through Kanyi Kiruchi & Co. Advocates, and urged the Court to allow his claim. He raised one issue for determination being whether the Appellant had an interest in the suit property through Customary trust.
21. For this the Appellant relied on Section 28(b) of the [Land Registration Act](#), which outlines the overriding interest upon a suit land, which states;

“unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interest as may, for the time being subsist and affect the same without them being noted on the register.

(b) Trusts, including Customary trust.

22. The Appellant also relied on the case of *Isaack Kieba M’Inanga vs Isaaya M’Lintari & Another (2018) eKRL*, where the Supreme Court set out the principles to be considered in a case of Customary trust. These 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.
23. The Appellant also relied on the case of *Mbui Mukangu vs Mutwiri Mbui C.A. No. 281 of 2000*, where the Court held;

“For one to establish a claim in Customary trust one had to prove that they are in actual Physical possession or occupation of the parcel of land”

24. It was the Appellant’s submissions that he has satisfied all the above stated tests, and the trial Court ought to have allowed his claim. He submitted that on the 1st and 2nd tests, the Appellant is a family member of the Kabiri’s family, and the land was given to their mother by Government of Kenya to settle the landless. However, due to the fact that women then did not hold ID cards, the suit property was agreed to be registered in the name of their elder brother Githinji Kabiri(deceased), who was to hold the said land in trust for the family of Mary Njoki Kabiri(deceased), the Appellant included.
25. He further submitted that the said Githinji Kabiri(deceased), allowed the Appellant to stay on the suit property with their mother from 1962, to date. That their mother had subdivided the land into three portions, so that each of them, being Githinji, their mother and Appellant, held 5 acres and upon the Appellant becoming an adult, he continued to use his 5 acres, he got married and his Children have been raised on this parcel of land, though it was initially registered in the name of his late brother Githinji Kabiri(deceased). That the Appellant was not registered as a proprietor of the suit land, because his elder brother was holding it in trust for the family.



26. It was his further submissions that the Appellant's mother and some of his relatives were buried on the suit land and he has no other place to call home apart from the suit land. Further that the Appellant and his wife have continued to cultivate on the suit land and it has never been left idle and he has therefore acquired possession and ownership of his portion of land which belonged to their mother, and his late brother had allowed him to stay thereon.
27. On the fourth and fifth test set out on Isaack Kieba case, it was submitted that the Appellant started to live on the suit land in 1962, as a minor aged 12 years, and on or around 1968, he attained the age of majority and he got married. That even after marriage, he continued to live on the suit property and was never evicted by his elder brother Githinji Kabiri.
28. The Appellant further submitted that as for the test in Mbui vs Mbui, he started to live on the suit property with his mother and brother and in the year 1971, their mother subdivided the land into three portions wherein, the Appellant was given the eastern side and Githinji Kabiri the western side and their mother the middle. That he has continued to cultivate the 5 acres to date.
29. Further, that the Court of Appeal in Nyeri Civil Appeal No. 36 of 2014, acknowledged that the Appellant had occupied that part of the suit property for more than 50 years, and had continued to occupy the same to date. Therefore, the said acknowledgement is that the Appellant is occupying the suit property through a Customary trust as stated in the case of Mbui vs Mbui(supra).
30. The Appellant also submitted that vide the Judgement of the trial Court, the Appellant has been denied justice because for more than 50 years, he has occupied the suit property through Customary trust. He urged the Court to allow his appeal and set aside the trial Court's Judgement as he had proved his case on the balance of probabilities that he had an overriding interest over the said suit property through Customary trust.
31. The Respondents have opposed the appeal and filed their submissions on 17th July 2023, through Omony, Momanyi Gichuki & Co. Advocates, and urged the Court to dismiss the instant appeal. It was the Respondents' submissions that out of the nine grounds raised in the Memo of Appeal, the Appellant only tackled ground No. 3, and therefore the rest were abandoned.
32. In their submissions, the Respondents raised four issues for determination.
33. On whether the Appellant had an interest on the suit property, through Customary trust, the Respondents submitted that the Customary trust cannot be implied. If the claimant does not have any right arising from actual occupation or possession of the land in question. It was submitted that Customary trust is always usurious in origin and the fact that the Appellant has temporary structures on the suit land does not by itself confer rights envisaged under Section 30 of the Registered Land Act, (repealed). It was their submissions that the Respondents and even their late husband did not welcome the occupation of the Appellant on the suit land. They relied on the case of Isaack Kieba vs Isaaya Theuri (Supra) where the Court held;

