



**Kariuki & 3 others v Gachanja (Environment & Land Case
E035 of 2021) [2024] KEELC 1089 (KLR) (8 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 1089 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT & LAND CASE E035 OF 2021
LN GACHERU, J
FEBRUARY 8, 2024**

BETWEEN

**ELIUD MACHARIA KARIUKI 1ST PLAINTIFF
NDEGWA WAITI 2ND PLAINTIFF
PATRICK MUNGA MWANGI 3RD PLAINTIFF
WAIRIMU NJOROGE 4TH PLAINTIFF**

AND

BETTY WAMBUI GACHANJA DEFENDANT

JUDGMENT

1. The Plaintiffs herein have sued the Defendant, Betty Wambui Gachanja vide a Plaint dated 17th August 2021, wherein they prayed for Judgement against the Defendant and sought for the following orders;
 - i. A declaration that Land Parcel Number Loc.2/Gacharage /528, measuring 49 Acres, or the registered in the name of Mwangi Nduati, (deceased) is encumbered by a trust in favour of the Plaintiffs and all disclosed beneficiaries as descendants of the original owner and purchaser Nduati Waititualias Nduati Waweru, deceased.
 - ii. An order do issue for the dissolution of trust binding and subsisting on land parcel Number Loc.2/Gacharage/528, and the land be shared out as follows; Betty Wambui Gachanja and Miriam Njeri Mwangi both widows of Mwangi Nduati(deceased) to get 6.1 acres to hold in trust for all the Children of Mwangi Nduati equally (From the 1st House).Wanjiru Mwangi to get share of Njoroge Nduati(deceased) being 6.1 acres to hold in trust for all the dependants entitled in that family equally (From the 1st House).Eliud Macharia Kariuki and Chege Kariuki to get 6.1 Acres being the share of their deceased father Kariuki Nduati to hold in trust for themselves and their siblings equally as entitled (From the 1st House).Ndegwa Waite, to get the



share of his deceased father, Waite Nduati of 6.1 acres to hold in trust for himself and siblings equally as entitled (From the 1st House).Wairimu Njoroge, the daughter of Njoroge Nduati, deceased, to get 6.1 acres to hold in trust for herself and her siblings as entitled (From the 2nd house).Mwangi Ndirangu the son of Ndirangu Nduati, deceased, to get 6.1 acres to hold in trust for himself and his siblings as entitled (From the 2nd house).Munga Mwangi, the son of Maina Nduati, deceased, to get 6.1 acres to hold in trust for himself and his siblings as entitled.

- iii. The Honourable Court be pleased to issue an order directing and authorizing the Deputy Registrar to execute all the requisite documents for land transfer documents and forms to facilitate the sub-division and transfer as above.
 - iv. The Honourable Court be pleased to issue a further order/or directions it may deem fit, expedient, necessary, meet and just in the circumstances of this case.
 - v. The Defendant be ordered to pay costs and interest of the suit.
 - vi. Any other or better relief this Honourable court may deem fit to grant.
2. It was their claim that the suit land Loc.2/Gacharage/528, measuring 49 acres. was originally owned by Nduati Waititu, who died on or around 1952, during the state of emergency. They also claimed that the suit land was purchased by Nduati Waititu in 1938, from the family of Athii.
 3. Further that Nduati Waititu paid the then agreed purchase consideration of 500 goats and 50 rams, with his Children by pooling resources and contributing towards the said purchase. It was averred that the purchase started on 1938, before land consolidation and was completed in 1960s.
 4. That during the land consolidation, the purchased land was consolidated and demarcated to give rise to Loc.2/Gacharage/528, now measuring 49 acres, and was registered in the name of Mwangi Nduati, who was the elder son of the purchaser (Nduati Waititu).
 5. It was their allegation that Mwangi Nduati was registered as the proprietor of the suit land, Loc. 2/ Gacharage/528, to hold it in trust for himself and his siblings, being the Children of the original purchaser and owner: - Nduati Waititu alias Nduati Waweru.
 6. Further, it was their averment that the suit land, Loc. 12/Gacharage/528, was registered in the name of Mwangi Nduati(deceased), but is encumbered by a continuing trust in favour and for the benefit of all the Children of Nduati Waititu, alias Nduati Waweru.
 7. The Plaintiffs further stated that Nduati Waititu had two wives, and thus two houses, which were made of the House of Wangari as House A, and the House of Wanjiku as House B.
 8. The Plaintiffs are the grandchildren of Nduati Waititu, and they have brought the suit herein on their own behalf as beneficiaries of the trust and on behalf of the other persons and families entitled. They particularized the subsisting trust in land parcel No. Loc.2/Gacharage/528, as follows;
 - a. The subject is both family and ancestral property whose purchase was conceived and commenced by the family Partriach, Nduati Waweru alias Nduati Waititu.
 - b. The Purchase of the subject was jointly done by the children of the Patriach, Nduati Waititu and their dependants and family are entitled to benefit under the trust.
 - c. The family members as entitled have always respected the trust and on have variously resolved in the past to dissolve the trust for each of the beneficial family units to get their due share.



- d. The dispute has always been while each family is entitled to with the Defendant's family demanding an unjust share in the land.
 - e. The Distribution of the land ought to be equitable and each family unit should get an equal share as per paragraph 10 of the statement in support and the prayers in this plaint.
9. The Plaintiffs further averred that the Defendant is the widow and Legal Representative of the estate of Mwangi Nduati, a son of Nduati Waititu, the original owner of the suit land from the first house of Wangare.
 10. They emphasized that the said Mwangi Nduati was only registered as the owner of the suit land Loc.2/ Gacharage/528, to hold it in trust for himself and his other siblings from the two houses of Nduati Waititu(deceased).
 11. Further, that the suit land is a family and ancestral land for the benefit of all family members legally entitled as beneficiaries of the trust. Therefore, neither Mwangi Nduati (deceased), the registered owner nor the Defendant, who is his widow and legal representative of the estate of Mwangi Nduati, have absolute ownership thereof as the land is encumbered by a trust in favour of persons entitled.
 12. Further, they claimed that the dispute over this suit land has variously been before the area chief, the Lands Disputes Tribunal, and also the District Officer for deliberations, but it has never been resolved on how to share it out. They alleged that the mode of distribution and sharing provided by them is the most fair and equitable one as it considers and reflect the desires and wishes of both the original owner and his deceased sons, who pooled their resources to purchase the said family land.
 13. The Plaintiffs urged the Court to allow their claim.
 14. The suit is opposed by the Defendant herein through her statement of Defence dated 28th February 2022. She denied all the allegations made in the Plaint and did put the Plaintiffs to strict proof thereof.
 15. It was her averments that indeed Nduati Waititu (deceased), had intention of purchasing the said land, but he died on or around the year 1952 or thereabout during the colonial time, but he died before making any payments at all.
 16. It was her further allegation that when Nduati Waititu failed to pay at all for the land, then Njoroge Nduati and Mwangi Nduati managed to purchase the suit land. That the vendors of the suit land had even sued Njoroge and Mwangi Nduati, before the Land Consolidation Committee in 1958, and the two were ordered to pay 300 goats and 20 rams and they continued to live on the suit land. Therefore, it was her allegations that the Plaintiffs claim was full of falsehoods, which was meant to misguide the court.
 17. The Defendant further alleged that when Njoroge Nduati, and Mwangi Nduati, were sued before the Land Consolidation Committee, they summoned their step-brothers, Ndirangu Nduati, Maina Nduati, and their mother, who had settled in Kinangop area, and the Rift Valley, for discussion on how to raise the purchase price as directed by the Land Committee. However, they refused to participate in raising the said money. Therefore, Njoroge Nduati and Mwangi Nduati, paid the purchase price gradually by themselves and thus, they became the owners of the said parcel of land.
 18. She reiterated that the suit land was purchased by Njoroge Nduati and Mwangi Nduati, and during land demarcation and consolidation in 1964, the two agreed to have the land registered in the name of Mwangi Nduati, since he had made a higher payment. That the said Mwangi Nduati held the land for himself and also in trust for Njoroge Nduati, but not the whole family of Nduati Waititu as claimed by the Plaintiffs.