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.”
34. Further, it was their submissions that to prove a trust in law, one need to be in actual, physical, uninterrupted possession and occupation of the land. It was also upon a party who alleges Customary trust to prove that it was the intent of the parties or family members that the parcel of land would be registered in trust for other family members and once the onus is discharged, then the Court would render its decision on the intent. It was further submitted that a Court cannot infer trust and this has to be decided on a case to case basis.



35. Further, it was submitted that the available evidence was to the effect that the husband to the Respondents (Githinji Kabiri –deceased), single handedly paid the purchase price of the allocated suit property and he was eventually registered as the sole proprietor of the suit land, upon final payment of the loan to the Settlement Fund Trustees, and he was eventually issued with a title deed. Therefore, the Appellant was never in physical possession nor did he make any contributions towards the payment of the loan.
36. Further that the Appellant had put up temporary structure on the eastern side of the suit Land, which portion was given to him by the Late Githinji Kabiri, on temporary basis, but not because of trust. That though the Appellant had raised the issue of length of time of occupation, that occupation has been interrupted by the numerous suits filed in Court.
37. It was also submitted that the suit land was not ancestral land, as the Appellant and his mother had moved from Gatanga area, and therefore the intention of the deceased was not to hold the suit land in trust for the Appellant, but he was only removing his mother from a difficult area of Kilimambogo, in Gatanga Division, to Maragua Ridge, and the Appellant was allowed only to farm on a small portion before sorting himself out. That the Green card does not indicate that Githinji Kabiri(deceased), was holding the land in trust for his family.
38. On whether the Appellant had a right to inherit from his deceased brother’s property, under Kikuyu Customary Law, it was submitted that as testified by DW1 Mwangi Gatheyu, according to Kikuyu Customary Law, a person cannot inherit from his brother, no matter how propertied the brother is, such as the deceased person could only be inherited by his wife and children uncles the land is ancestral land.
39. That the suit land herein is not ancestral land, and so the Appellant is not allowed to inherit his deceased brother’s property according to Kikuyu Customary Law or any other Law.
40. On whether the title deed indicates that the property is being held in trust, it was submitted that the Green card, and the resultant subdivisions in the Respondents’ names do not show that the land is registered so that the proprietors can hold the said title in trust for any other person including the Appellant. Therefore, the Appellant herein wants to unduly enrich himself from his late brother’s parcel of land, and thus disturbing the Respondents herein.
41. On whether there was any contribution made by the Appellant towards the property being held in trust, it was submitted that there was unchallenged evidence that the late Githinji Kabiri(deceased), paid for the purchase price of the allocated suit property alone, and the Appellant never contributed anything. That the loan payment was to Settlement Funds Trustees and DW 2 Flora Wanjiku, gave uncontroverted evidence that the Appellant never made any contribution towards repayment of the loans due to the Settlement Fund Trustees(SFT).
42. On whether the Appellant’s occupation on the land gave him right to inherit, the Respondents relied on the case of *Kasuve vs Mwaani Investment Ltd & Others* (2004) IKLR 184, where the Court of Appeal held;

In order to be entitled to and by adverse possession, the claimant must prove that he had been in exclusive possession of the land openly and as of right and without interruption for a period of 12 years either after dispossessing the owner or by discontinuation of the possession by the owner or his own volition”.
43. The Respondents submitted that though the Appellant had raised the fact that the length of occupation on the land should be appreciated, the Appellant failed to raise the fact that his occupation



on that land was much interrupted by numerous law suits and thus the Appellant's occupation was unwelcome.

44. In conclusion, it was submitted that if the Appellant had any claim over the suit property, he should have contested the Succession Cause No. 174 of 1994, by filing a protest, which he did not do, and so the Grant was confirmed. They urged the Court to uphold the trial Court's Judgement and dismiss the instant appeal.

45. The above are the pleadings before the trial Court, the outcome of the trial Court, the Memo of Appeal and the written submissions by the parties herein. The Court has considered all the pleadings herein and rival written submissions and finds as follows;

This being a first appeal, as provided by Section 65(1) of the *Civil Procedure Act*, this Court as an Appellate one is allowed to determine the appeal on both law and facts.

46. Further, as the Court determines the appeal, it is mandated by Section 78 of the *Civil Procedure Act* to re-evaluate, re-assess, re-analyse and re-consider, the evidence as is contained in the Record of Appeal. See the case of Peter M. Kariuki vs Attorney General (2014) eKRL, where the Court held;

"we have also as we are duty bound to do as a first appellate Court, to re-consider the evidence adduced before the trial Court and re-evaluate, it and draw our own independent conclusions to satisfy ourselves that the conclusions reached by the trial judge are consistent with the evidence"

47. Further, this Court as a first Appellate Court will be guided by the Principles which were set out in the case of *Selle v Associated Motor Boat Co.* [1968] EA 123, where the Court held that;

An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (*Abdul Hameed Saif vs. Ali Mohamed Sholan*(1955), 22 E. A. C. A. 270).

48. This Court did not have the benefit of hearing the testimonies of the parties and consider them as the trial Court did. Further the Court will be alive to the fact that the trial Court exercised its discretion, and this Court cannot simply interfere with that discretion simply because it has been moved on appeal.

49. In the case of *Musa Cherutich Sirma vs Independent Electoral & Boundaries Commission & 2 others* (2019) eKLR, the Supreme Court held as follows; -

in reiterating the above position, we affirm that we would only interfere with the Appellate Court's exercise of discretion if we reach the conclusion that in exercise of such discretion, the Appellate Court acted arbitrary or capriciously or ignored relevant facts or completely disregarded the principles of the governing law leading to an unjust order. Conversely, if we find that the discretion has been exercised reasonably and judiciously, then the fact that we would have arrived at a different conclusion than the Court of Appeal is not a reason to interfere with the Court's exercise of discretion"