19. She averred that the suit land belongs to the families or beneficiaries of Njoroge Nduati and Mwangi Nduati, who were the legitimate purchasers, and therefore the subsisting trust is in favour of the two families only, but not the larger family of Nduati Waititu as alleged by the Plaintiffs.
20. The Defendant also denied that the suit land is a family or ancestral property or land, and also denied that the Plaintiffs are entitled to any share thereof. It was her contention that the particulars of trust listed by the Plaintiffs are falsified, ill motivated and are brought in bad faith, with no base at all in law, but only meant to deny the Defendant her rightful inheritance.
21. She reiterated that the suit land, Loc.2/Gacharage/528, was registered in the names of Mwangi Nduati, in agreement and understanding that he was to hold it in trust for himself and Njoroge Nduati. Thus, the said land belongs to the beneficiaries of the two families and not the Plaintiffs.
22. The Defendant urged the Court to dismiss the Plaintiffs' claim and allow the distribution of the said land to the Dependents of Mwangi Nduati and Njoroge Nduati, who have filed a Succession Cause No. 822 of 214 at Murang' High Court. She denied ever been involved in any other dispute or arbitration over the suit property. She urged the court to dismiss this suit with costs to herself.
23. After the pre-trials, the matter proceeded for viva voce evidence. The Plaintiffs called a total of five (5) witnesses whereas the Defendant gave evidence for herself and called two more witnesses.

Plaintiff's case

24. PW1: Eliud Macharia Kariuki from Naivasha area told the Court that he is 76 years old. He relied on his witness statement dated 17th August 2021, as his evidence in chief. He also produced the list of documents as P.Exhibits 1-12.
25. He reiterated that the suit land is Loc.2/Gacharage/528, which is 49 acres, and that the said land was purchased by Nduati Waititu in 1938, and it was registered in the name of Mwangi Nduati, as a trustee for Nduati Waititu's Family. It was his further evidence that Mwangi Nduati was the son of the first wife (Wangare), as Nduati Waititu had two wives. That each of the wife had four sons, and Mwangi Nduati, was registered as the owner of the suit land to hold it in trust for the other children of Nduati Waititu, being eight (8) sons. He further testified that he was giving evidence for himself and the other 8 sons, and that the Plaintiffs are all grandchildren of Nduati Waititu.
26. However, his witness Miriam Njeri Mwangi, was the 2nd wife of Mwangi Nduati, the registered owner of the suit land, who is now deceased. The said Miriam Njeri had agreed to have the land subdivided as claimed by the Plaintiffs. It was his further evidence that Bethy Wambui Gachanja, is the daughter-in-law to Mwangi Nduati, as she is the wife of Gachanja Mwangi, and she has denied existence of a trust, though she is married in the family. He urged the Court to allow his claim.
27. When cross-examined by counsel for the Defendant, he reiterated that he was the son to Kariuki Nduati, who was a brother to Mwangi Nduati, and Njoroge Nduati, and both of them are sons of Wangare, one of the wives of Nduati Waititu.
28. He confirmed that he has no house on, and he has never utilized the suit land. Further, that Njoroge Nduati, was the first son of Nduati Waititu, but he was not registered as the trustee. It was his further claim that the four sons of Nduati Waititu, agreed to have the suit land registered in the home of Mwangi Nduati, to hold it in trust for the larger family of Nduati Waititu.
29. It was his further claim that Nduati Waititu had subdivided the suit land into four portions, before 1952, but the land is under one title, and is still intact, registered in the name of Mwangi Nduati(deceased).



30. It was his evidence that he went to the Rift valley in 1965, after the death of his father, but he alleged that his mother contributed money towards payment of purchase consideration of this land, and that he was born in 1946. It was his further evidence that the last payment of the land was between 1965-1971, and he disputed that the land was paid for only by Njoroge Nduati and Mwangi Nduati.
31. He further testified that none of the Plaintiffs live on the suit land, and it was his evidence that they live in different parts of the country. It was his further evidence that he was born on the suit land, but he later followed his mother to the Rift valley. That Mwangi Nduati wanted him to come back to the land with the others so that they could share the land, but the said Mwangi Nduati died before the land could be shared. He also stated that though they live in the Rift Valley, they do not have land there.
32. He alleged that to Betty Gachanja was married to Gachanja Nduati, who was a son to Mwangi Nduati, and he confirmed that there is a Succession Cause and Betty Wambui Gachanja, is the legal administrator of the estate of Mwangi Nduati(registered owner) and PW1, has objected the mode of distribution of the said estate.
33. It was his further evidence that the Plaintiffs are seeking for the dissolution of the subsisting trust so that the land can be subdivided into 8 portions. Further that the agreement between Mwangi Nduati, and his other brothers on how the land should be divided was an oral agreement, but they had agreed that the suit land should be divided into eight portions.
34. In re-exam, he confirmed that Nduati Waititu, died before the whole purchase consideration was paid, and he died before independence. Further that Mwangi Nduati died in 1992, and the balance of the purchase consideration was paid by all the sons of Nduati Waititu after pooling resources together.
35. He confirmed that only Njoroge Nduati and Mwangi Nduati, lived on the suit land, and the other six brothers went to live in different parts of the Country, such as Naivasha, Nairobi and Mombasa.
It was also his evidence that the matter was once before the Chief and the village elders too, which proceedings are part of his exhibits.
36. PW 2: John Njuguna M Mugo, from Gacharage scheme told the Court that he is 77 years old. He adopted his witness statement dated 11th October 2022, as his evidence in chief. In his witness statement, he stated that he knew all the litigants herein who are from the same clan and house of “Ethaga a Mbari ya Ndungi”. Further, he also stated that the suit land is in Mununga Scheme in Gathukiini area and their Patriarch was Nduati Waititu, who was also his grandfather.
37. It was his further evidence that the suit Land Loc. 2/Gacharage/528, belonged to Nduati Waititu, who purchased it from the house of Karachu. That Nduati Waititu, did not finish paying full purchase price, and the balance of the consideration was paid by the sons of Karachu, being Gichoya and Kimwaki, who are now deceased.
38. It was also his evidence that the last consideration was paid in 1967, and he was present when the last payment was made, and that he is the one who wrote the final agreement, and acknowledgement in 1967. He testified that he was called to write the said final agreement by Mwangi Nduati and Njoroge Nduati.
39. That the said agreement was written in a hard cover book, which was handed over to Mwangi Nduati, in the presence of Njoroge Nduati. That in the said meeting, the balance was confirmed to be 60 goats and 10 rams, and it was paid in money form. For 60 goats, the total amount was 1200/= and for 10 rams was 300/=.