50. With the above findings and conclusions in mind, and having perused the Record of Appeal, and considered the written submissions, the Court finds the issues for determination are;
- i. As per the available evidence, is there prove of Customary trust or not?
 - ii. Whether the Appeal is merited?
 - iii. Who should pay costs of the appeal?
51. Before delving into the above issues, the Court will first point out the undisputed facts.
52. It is not in dispute that the Appellant herein Peter Ngugi Kabiri, and the late Githinji Kabiri (deceased), are brothers. They are the Sons of Mary Njoki Kabiri(deceased), who allegedly hailed from Gatanga Division of Murang'a County. It is also not in doubt that in 1962, the Government of Kenya resettled landless people through the Settlement Funds Trustees, and such resettlement was done at Maragua Ridge, where the suit land is situated. It is evident that the suit land Maragua Ridge/18, was allocated to Githinji Kabiri(deceased), the brother to the Appellant in 1962, through the Settlement Fund Trustees, in 1962. The Appellant had alleged that at this time, he was only 12 years and thus a minor. It is also evident that after the allocation, the late Mary Njoki Kabiri, the mother to Githinji Kabiri(deceased), and the Appellant, and her sons moved to the suit property on or around 1962. The Appellant alleged that this land was indeed allocated to their mother, but because she did not have an ID Card, the same was registered in the name of Githinji Kabiri(deceased), the elder son of Mary Njoki Kabiri, who was aged 40 years, by then to hold the said land in trust for the family of Mary Njoki Kabiri, the Appellant included.
53. The Respondents on their part had alleged that the suit land was allocated absolutely to Githinji Kabiri(deceased), but not to hold it in trust for anybody. That Githinji Kabiri(deceased), invited his mother and the Appellant to the suit land, Maragua Ridge/18, so as to remove them from the difficult area of Kilimambogo, and allowed them to cultivate a small portion of the suit land. That the Appellant was allowed to cultivate that small portion on temporary basis, as he waited to sort himself out. The Respondents admitted that the Appellant had occupied that portion of land since 1963.
54. It is also evident that in 1986, or thereabouts a dispute arose over the ownership of this suit property between the Appellant and his brothers Githinji Kabiri(deceased). The said dispute culminated in filing of several law suits, over the suit property. The first dispute was before the elders wherein there was an arbitration and the elders gave an award to the effect that there was a Customary trust and Appellant was to get 5 acres and Githinji Kabiri was to get 10 acres. Several other cases followed and eventually the Appellant filed a HCCC No. 111 of 2010 at Nyeri High Court. The said suit was eventually heard at Kigumo SPM's Court wherein a determination was issued on 13th May 2021, which culminated to this appeal.
55. It is evident that Githinji Kabiri (deceased,) died in 1992, and a Succession cause No. 174 of 1994, was filed in respect of his estate. The Appellant alleged that he was not informed of the said Succession proceedings, which Succession cause culminated in the suit land being subdivided into two equal portions, each portion registered in the name of each widows of Githinji Kabiri(deceased). These two parcels of land are Maragua Ridge/559 and 560.
56. During, and after the subdivision of the suit property and thereafter transmission, the Appellant was on the suit land. It is evident that the Appellant had at one time filed an Originating Summons (OS), at the High Court at Nairobi, being HCCC No. 2061/1995 (Nairobi), claiming ownership by adverse possession. The said Originating Summons was dismissed for want of prosecution.



57. Further there was an LDT case at Murang'a Law Court, being LDT No. 23 of 2010, wherein, the Court gave an order to maintain the status quo.
58. The suit herein was determined on 13th May 2021, and the trial Court held that the Appellant had failed to adduce sufficient evidence to prove Kikuyu Customary trust, and that the Appellant could not inherit from his deceased brother Githinji Kabiri (deceased). The said suit was dismissed. The above are the undisputed facts, and the Court will now deal with the issue set out for determination.

i. As per the available evidence, is there prove of existence of Customary trust or not?

59. The Appellant herein had alleged that he is entitled to 1/3, of the suit properties/property by virtue of existence of Customary trust. The Respondents had denied the existence of such Customary trust.
60. The trial Court found in favour of the Respondents by dismissing the Appellant's case and thus this appeal.
61. It is evident that Customary trust is an encumbrance on the land, and these are non-registrable rights which run with land. They are overriding and subsist on the land; See the case of Kanyi vs Muthiora (1984) KLR 712., where the court held;

the registration of land in the name of the Appellant under the Registered *Land Act* (Cap 300), did not extinguish the Respondent's right under Kikuyu Customary law and neither did it relieve the Appellant of her duties or obligations under section 28 of the said Act"

62. Further Customary trust has been held to be an intergenerational equity. See the case of Mbui Mukangu vs Gerald Mutwiri Mbui C.A. No. 281 of 2000, where the Court of Appeal held;

That Customary trust is a concept of intergenerational equity, where the land is held by one generation for the benefit of the succeeding generation.

63. The Court also held that possession and occupation are key elements in determining the existence of a Customary trust.
64. It is also trite that Customary trust must be proved by way of evidence. Customary trust is never implied and the Court cannot imply or infer Customary trust. The trust has to be proved by way of evidence. See the case of Juletabi African adventure Limited & Another vs Christopher Michael Lockley (2017) eKLR, where the court held; -

"it is settled that the onus lies on a party relying on the existence of a trust to prove it through evidence. That is because;

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

65. The Appellant is the one who had alleged existence of trust and the burden of prove was upon him to prove such allegation. This is in accordance with the provisions of Sections 107, 108 & 109, of the *Evidence Act*, and the said sections of law are;- "To the effect that he who alleges must prove." See the case of Alice Wairimu Macharia vs Kirigo Philip Macharia (2019) ekrl, where it was held that the legal burden to prove the existence of trust rests with the one who is asserting a right under Customary trust, and that person must prove that the suit properties were ancestral land and that one family member was designated to hold the properties on behalf of the family.



66. In the present case, it is very important to examine the root of the suit land. The Appellant and Githinji Kabiri(deceased), are the sons of Mary Njoki Kabiri(deceased). The Appellant had alleged that the initial suit land was Maragua Ridge/18, and was allocated to “Mary Njoki Kabiri” the mother to the Appellant and Githinji Kabiri (deceased), by the Government of Kenya because she was landless. The Appellant further alleged that the said “Mary Njoki Kabiri” did not have an ID card, and for that reason, the suit land was registered in the name of Githinji Kabiri (deceased) her elder son, to hold it in trust for the family of “Mary Njoki Kabiri”.
67. The Respondents denied such existence of Customary trust and alleged they that the suit land was allocated to Githinji Kabiri(deceased), solely by Settlement Funds Trustees. That he had only invited the Appellant and his mother to the suit land to alleviate them from the difficulties they faced at Kilimambogo area.
68. Though the suit land was allocated to Githinji Kabiri(deceased), the Court will take Judicial Notice of the fact that in 1962, there was resettlement of the landless people by the Government. The Court too takes Judicial Notice of the fact that women never used to hold ID Cards at this time in history of the Country, and so they could not be registered as land owners.
69. There was evidence from both the Appellant and the Respondents that the Appellant moved into the suit land, Maragua Ridge /18, in 1962. The Appellant also testified that he got married in 1968, and he had lived on the suit land with his wife and Children since then.
70. Given that women were not holder of ID Cards, this Court believe that the suit property was allocated to “Mary Njoki Kabiri” (deceased), the mother to the Appellant and Githinji Kabiri(deceased), by the Government of Kenya through Settlement Funds Trustees, and consequently, the land was registered in the name of Githinji Kabiri(deceased).
71. After the said allocation to “Mary Njoki Kabiri”, and her sons, Githinji Kabiri and the Appellant, occupied the suit property. This is therefore an ancestral land for the Mary Njoki Kabiri’s family.
72. The Appellant alleged that the suit land was registered in the name of Githinji Kabiri(deceased), as the elder son of Mary Njoki Kabiri.
73. In the case of Henry Mwangi vs Charles Mwangi C.A. 245 of 2004, the Court held that under Kikuyu Customary law, to which both parties are subject to, the eldest son inherits land as a Muramati, to hold in trust for himself and the others.
74. This Court finds that the above concept applies herein. Even if the land was not being inherited, but it was allocated to the landless “Mary Njoki Kabiri” and it was registered in the name of her eldest son Githinji Kabiri (now deceased), to hold it in trust for himself and the rest of the family, the Appellant included.
75. From the available evidence, the original suit property Maragua Ridge/ 18, was allocated to Githinji Kabiri(deceased), in 1962, but he acquired the title in 1977, as per the Green card attached to the Respondents bundle of documents.
76. The Respondents adduced evidence to the effect that the suit property was registered in the name of Githinji Kabiri(deceased), as from 1977, and there was no indication in the title that it was held in trust for the Appellant or anybody else.
77. The suit land having been registered in 1977, it was governed under the regime of Registered [Land Act](#) Cap 300, (now repealed). It is evident that Githinji Kabiri was registered as the proprietor of the suit land in 1977, and as provided by Section 27 of the Registered [Land Act](#), he held the said land as