40. Further, that the balance of consideration was paid by all the 8 sons of Nduati Waititu from his two houses. The purchase of the suit land had been commenced by Nduati Waititu, in 1938 but during land consolidation, the suit land was registered in the name of Mwangi Nduati in 1962 – 1963.
41. Further that Mwangi Nduati was registered in trust for all the 8 sons of Nduati Waititu, and he was the youngest from the house of Wangare, which was the first house of Nduati Waititu. That the reason for such registration was because Mwangi Nduati was the one staying at home, while the other brothers had gone to the Rift valley to work in the farms in order to get money to clear the balance of the consideration. Therefore, the balance was cleared by all the 8 brothers upon pooling of the funds.
42. Further, he testified that Mwangi Nduati died in 1992, but he knew and acknowledged that he held the land in trust for himself and his other 7 brothers. It was his further evidence that Betty Wambui Gachanja, is the daughter-in-law for Mwangi Nduati, and she joined the family in 1980, upon marriage and she may not know the history of the suit land, and the desires of the registered owner. Further, that he is a village elder, which position he has held from 1970s, and he is well aware of the history of this land, both as an elder and family member.
43. That during land consolidation 1963, the suit land was consolidated, demarcated, and registered in the name of Mwangi Nduati, to hold in trust for himself and his 7 brothers. He urged the Court to subdivide the land into eight (8) portions for each of the brother houses.
44. When cross-examined by the counsel for the Defendant, he told the Court that he lives on the suit land, and that the Plaintiffs do not live on the suit land, but he knows their grandfather and their fathers.
45. Further, he stated that Wambui Gachanja lives on the suit land, and reiterated that he drafted the agreement in 1967, and he was called by Mwangi Nduati to write the said agreement. That the balance of the purchase consideration was paid by Mwangi Nduati, which was 60 goats and 10 rams, which he paid in cash.
46. In re-examination, he stated that the parties are related to him as they belong to the family of his grandfather. He reiterated that the land was brought from Karachu, before land consolidation in 1938. Further, that though the land is registered in the name of Mwangi Nduati, it was for Nduati Waititu, who died before emergency in 1952. He reiterated that the suit land is supposed to be shared among the eight sons of Nduati Waituti, from his two wives. It was his further evidence that he drew the sale agreement in 1967, and he did not ask where the goats or rams came from, but the purchaser was Nduati Waititu.
47. PW 3: Miriam Njeri Mwangi, from Gathukiini in Mununga village told the Court that she was born in 1943. She also adopted her witness statement dated 26th September 2022, as her evidence in chief. It was her evidence that her husband was Mwangi Nduati, and she was his 2nd wife, the 1st wife being Freshia Wangare, who is now deceased.
48. She testified that Freshia Wangare was the mother to Gachanja Mwangi, the husband to Betty Gachanja, the Defendant herein. She further testified that Freshia gave birth two sons, and she had eight children. She also claimed that Mwangi Nduati, her husband was the registered owner of the suit land to hold in trust for his siblings being 8 sons of Nduati Waituti.
49. It was her further evidence that Nduati Waititu was the Original owner of the suit land, and he died during the emergency period, thus before land demarcation and consolidation. That Nduati Waititu, bought the suit land from the house of Mbari ya Athii, in 1938, wherein he started paying the purchase consideration.



50. That the history of the land is known within the family circles and she got married in the homestead in 1965, and when she got married, it was made clear to all the family members that the subject land was owned by Nduati Waititu, and upon his death, all the family members agreed to have the land registered in the name of Mwangi Nduati, to hold it in trust for all the 8 Sons.
51. That the balance of purchase consideration was 300 goats and 20 rams which was paid by all his sons of Nduati Waititu, upon pooling the resources together. Further that during land consolidation, Mwangi Nduati was the one who was chosen to be registered as the owner, but to hold the said land in trust for the others.
52. It was also her evidence that she resides on the suit land together with her family, and she proposed and requested that the suit land should be shared equally among the 8 houses of the sons of Nduati Waititu, as per the wishes of her husband Mwangi Nduati. To her, the Defendant who is her daughter in law does not know the history of the suit land.
53. In cross-exam, she confirmed that when Nduati Waititu died, she had not been married. She also confirmed that she had ran away from matrimonial home, and stayed away for long. She later returned to her matrimonial home, but could not remember when. She also could not remember when her husband Mwangi Nduati died and she testified that the suit land was to be shared by Mwangi and Njoroge, although there were others who were entitled to it too.
54. Further, she did not know where the land come from, and Mwangi Nduati did not tell her how the land was to be distributed. It was her evidence that Eliud Macharia Kariuki, the 1st Plaintiff does not live on the suit land, but he lives in Maela area in Naivasha. Further, she did not know Ndegwa Waiti, and that Patrick Mwangi lives in Maela.
55. In re-examination, she told the Court that all the Children of Nduati Waititu are supposed to inherit the land, and Betty Wambui should not inherit this land alone, as it is a family land. She reiterated that the Plaintiffs do not live on the suit land, but some have purchased land elsewhere, but their fathers were entitled to inherit the suit land.
56. PW 4: Patrick Mung Mwangi, 74 years who also adopted the witness statement of Eliud Macharia Kariuki, the 1st Plaintiff. He told the Court that he is a cousin to the Plaintiffs and that his father was Mwangi Nduati B and he lives in Maela, in Naivasha area.
57. In cross-examination, he told the court that his mother was Wairimu Mwangi, and his father was Mwangi Nduati B. and that Mwangi Nduati, the registered owner of the suit land was his uncle.
58. Further, that he had claimed the land from Mwangi Nduati in a year that he cannot recall, and he used to live on the suit land, and he was born in 1950, on the said land.
59. However, that his family migrated in 1964, although the land had been bought by their grandfather Nduati Waititu, and Nduati Waititu died in 1952, wherein, he had paid part of the purchase consideration. Further, the balance was completed later, and his parents (father) assisted in payment of the purchase price.
60. However, the record for such payment were destroyed, and his father was Mwangi Nduati B, who did not pay the balance of the purchase consideration, but his mother did pay. That his father Mwangi Nduati B, died in 1953, during the state of emergency, and his mother lives in Maela area in Naivasha. He could not recall the last date of the payment of the balance of the last consideration.
61. In re-examination, he confirmed that he was born on the suit land and he started his Primary education at Gacharage, where the suit land is situate, before the family migrated to the Rift valley. He stated



that the initial purchase consideration was paid by their grandfather, and the recorded agreement is for 1968.

62. PW 5: Eunice Wairimu Njoroge, from Nakuru also adopted the witness statement of Eliud Macharia Kariuki. It was her evidence that she is a daughter of Njoroge Nduati B, the son of Nduati Waititu, who was their grandfather and initial purchaser of the suit land.
63. In cross-examination, she reiterated that her grandfather Nduati Waititu died during the state of emergency in 1955. She further stated that she went to live in Nakuru in 1982, and she has never demanded land from Mwangi Nduati(deceased), during his lifetime.
64. However, Mwangi Nduati(deceased), had visited her family in Nakuru in 1989, and told her mother that he wanted to subdivide the land. Unfortunately, Mwangi Nduati(Deceased), died before he could subdivide the said land, but her family did not demand their share of the land then. That her mother told her about the history of this land.
65. In re-exam, she told the court that her father Njoroge Nduati B, belonged to the first house of Nduati Waititu, and he died during the state of emergency. She confirmed that she was born in Kinyona area, in 1942, at the suit land. That Mwangi Nduati A, went to see her mother in 1989, at Nakuru and he wanted her mother to give out money for subdivision of the land. That Mwangi Nduati A, had no problem with the subdivision of the land among the 8 family members.