- an absolute proprietor with all the rights and privileges appurtenant thereto. This provision of Law is now found in Section 24 of the [Land Registration Act](#) 2012.
78. As an absolute proprietor, the right of the said Githinji Kabiri (deceased), could not be defeated except as provided by this Act. The said provision of law is now mirrored in Section 25 of the Land Registration Act, 2012. The Respondents herein got registered as the absolute owners of the suit land, Maragua Ridge 559 & 560, in 1995. Therefore, they also became absolute owners as provided by Section 27, of the Registered [Land Act](#), Cap 300 (repealed), and their rights could only be defeated as provided by the Act.
79. The rights of an absolute proprietor can be defeated under the Act as provided by Section 30, of the Cap 300(repealed), wherein these rights are encumbrances, which need not to be noted on the register. These encumbrances are overriding interests and when proved, they can defeat the right of a registered proprietor.
80. It has indeed been held by Courts in this Country that Section 30(g) of the Registered [Land Act](#)(repealed), provided for Customary trust. It provides as follows;
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;”
81. This Section 30, of the Cap 300(repealed), is now mirrored in Section 28 of the [Land Registration Act](#), 2012, and specifically section 28(b) identifies trust, including Customary trust, as one of the overriding interests, which may subsist on the land, and affect the land, without it being noted in the registry, and may defeat the right of a registered proprietor.
82. Therefore, though the Respondents are the registered proprietors of Maragua Ridge 559 & 560, and prior to that Githinji Kabiri(deceased), was the proprietor of Maragua Ridge /18, and the said holding is absolute and indefeasible, if the Appellant proves existence of Customary trust as an overriding interest under Section 30(g) of Cap 300(repealed), or section 28(b), of the [Land Registration Act](#) 2012, then their absolute rights and indefeasibility of the title, will be defeated.
83. See the case of *Kanyi vs Muthiora* (1984) KLR 712, where the Court held;
- “the registration of the land in the name of the Appellant under the Registered [Land Act](#) (Cap 300) did not extinguish the Respondents right under Kikuyu Customary Law and neither did it relieve the Appellant of her duties or obligations under Section 28 of the Act”
84. However, for such right to be defeated, the Appellant herein as the claimant needed to call sufficient evidence to prove existence of Customary trust. See the case of *Njenga Chogera vs Maria Wanjira Kimani & 2 Others* (2005) ekrl, which quoted with approval, the holding in the case of *Muthuita v Muthuita* (1982-88) 1 KAR 42, where the Court of Appeal held that Customary trust is proved by leading evidence. Trust is a question of fact, which must be proved by whoever too is claiming a right under Customary trust. A trust can never be implied by the Court unless the intention to create a trust in the first place is clear.
85. Given that Customary trust is proved by calling of evidence, the Court has analysed the available evidence and it is evident that the Appellant got into the suit land in 1963. He lived thereon with his



mother and in 1968, he got married and he brought up his family on the suit land. The Appellant alleged that the loan at the Settlement Funds Trustees (SFT), was paid using the proceeds from the farm produce harvested on the suit land. The Respondents testified that Githinji Kabiri(deceased), paid for the loan from SFT, alone. They also testified that there was a time that the loan was in arrears, but when Githinji Kabiri(deceased), requested the Appellant herein to assist in payment of the said loan, the Appellant refuse to contribute.

86. However, this Court finds that indeed the Appellant, his mother and Githinji Kabiri(deceased), lived and worked on the suit land and it is evident that the proceeds from the farm produce that was grown and harvested thereon, was used to clear the loan with Settlement Funds Trustees.
87. The parties herein have all quoted the case of Isaack M. Kieba (supra), wherein the Supreme Court set out the Principles to be considered in determining a Customary trust. It was held that each case has to be determined on its merits and quality of evidence.
88. The Court has re-evaluated and re-analysed the available evidence, and it finds and holds that the Appellant has been in long occupation and use of the suit land.
89. The Appellant remained on the suit land for that long, and he even married while he was still occupying the suit land. It is very clear that the intention of Mary Njoki Kabiri(Deceased), was that her elder son Githinji Kabiri (deceased), would hold the suit land in trust for himself and his brother the Appellant herein.
90. From the evidence of the Appellant and the Respondents, the Appellant started to stay in the suit property 1962. He has therefore had a long stay, occupation and use of the suit land.
91. In the case of Mbui Mukangu vs Gerald Mutwiri Mbui C.A No. 281 of 2000, the Court held;

That for one to establish a claim in Customary trust, one had to prove that they are in actual physical possession on occupation of the parcel of land”.
92. The Respondents asserted that even if the Appellant has put up structures on the suit land, the said structures are temporary. This Court did not relate the said submissions of temporary structures and Customary trust. It is obvious that in rural set up most of the houses are made of poles and mud, and thus temporary. However, those kinds of buildings are the homes of the rural people, and the fact that they are not permanent structures – not made or build of bricks and cement, does not mean that one is holding the land temporarily.
93. Having analysed the available evidence, this Court as an Appellate Court, finds and holds that there was indeed evidence of existence of Customary trust, and that the intention of the parties herein was very clear that Githinji Kabiri(deceased), was to hold the suit land in trust for his brother; the Appellant herein.
94. All the elements set out in the case of Isaack Kieba(supra), have been met: that is the nature of the holding of the land and the intention of the parties is that the said holding was for the benefit of the family of Mary Njoki Kabiri,(deceased); the Appellant was in possession and actual occupation of the said land; the land was family land as it was the intention of the Government to allocate the land to Mary Njoki Kabiri (deceased), who was landless, and the claim is directed to the Respondents, as the registered proprietors, who are members of the family of the Appellant herein.
96. There was evidence of existence of Customary trust and the trial Court arrived at a wrong conclusion when it held that there was no evidence of existence of Kikuyu Customary trust, and as a consequence thereof dismissed the Appellant’s suit.



ii. Whether the Appeal is merited?

97. The Court has found that indeed there was evidence of existence of Customary trust, and that the Appellant has lived in the suit land for long, since 1963.
98. However, in its conclusion, the trial Court had concluded that the Appellant failed to adduce evidence to establish that Kikuyu Customary trust existed between him and his deceased brother. This Court has found the contrary.
99. The trial Court also held that the Appellant purported to inherit his deceased's brother, and according to Kikuyu Customary law, that Could not happen.
100. However, this Court finds and holds that the claim herein was for determination of Customary trust, and it is not a succession or inheritance claim. Therefore, this court finds and holds that the trial Court erred in fact in arriving at such conclusion.
101. It is trite that Customary trust is an overriding interest which subsists on the land and can defeat a proprietor's absolute and indefeasible right over his land, where such overriding interests attach. The Respondents are registered proprietors of the suit properties, Maragua Ridge /559 & 560. The Court has found that there is existence of Customary trust. Therefore, their right is subject to the existence of the said Customary trust in favour of the Appellant.
102. It is trite that registration of land in the name of a proprietor does not extinguish the Customary trust, and therefore the fact that the Respondents got registered as the proprietors of their respective parcels of land, that did not extinguish the Appellant's right under the Customary trust, and did not relieve the Respondents of their obligations under Section 28 of Cap 300 (repealed), which provisions of law, are captured in Section 25 of the *Land Registration Act*.
103. After analysing the available evidence, the Court finds that the trial Court failed to appreciate the Appellant's evidence that he had lived on the suit land since **1962**, constructed his home thereon and had utilised his portion of land on the eastern side for so long.
104. The trial Court failed to appreciate that the allocation of the suit land was done in 1962, while the mother of the Appellant and Githinji Kabiri(deceased), was alive and therefore, said Githinji Kabiri (deceased), was registered as a proprietor of this allocated land, Maragua Ridge/18, to hold the said land in trust for the family of Mary Njoki Kabiri(deceased), Appellant herein included.
105. It is not in doubt that the Appellant has lived on the suit land since 1962, and neither Githinji Kabiri(deceased), nor the Respondents ever evicted him nor prevented him from building his house thereon. The Appellant alleged that some of his relatives have been buried on the suit land.
106. Further, this Court finds that the trial Court put a lot of emphasis on the Succession proceedings and failed to appreciate that the claim was for Customary trust and not dispute over Succession. The trial Court indeed put a lot of weight on the Respondents evidence and ignored the Appellants evidence and therefore he arrived at an erroneous decision. A claim for Customary trust cannot be done in a Succession cause. See the case of *In re Estate of Stanley Mathenge Ruriga (Deceased)* [2018] eKLR the Court held that;