Defence case

66. DW1: Betty Wambui Gachanja from Mununga Loc. 2/Gacharage/528, told this Court that Mwangi Nduati, was her father-in-law. That her husband was Gachanja Mwangi, who is deceased and she is a daughter-in-law to Mwangi Nduati, who died in 1992. Further that the said land was registered in the name of Mwangi Nduati after he bought it from Mugwe Karachu. She also adopted her witness statement dated 9th September 2022, as part of her evidence.
67. She produced the list of documents as DExhibits 1-2. It was her evidence that the suit land was paid for by Mwangi Nduati and Njoroge Nduati, and the said land should be inherited by the families of Mwangi Nduati and Njoroge Nduati, and not any other person.
68. That the Plaintiffs should not inherit the lands as they did not assist in the purchase of the same, as the last payment was made in 1971, and the purchase consideration was for 300 goats, which goats were fully paid by Mwangi and Njoroge.
69. In her witness statements, she stated that she is the legal administrator of the estate of Mwangi Nduati and the said Mwangi Nduati had two wives Freshia Wangari Mwangi and Miriam Njeri Mwangi. Further, that Mwangi Nduati was the son of Nduati Waititu, and the suit land is registered in the name of Mwangi Nduati and is utilized by the family of Mwangi Nduati and Njoroge Nduati, who purchased the said land.
70. It was her further evidence that Nduati Waititu had intention of purchasing the said land, but he died in 1952, before making any payment at all as purchase consideration.
71. Further that in 1958, the Vendor of the suit land sued Njoroge Nduati and Mwangi Nduati before the Land Consolidation Committee, and the two were ordered to pay 300 goats and 20 rams as the purchase price.
72. It was her allegations that when Njoroge and Mwangi were sued, they summoned their step brothers Ndirangu Nduati and Maina Nduati, and their mother who had settled in Kinangop and Rift Valley areas, to raise the purchase consideration, but they refused to participate in the said payment.



73. That Njoroge Nduati and Mwangi Nduati raised the purchase price gradually and paid the owners, and the Plaintiffs and their families did not contribute anything towards the payment of the purchase price.
74. Therefore, during the land Consolidation in 1964, Njoroge Nduati and Mwangi Nduati, who paid the purchase consideration, and thus recovered the suit land, agreed to have the said land registered in the name of Mwangi Nduati(deceased), as he had paid a higher amount than his brother Njoroge Nduati.
75. That Mwangi Nduati was to hold the land in trust for himself and his brother Njoroge Nduati. It was her further evidence that the final payment of the purchase consideration was made in 1971, and the two brothers agreed that the land would be subdivided accordingly to the ratio of payment/ contribution of purchase price. That the two brothers lived on the suit land peacefully.
76. Therefore, the suit land belongs to the families and beneficiaries of Njoroge Nduati, and Mwangi Nduati, who were the legitimate purchasers and not the Plaintiffs at all. That the continuing trust is in favour of the two families only, but not the larger family of Nduati Waititu, as alleged by the Plaintiffs. She denied that the suit land was held in trust for the large family of Nduati Waititu.
77. She alleged that the Plaintiffs and their families migrated to the Rift Valley and they do not live on, and / or utilize the suit land. That during the purchase of the suit land, none of the Plaintiffs contributed towards the purchase price. Further that Mwangi Nduati used to visit the Plaintiffs families at the Rift valley, but they never demanded any share of land nor refunded him part of the purchase consideration, during his lifetime.
78. It was her further evidence that the suit is occupied by the families and beneficiaries of Njoroge Nduati and Mwangi Nduati and not the Plaintiffs, and therefore the Plaintiffs are not entitled to any of their prayers as stated in their claim.
79. In cross-examination by counsel for the Plaintiffs, she stated that her husband died in 2013, and her father in-law was the registered owner of the suit land. She also stated that she got married in the homestead in 1977. That when she got married in 1977, Miriam had run away from the Matrimonial home, and she returned in 1990 after 18 years. She also confirmed that during land consolidation in 1962, she had not gotten married into the homestead. She could not tell in what capacity Mwangi Nduati got registered as the owner of the suit land.
80. Further, she was told that Nduati Waititu had intention of buying the suit land, but he did not pay for it (in 1938). The purchase payment was made to Mugwe Karachu in 1963, but she was not yet married. Further, that she was born in 1951 at Dagoreti area in Nairobi, and she was not born in Gacharage area, though she knows the history of the land from the documents kept by Mwangi Nduati. She also told the Court she knows the history of the land from what she was told and what was written down.
81. In re-examination, she reiterated that she got the history of the land from her mother-in-law, Freshia Wangare Mwangi. That Mwangi Nduati died in 1992, and she was married into the homestead by then. That she first saw Miriam in 1990, when she returned to the homestead.
82. DW 2: Virginia Nyanjiru, from Murang'a told the Court that she knew Mwangi Nduati (deceased), who was a brother to her husband-Mwangi Njoroge. She testified that the suit land was bought by Njoroge Nduati and Mwangi Nduati, who were sons of Wangare. She also testified that Mwangi Nduati was married to two wives – Wangare and Njeri. It was her evidence that she was present when the land was purchased, but she never found Nduati Waititu. She also testified that Eliud Macharia Kariuki, was not known to her, and he did not participate in the purchase of the suit land. Further that the Plaintiffs do not live on the suit land. She adopted her witness statement as part of her evidence.



- It was her further evidence that the suit land should be inherited by the families of Mwangi Nduati and Njoroge Mwangi, both deceased.
83. In her witness statement, she stated that in 1958, the vendor of the suit land had sued Njoroge Nduati and Mwangi Nduati, before the Land Consolidation Committee, which Committee ordered the two to pay 300 goats and 20 rams, to the vendors as purchase consideration. That the Plaintiffs families did not pay the purchase price/ consideration, and they moved to the Rift valley where they live to date. That the Plaintiffs relocated to the Rift valley where they purchased their respective parcels of land, and they migrated with full knowledge that the suit land was not bought by Nduati Waititu, and they did not contribute towards its purchase.
 84. Further that Mwangi Nduati(deceased), used to visit the Plaintiffs and they did not demand any land from him during the lifetime of Njoroge Nduati and Mwangi Nduati. She told the Court that the Plaintiffs are not entitled to any share of the suit land.
 85. In cross-examination, she told the Court that she did not know Nduati Waititu, as when she got married, Nduati Waititu was not alive. She disputed that the land was bought by Nduati Waititu. It was her evidence that she knew the history of the suit land from what she heard. That she only saw the last goats being exchanged as the purchase consideration, and she did not know the father of the two Vendors who were paid the goats. She confirmed that Miriam Njeri was a wife to Mwangi Nduati A, but she had gone back to her maternal home and returned to her matrimonial home just before Mwangi Nduati died.
 86. In re-examination, she confirmed that the land was bought by Mwangi Nduati and Njoroge Nduati. She further reiterated that the last goats were paid by Njoroge and Mwangi, but not the Plaintiffs nor their families.
 87. DW 3: James Maina Githu, from Gacharage village told the Court that Mwangi Nduati was his neighbor and a friend. That he had known him for long and his father was Nduati Waititu, who had two wives – Wangare and Wanjiku Nduati.
 88. That the suit land was registered in the name of Mwangi Nduati(deceased), after he paid for it. That the family of Waceke moved to the Rift valley and the 1st Plaintiff too went to the Rift valley with Waceke. That the Plaintiffs and their families did not assist in the purchase of the suit land.
 89. That the purchase consideration was 300 goats and 20 rams, and he was present when the last goats were paid in 1971. That he was called as a witness, and it was his evidence that the land should be inherited by the families of Mwangi Nduati, and Njoroge Nduati. That the Plaintiffs did not participate in the purchase of the suit land, and therefore they should not inherit the land. He also testified that Miriam Njeri, was married to Mwangi Nduati as a 2nd wife in 1965, but she ran away in 1972, and then returned to her matrimonial home in 1990, after 18 years. He also stated that the land was in the name of Mwangi Nduati, because he contributed more toward the purchase of the said land.
 90. In cross-examination, he stated that he was born in 1945, and he knew Nduati Waititu who died in 1952, during the state of emergency. He also knew that Nduati Waititu had two wives, and he did not know all the Children of Nduati Waititu. He further stated that Betty Wambui Gachanja, the Defendant herein, is related to him, as DW2, is his step-sister. It was his evidence that Nduati Waititu was from Mugoiri area, and he did not have land in Gacharage area, but he was given land as a “Muhoi” by the family of Karachu.
 91. However, he was not yet born in 1938, but he knew Nduati Waititu ,had the intention of buying the suit land from the Karachus family in 1938. He was given the history of the land by Mwangi



- Nduati(deceased), and the purchase consideration was 300 goats, which goats were paid in instalments. That he was present when the last instalment was paid, and that the last payment was on 14th February 1971, and he witnessed the payment of 19 goats and 2 rams.
92. In re-examination, he stated that Nduati Waititu, had not paid for the parcel of land when he died, though he had intention of buying it. It was his evidence that Mwangi Nduati and Njoroge Nduati, both deceased, paid 300 goats and 20 rams, and he witnessed the last payment of 19 goats and 2 rams. He reiterated that Nduati Waititu was a “Muhoi”, who had intention of buying the suit land, but he died before paying for it.
93. After the close of viva voce evidence, the parties filed their written respective submissions. The Plaintiffs filed their submissions on 24th July 2023, through Kirubi, Mwangi Ben & Co. Advocates, and submitted that there is no dispute that the suit land Loc. 2/Gacharage/1528, is registered in the name of Mwangi Nduati(deceased), who died in 1992. However, it was the Plaintiffs submission that the said land was registered in the name of Mwangi Nduati, to hold it in trust for himself and his 7 brothers.
94. They also submitted that there was enough evidence to support their claim as adduced by the witnesses. They relied on the case of Grace Wambui Muchoki & Another –vs- John Njaramba Muchoki, Murang’a ELC No. 371 of 2017, where the Court quoted the case of Isack M’inanga Kiebia V Isaaya Theuri M’lintari & Another SCOK No. 10 of 2015.
95. Further they submitted that the Supreme Court set out the principles to be considered while determining an existing Customary trust. These principles are quoted in the case of Isack Kieba M’inanga v Isaaya Theuri M’Lintari & another [2018] eKLR, where it held as follows:
- “ Each case has to be determined on its own merits and quality of evidence. It is not every claim of a right to land that will qualify as a customary trust. In this regard, we agree with the High Court in Kiarie v. Kinuthia, that what is essential is the nature of the holding of the land and intention of the parties. If the said holding is for the benefit of other members of the family, then a customary trust would be presumed to have been created in favour of such other members, whether or not they are in possession or actual occupation of the land. Some of the elements that would qualify a claimant as a trustee are:
1. The land in question was before registration, family, clan or group land.
 2. The claimant belongs to such family, clan, or group
 3. The relationship of the claimant to such family, clan or group is not so remote or tenuous as to make his/her claim idle or adventurous.
 4. The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances.
 5. The claim is directed against the registered proprietor who is a member of the family, clan or group.”
96. The Plaintiffs also relied on the case of Justus Maina Muruku vs Jane Waithira Mwangi (2018) eKLR, where the Court held that customary trust is an overriding interest, recognizable and protected by the law. That the intention of the family members who are all deceased was to have Mwangi Nduati(deceased), registered as a proprietor to hold the said land in trust for all the family members of Nduati Waititu.



97. It was also their further submissions that as held in the case Isaack Kieba (*supra*), in determining customary trust, the claimant need not been in actual possession or occupation. The supreme court held as follows: -
- “Unless a trust is proved, the respondents have neither possessory nor occupational rights that can be protected as overriding interests... We hasten to add that to prove a trust in land; one need not be in actual physical possession and occupation of the land.”
98. They also relied on the case of James N. Kiarie vs Geoffrey Kinuthia & Another (2012) eKLR, where the court held;
- “While occupation may be relevant and has been found to be relevant in some cases in raising the inference of a trust, it is not ----- a necessary ingredients for a trust to be established-----”
99. Ultimately the Plaintiffs relied on the case of Monicah Wamuhu Mbugua & Others vs Martin Mbugua Njenga & 2 Others (2022) ekrl, where the Court held;
- “what is essential is 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 family members, whether or not they are in possession or actual occupation of the land”.
100. The Plaintiffs urged the court to allow their claim as prayed in their Plaint dated 17th August, 2021.
101. On her part, the Defendant filed her written submissions dated 4th September 2023, through L M Kinuthia & Co. Advocates, and submitted that the patriarch of the parties herein is Nduati Waititu, who died in 1952, during the state of emergency. That the said Nduati Waititu, had two wives, being Wangari Nduati and Wanjiku Nduati. It was further submitted that all the sons of Nduati Waititu are deceased, and that the Plaintiffs are the grandchildren of the said Nduati Waititu.
102. It was also submitted that the family of Wanjiku Nduati migrated to the Rift Valley and the family of Wangare Nduati, remained behind in Gacharage area, and two of them Mwangi and Njoroge continued to occupy and utilize the suit property.
103. Further, it was submitted that the Children of the 2nd house (House B of Wanjiku), were well settled in the Rift Valley and they have never went back to Gacharage area, especially the suit property, during the lifetime of the registered owner of Loc.2/Gacharage/1528, but only did so after his death.
104. It was also submitted that the 1st Plaintiff Eliud Macharia Kariuki, was the son of Kariuki Nduati(deceased,) who also migrated to the Rift Valley with the family of Waceke alia Wanjiku Nduati, and he did not participate in the purchase and payment of the purchase consideration of the suit land. Further, that he did not stake any claim during the lifetime of Mwangi Nduati, the registered owner of the suit land.
105. The Defendant also submitted that Nduati Waititu was a “Muhoi” who had migrated to Gacharage from Mugori area and that he had the intention of buying the suit land, from the family of Kimwaki Karachu. However, the said Nduati Waititu, died before making any payment and Mwangi Nduati and Njoroge Nduati paid for the land, after they were sued by the sons of the vendor before the land consolidation committee in 1958.
106. Further that the land was later registered in the name of Mwangi Nduati(deceased), because he contributed more towards the purchase price, but he was to hold it in trust for Njoroge Nduati.