Issues of ownership of land and declaration of trust are matters which do not fall under the preamble and must be filed as separate suits. Though the Applicant claim to be entitled to a share, her claim is based on trust since she is not a widow of the deceased and does not fit in the definition of a dependant under Section 29 of the *Law of Succession Act*. The High Court has variously held that a party claiming under trust must file a substantive suit. In



Nakuru H. C. Succession Cause No. 488/2010. In the matter of estate of the Late Jonathan Kinyua Waititu. The Court stated: -

To reaffirm this legal position, I again take refuge in the decision in H. C. Succession Cause No. 864 of 1996 (2015) eKLR, where the Court held that: -

“Even if there was material establishing that there was such a trust I doubt that the resolution of this issue would be a matter of the probate court. The mandate of the probate court under the *Law of Succession Act* is limited. It does not extend to determining issues of ownership of property and declaration of trusts. It is not a matter of the probate court being incompetent to deal with such issues but rather that the provisions of the *Law of Succession Act* and the relevant subsidiary legislation do not provide a convenient mechanism for determination of such issues. A party who wishes to have such matters resolved ought to file a substantive suit to be determined by the Environment and Land Court.”

107. Consequently, and for the reasons above stated, I must find and hold that this court has no jurisdiction to resolve the proprietary interest on land on the alleged trust.

108. Similarly, Justice Limo in Kerugoya H. C. Succession Cause No. 90/2013 Elijah Gachoki and Another –v- Stanley Mugo Kariuki & Another stated:

“It is also important to note that the *Law of Succession Act* Cap 160, Laws of Kenya really deals with intestate and testamentary succession and administration of deceased persons. The architectural design of the Act is not meant to deal with disputes related to land and in this regard I agree with the 2nd respondent that such disputes whether based on trust or contractual obligations should be left to the Environment and Land Court which by law is seized with the jurisdiction and constitutionally mandated to deal with such disputes under Article 162(2) of *the Constitution*”.

109. Therefore, this Court finds the available evidence before the trial Court pointed to, and proved existence of Customary trust, which was not extinguished even after the Respondents got registered as proprietors of the suit properties after transmission in 1995.

110. Further, this Court finds and holds that the trial Court erred both in law and in fact when it arrived at the finding and conclusion that it did, by dismissing the Appellant’s claim.

111. Consequently, the Court finds that the Appeal herein is merited, and this court will have no option, but to upset, or set aside the findings of the trial Court.

iii. Who should pay costs of this Appeal?

112. As provided by Section 27 of the *Civil Procedure Act*, costs are granted at the discretion of the Court.

113. Further costs do follow the event, and is granted to the successful litigant. The Appellant herein is the successful litigant and is therefore entitled to costs of the Appeal and costs at the lower Court.

114. Having now carefully re-evaluated, re-considered, re analysed and re-assessed, the available evidence that was availed before the trial court, this Court finds that the Appellant did prove his case before the trial on the required standard of balance of probabilities. Consequently, this court allows the Appeal as contained in the Memo of Appeal dated 7th June 2021, by setting aside the Judgement of the trial



Court dated 13th May 2021, and substituting it with the Appellant's claim as set out in the Plaint dated 16th September, 2010, plus costs of this appeal, and costs at the lower court.

The Appeal is allowed as above.

It is so ordered.

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

L. Gacheru

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JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

Delivered online in the presence of;

Ms Muturi H/B for Kanyi Kiruchi for the Appellant

Mr Nyaberi for the Respondents

Joel Njonjo - Court Assistant

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