107. The Defendant denied that the said Mwangi Nduati was holding the suit land in trust for the large family of Nduati Waititu. The Defendant raised five issues for determination.

108. The first issue was who purchased the suit?

It was her submissions that the suit land was purchased by Njoroge Nduati and Mwangi Nduati after their father Nduati Waititu, who had intention of purchasing the same died in 1952, before making any payments. It was her submissions that in 1958, the vendors sued Njoroge and Mwangi Nduati and they were ordered to pay 300 goats, and 20 rams, which they paid alone as the purchase consideration.

109. The second issue was on how the suit land purchased?

The Defendant submitted that the suit land was purchased by Njoroge Nduati and Mwangi Nduati, who paid the purchase consideration gradually, and they completed payment in 1971, as per the sale agreement produced in court as exhibit. It was submitted that the Plaintiffs families who were settled at the Rift valley were summoned to participate in raising the purchase price but they declined.

110. The 3rd issue was whether Mwangi Nduati was holding the suit land in trust for the Plaintiffs and their families?

It was submitted that in 1964, Mwangi Nduati(deceased) was registered as the owner of the suit land as he paid a higher amount than Njoroge Nduati(deceased). Therefore, Mwangi Nduati is holding the land in trust for himself and his brother Njoroge Nduati, but not the Plaintiffs and their families. That the Plaintiff are well settled in the Rift valley, and did not lay any claim during the life time of Mwangi Nduati and Njoroge Nduati.

111. The fourth issue is whether the Plaintiffs are entitled to the prayers sought. It was submitted that the suit land is not an ancestral land as it was purchased by the two brothers namely Mwangi Nduati and Njoroge Nduati, and so the Plaintiffs are not entitled to any share of the suit land, as they did not contribute to payment of the purchase price.

112. The 5th issue is on whether the Defendant is entitled to costs of the suit. It was submitted that the Plaintiffs have brought this suit in bad faith with the intention of disrupting the Defendant's quiet possession and occupation of the suit land and therefore the Defendant is entitled to costs of this suit.

113. The Defendant submitted that the Plaintiffs have not proved a prima-facie case and relied on the case of *Mrao vs First American Bank & 2 Others (2003) eKLR*, on what constitute a prima facie case.

114. She also submitted that the Plaintiffs did not prove their case on the required standard as provided by Section 107(1) of the *Evidence Act*, which states "whoever desires the court to give Judgement as to any legal right or liability dependent on the existence of facts which he assets must prove those facts exists"

115. Further the Defendant relied on the case of *Isaack M. Kieba(Supra)*, on the principles to consider in determining a customary trust, and submitted that each case has to be determined on its on circumstances.

116. It was the Defendant's further submissions that since the suit land is not a family or ancestral property, the Plaintiffs are not entitled to any share thereof, and she urged the Court to dismiss their suit with costs to her.

117. The Court has carefully considered the available evidence, the submissions filed by the parties and the relevant provisions of law and finds as follows;

118. There is no doubt that the parties herein are related. The family patriarch was Nduati Waititu(deceased), who allegedly died on or around 1952, which was before land demarcation. It was



- alleged by the Defendant that Nduati Waititu was a “Muhoi” and he intended to buy land from the “Kimwakis.” The Plaintiffs alleged that Nduati Waititu bought the suit land from the family of Karachus, in Athii Schemes on or around 1938. The Plaintiffs also admitted that the said Nduati Waititu was a “Muhoi” in the said area of Gacharage and had no land of his own.
119. Further, it is evident that the said Nduati Waititu, had two wives and thus had two distinct houses. The parties herein are in agreement that Nduati Waititu was a “Muhoi” who started the process of buying land on or around 1938.
 120. The parties are also in agreement that Nduati Waititu, died on or around 1952, during the state of emergency, before the said purchase was completed. The Plaintiffs alleged that the purchase consideration was 500 goats and 50 rams, and that by the time of this death, Nduati Waititu had a balance of 300 goats and 20 rams.
 121. However, the Defendant alleged that Nduati Waititu had intention of buying the suit land from Kimwaki’s family, but he died before making any payment. She further averred that the family(sons) of the vendor sued the family of Nduati Waititu before the Land Consolidation Committee in 1958, and the Committee decreed, and or directed that the family of Nduati Waititu was to pay 300 goats and 20 rams as purchase consideration to the Vendor. The Defendant further averred that only Mwangi Nduati and Njoroge Nduati, who were sons of Wangare, the 1st house, had remained on the suit property.
 122. That when the two, Njoroge and Mwangi, summoned the other family members to help in paying the purchase consideration, they declined and so Njoroge Nduati and Mwangi Nduati paid the said consideration gradually and they finalized payment in 1971.
 123. There is also no doubt that from his two wives, Nduati Waititu had eight sons, and Nduati Waititu and his four sons died on or around 1952. Further, it is evident that a number of Nduati Waititu’s family members, moved out of Gacharage area and some of them settled at Kinangop area and others in the Rift valley.
 124. All the Plaintiffs herein resides outside the suit land, and they are all grandchildren of Nduati Waititu, and have lived a large part of their lives either at Kinangop or Rift valley.
 125. It is also evident that the suit land is registered in the name of Mwangi Nduati(deceased), as from 10th January 1964. The said registration is under the Registered [Land Act](#), Cap 300 Laws of Kenya. From the death certificate produced as exhibit, the Mwangi Nduati died on 29th June 1992. The Letters of Administration were issued to Betty Wambui Gachanja on 9th November 2016, and there is a Succession Cause pending over the distribution of his estate.
 126. It is also evident that this family of Nduati Waititu has had a protracted land dispute over the ownership of the suit property, Loc. 2/Gacharage/528, which comprises of 49 acres. The Court has seen proceedings before the Village Elders, the Land Disputes Tribunal at Makuyu, and SPM Case No. 67/2002 at Thika Law Courts. The claimants have been the Plaintiffs herein, led by the 1st Plaintiff, who have always held that they are entitled to a share of the suit land, which land had been purchased by their grandfather, Nduati Waititu.
 127. There was also an allegation that the Plaintiffs herein had filed a Civil case at Nairobi, which case was later dismissed for want of prosecution. The said pleadings were not attached as Exhibits herein. It is evident that the Plaintiffs have always claimed that the suit land is an ancestral land, wherein the registered owner Mwangi Nduati is registered as so to hold it in trust for himself and his other 7 brothers.



128. The Defendant (who represents the family of Mwangi Nduati and to an extent Njoroge Nduati), has denied existence of trust and averred that the suit property was solely paid for by Mwangi Nduati and Njoroge Nduati, and the families of the two, who are now deceased, are the beneficiaries of the said parcel of land.
129. The Defendant has alleged that the Plaintiffs families declined to contribute to the purchase consideration because they are well settled in Kinangop and the Rift Valley areas, and the instant suit is only meant to disturb the Defendant's peaceful possession and occupation of the suit land.
130. The parties called witnesses to support their respective positions and hence this determination and the court has enumerated the undisputed facts. The court has considered the available evidence and the rival written submissions and finds the issues for determination are;
- i. Whether the Plaintiffs have proved existence of Customary trust?
 - ii. Whether the Plaintiffs are entitled to the reliefs sought?
 - iii. Who should pay costs of the suit?

i. Whether the Plaintiffs have proved existence of Customary trust?

131. The land in question herein is Loc.2/Gacharage/528, which is approximate 49 acres. The suit land is registered in the name of Mwangi Nduati (deceased), who was registered as such on 10th January 1964, as the first registration. This was during land demarcation and consolidation, which took place within the Central Province region between 1958 to 1964, or there about.
132. The said land is registered under "The Registered Land Act Cap 300(repealed) under the said Act, Section 27(a) of the said Act provides;
- "The registration of a person as the proprietor of land shall rest in that person the absolute ownership of that land together with all rights and privileges belonging on appurtenant thereto"
133. Therefore, as the registered owner of the suit land under Cap 300(repealed), Mwangi Nduati (deceased), is deemed to be the absolute owner of the said land.
134. Further Section 28 of the same Act provides;
- "The right of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of Court, shall not be liable to be defeated except as provided in this Act and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto....."
135. It is therefore clear that Mwangi Nduati (deceased) rights shall not be liable to be defeated excepts as provided by the same Act. These rights that can defeat the holdings of a registered proprietor are found in Section 30 of Cap 300(repealed), and these are overriding interests. The said Section 30 of Cap 300 (repealed) provides; -
- " 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:-....



Provided that the Registrar may direct registration of any of the liabilities, rights and interest hereinbefore defined in such manner as he thinks fit.

136. Customary trust is one of these overriding interests and if a claimant is able to prove existence of customary trust in his / her favour, then the rights of a registered proprietor can be defeated. This is found in Section 30(g) of Cap 300 (repealed) which provides;

“30(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;

137. This provision of law is now mirrored in section 28(b) of the [Land Registration Act](#), 2012 which provides;

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

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

138. Courts in this Country have often held that rights of a person in possession or actual occupation of land under section 30(g) of the Registered [Land Act](#)(repealed), give rise to customary trust, which right is now clearly stated in Section 28(b) of the [Land Registration Act](#).

139. It is therefore evident that if the Plaintiffs herein prove existence of customary trust, then the rights of the registered proprietor, Mwangi Nduati(deceased), which is absolute, will be defeated. See the case of Kanyi vs Muthiora(1984) KLR 712 CA, where the Court held that;

“ the registration of land in the name of a proprietor under the Registered [Land Act](#), did not extinguish rights under Kikuyu Customary law and neither did it relieve the proprietor of the duties or obligations as a trustee.”

140. It is trite that customary trust is one of the overriding interests attached to the land and which are recognizable under Section 30 (g) of Cap 300 (repealed), and 28(1) of [Land Registration Act](#) 2012. See the case of Gathiba vs Gathiba, Nairobi Hccc No. 1647 of 1984, where it was held that registration under Section 28 of the Registered [Land Act](#), does not relieve a proprietor from any duty or obligation to which he is subject as trustee.

141. Further, it is trite that customary trust is proved by calling of evidence, and the said prove should be on the required standard of balance of probabilities. See the case of Njenga Chogera vs Maria Wanjira Kimani & 2 Others (2005) eklr, which referred to the case of Muthuita vs Muthuita (1982-88) 1klr 42, the Court of Appeal held that;

“ Customary trust is proved by the person claiming it under, by leading evidence and trust is a question of fact which is proven by evidence. Further that a trust is never implied by the Court, unless there was an intention to create a trust in the first place.”



142. A trust can never be implied by the Court unless the intention to create a trust in the first place is clear. This was the holdings in the case of Peter Ndungu Njenga vs Sophia Watiri Ndungu (2000) eKLR, where the Court held:

“the concept of trust is not new, but only in case of absolute necessity, the Court may presume a trust. But such presumption is not to be arrived easily. The Courts will not imply a trust save in order to give effect to the intention of the parties. The intention of the parties to create a trust must be clearly determined before a trust is implied”

143. Again in the case of Juletabi African Adventure Ltd & 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.”

144. As submitted by the parties herein, the principles to be considered and proved for a claimant to qualify in a case of customary trust, have been clearly set out by the Supreme Court, in the case of: Isack Kieba M’inanga v Isaaya Theuri M’Lintari(supra) where it held as follows; -

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

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

145. Being guided by the above decisions and provisions of law, have the Plaintiffs herein availed sufficient evidence to prove their case on the required standard of balance of probabilities?

146. It is trite that he who alleges must prove as provided by Section 107 of the [Evidence Act](#) which provides;

“107. 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.”

147. The Plaintiffs alleged that the suit land herein was an ancestral land thus family land, which was initially purchased by Nduati Waititu, their grandfather. That their parents assisted in payment of the purchase consideration, and the family of Nduati Waititu, the Plaintiffs’ families included, consented to have the suit land registered in the name of Mwangi Nduati(deceased), to hold it in trust for all the siblings of Nduati Waititu. This allegation has been denied and disputed by the Defendant herein.
148. The said allegations having been denied, it was incumbent upon the Plaintiffs to marshal sufficient evidence to prove their allegations. 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.
149. The genesis of the Plaintiffs allegations is that the late Nduati Waititu, the grandfather to the Plaintiffs, bought the suit land before his death. The said allegation is rebuffed by the Defendant, who averred that indeed, the late Nduati Waititu had intention of purchasing the suit land, but he denied before paying its purchasing consideration, and therefore, he did not pay for it.
150. In their respective evidence during the hearing of the suit, the Parties herein talked about a black book, which contained agreements on the payment of the purchase consideration. The said black book was produced as exhibits by the Defendant through her supplementary bundle of documents.
151. The Plaintiffs are grandchildren of Nduati Waititu and their evidence is basically on what was allegedly passed down to them by the older family members. The Plaintiffs are grandchildren mostly from the house of Wanjiku Nduati, whose sons are all deceased. However, the Plaintiffs did not adduce any evidence on whether their mothers are still living or deceased.
152. The said mothers could have given the court first hand evidence. Though the Plaintiffs had called one Miriam Njeri, the wife the 2nd wife to Mwangi Nduati(deceased), as their witness, this court noted that before the land disputes tribunal in 2002, she had given evidence against the Plaintiffs and had alleged that the Plaintiffs were not entitled to a share of the suit land, since they never contributed to its purchase. Her evidence is thus not reliable. The Defendant too is a granddaughter of Nduati Waititu and a daughter in-law of Mwangi Nduati(deceased) the registered owner.
153. For customary trust to be proved, evidence must be availed, and the evidence availed by the Plaintiffs are the proceedings of the Nduati family Succession, which was held on 22nd August 2002, before the elders. After the deliberations; the elders awarded the Plaintiffs 5 acres only from the suit property, but this award was rejected by the Plaintiffs.
154. The Plaintiffs have submitted that the elders awarded each of the siblings of Nduati Waititu 5 acres, which they rejected as they were entitled to equal shares of 6.1 acres and therefore, they filed this suit, to claim their rightful share.
155. The bone of contention is whether Nduati Waititu, the grandfather, bought and paid the purchase consideration for the suit land and whether the said land is a family/ancestral land subject to customary trust.
156. The Plaintiffs averred that Nduati Waititu started the purchase of the suit and in 1938, and the purchase consideration was 300 goats and 50 rams. That at the time of his death, he had paid 200



goats and 30 rams, and the balance was 300 goats and 20 rams. There was no evidence availed either in writing or orally that indeed Nduati Waititu had paid 200 goats and 30 rams, and that the purchase price was indeed 500 goats and 50 rams.

157. It was alleged that the balance of purchase consideration was 300 goats and 20 rams. Indeed, in the Black book which contains writing of 14th February 1971, it is indicated that Mwangi Nduati was ordered by the land committee in 1958 to pay 300 goats and 20 rams. In the said agreement of February 1971, Mwangi Nduati had indicated that he had finalized the payment of the ordered number of goats as purchase consideration.
158. Pw2, John Njuguna Mugo told the Court that he was called by Mwangi Nduati, to write the sale agreement of 1967, which was written in a black book. He alleged that the money was paid by Mwangi Nduati, and accordingly to him, that is when the final purchase consideration was paid. However, when the parties were before the Land Disputes Tribunal at Makuyu on 6th August 2002, the same witness had also stated that he witnessed Mwangi Nduati pay the purchase amount.
159. The Black book also contained proceedings of 7th January 1968, when it was recorded that Mwangi Nduati and Njoroge Nduati, had produced 250 goats and 11 rams, and the balance was 50 goats.
160. Further from the proceedings before the Land Disputes Tribunal, a witness for the Plaintiff Mwangi Wamiri testified that Mwangi Nduati and Njoroge Nduati paid the 300 goats and 50 rams, which had been decided by the land committee. However, he stated that he did not know whether the Plaintiffs contributed in the payment of the purchase price or not. The proceedings at the tribunal were not conclusive as the said tribunal did not make any findings, but advised the parties to file a succession cause court.
161. Therefore, from the proceedings before the elders and the land disputes tribunal, none of them found in favour of the Plaintiffs and this Court cannot find and hold that the Plaintiffs had been awarded 5 acres each by the elders, from the suit land, and they rejected it as they are entitled to each 6.1 acres. There was no evidence that the elders, who knew these parties well had concluded that Mwangi Nduati(deceased) held the land in trust for himself and his other brothers, and thus the Plaintiffs are their beneficiaries.
162. Though the Plaintiffs alleged that their families contributed in the payment of the purchase consideration there was no sufficient evidence availed to that effect.
163. What is clear is that the Plaintiffs and their families moved to the Rift Valley on or before the land demarcation and consolidation. It is also clear that the Vendor of the suit land had sued the family of Nduati Waititu before the land consolidation committee. It is also evident that the said committee decided that the vendor be paid 300 goats and 20 rams. It is also evident that the said goats and rams were paid by Mwangi Nduati and Njoroge Nduati, who had remained on the suit land, as the families of the other brothers had moved to other places.
164. From the proceedings produced in court, it was alleged that Mwangi Nduati and Njoroge Nduati(both deceased), had requested their other family members who had moved and settled at the Rift Valley to assist them pay the purchase consideration, but they declined. The Plaintiff alleged that their family members who were at the Rift valley assisted in payment of the purchase consideration, but no evidence was availed. The Plaintiffs herein relied on what they were told, but there was nothing written to that effect, given that there was a lot of history of this suit land written in the black book, which was produced as exhibit.



165. There was documentary evidence that final payment of the purchase consideration was done on 14th February 1971. This final payment was done by Mwangi Nduati, who later became the registered owner. Indeed, the sale agreements which were contained in the black book between 1965 to 1971, showed that goats and rams were paid by Mwangi Nduati and Njoroge Nduati, with no indication that the other family members paid anything. There was no evidence of payment made by the other family members who had moved to the Rift valley.
166. Having considered the available evidence, it is evident that Nduati Waititu had intended to buy the suit land from “Kimwakis” There was no evidence that the purchase consideration was 500 goats and 50 rams, and that Nduati Waititu had paid 200 goats and 30 rams, at the time of his death. Without evidence of that payment, the court will believe the evidence of the parties that Nduati Waititu was a “Muhoi” who intended to buy the suit land. Further, there is no evidence that he ever made any payment, and thus without having paid the purchase consideration, this land cannot be held to be a family or ancestral land of the Nduati Waititu’s family.
167. It is evident that the vendors sued the family of Nduati Waititu for purchase consideration before the Land consolidation committee, in 1958. There is evidence that the purchase consideration was paid by Mwangi Nduati and Njoroge Nduati, (both deceased), between 1965 and 1971, and the same was finalized in 1971. The two are therefore the purchasers of the suit land, and Mwangi Nduati was registered as the sole proprietor of the suit land on 10th January 1964.
168. The Defendant testified that Mwangi Nduati was the proprietor to hold the suit land in trust for himself and the family of Njoroge Nduati. The Court finds and holds that Mwangi Nduati and Njoroge Nduati having paid for the purchase consideration, then Mwangi Nduati was registered as a proprietor to hold the land in trust for himself and his brother Njoroge Nduati, but not the other siblings of Nduati Waititu who did not contribute to payment of the purchase consideration and were all settled at either Kinangop or the Rift valley. The only existence trust is between Mwangi Nduati (deceased and Njoroge Nduati deceased), and their families/ beneficiaries.
169. The case of Isaack Kieba (supra), set out the principles to be considered for one to qualify as claimant for a customary trust. The Court has considered these principles and has found that the land in question was not a family land for Nduati Waititu before registration.
170. Though the Plaintiffs belongs to Nduati Waititu’s family, they did not contribute to the purchase of the land since the Plaintiffs and/or their families did not participate in the purchase of the land, they were not entitled to be registered as the owners.
171. Therefore, this court having considered the available evidence finds that the Plaintiffs have not been able to prove the existence of Customary trust over the suit property, Loc. 2/Gacharage/528.

ii. Whether the Plaintiffs are entitled to the reliefs sought?

172. The Plaintiffs have sought for dissolution of the existing trust binding and subsisting on lands parcel No. Loc. 2/Gacharage/528, which land is registered in the name of Mwangi Nduati(deceased). They have also sought that after dissolution of trust, the land should be shared as stated in Para of the Plaint.
173. The court has found and held that there is no evidence of existence of trust. Without evidence of existence of trust, this Court cannot order for dissolution of any trust. The other reliefs sought are connected to prove of customary trust, which the court has found and held has not been proved.
174. Consequently, the court finds and holds that the Plaintiffs are not entitled to the reliefs sought.



(iii) Who should bear costs of the suit?

175. Ordinarily costs are granted at the discretion of the court, but is always awarded to the successful litigant. The Defendant is the successful litigant herein. However, the Court finds that the parties herein are related, and have litigated over this issue for long. Each party is directed to bear its own costs.

176. Ultimately, the Court finds and holds that the Plaintiffs have failed to prove their case on the required standard, on the existence of customary trust. Consequently, the Plaintiffs' claim is found not merited, and the same is dismissed entirely, with an order that each party should bear its own costs.

It is so ordered.

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

L. GACHERU

JUDGE.

Delivered online in the presence of:

Mr.Mwangi Ben for the Plaintiffs

Mr.L. M Kinuthia for the Defendant

Joel Njonjo – Court Assistant

L. GACHERU

JUDGE

8/02/2024

