



**Kikambi & 2 others v Nyoroka & 2 others (Environment and Land Appeal E034 of 2022) [2024] KEELC 3251 (KLR) (1 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 3251 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT AND LAND APPEAL E034 OF 2022**

**CK YANO, J**

**FEBRUARY 1, 2024**

**BETWEEN**

**ELIPHAZ RIUNGU KIKAMBI ..... 1<sup>ST</sup> APPELLANT**

**JAMLICK GITONGA KIRERA ..... 2<sup>ND</sup> APPELLANT**

**HARRISON MUTHURI RIUNGU ..... 3<sup>RD</sup> APPELLANT**

**AND**

**FLORENCE NYOROKA ..... 1<sup>ST</sup> RESPONDENT**

**ELIZABETH NCHORO MBAE ..... 2<sup>ND</sup> RESPONDENT**

**JOYCE NTIBUKA KIAMBARI ..... 3<sup>RD</sup> RESPONDENT**

*(Being an appeal from the judgment/decree of the learned Senior Resident Magistrate Hon. E.Ayuka dated and delivered on 16th June, 2022 in Nkubu ELC No. 27 of 2019)*

**JUDGMENT**

**Introduction**

1. The respondents in this Appeal moved the trial court vide a plaint dated 8<sup>th</sup> April, 2019 which was subsequently amended on 7<sup>th</sup> July, 2020 seeking a declaration that LR. No. ABOGETA/U-CHURE/88 now 3489 – 3510 were private land hence ancestral family land (trust land) and that their rights and occupation of the same had arisen due to their considerable long-time possession and developments thereon and an order for transfer of the land to them, and an order that the transfer of LR. No. ABOGETA/U-CHURE/3494 and 3496 to the 2<sup>nd</sup> and 3<sup>rd</sup> appellants be cancelled and the land to revert to the names of the 1<sup>st</sup> appellant, an order directing the 1<sup>st</sup> appellant to subdivide and register part of the land comprised in LR. Nos. ABOGETA/U-CHURE/3489 to 3510 in the names of the respondent's failure to which the Executive Officer of the court do sign all requisite transfer



- documents to effect the transfer of part of the land in the names of the respondents as well as costs and interest at court rates and any other relief the court may deem necessary.
2. The 1<sup>st</sup> appellant is the legal representative and the administrator of the estate of Kirera Kiambati alias M'kirera M'kiambati. The 1<sup>st</sup> appellant is a brother to the respondents and all are the children of M'kiambati Ndirai.
  3. The respondents pleaded that the suit lands are ancestral (Mburago) land and the same are registered in the name of the 1<sup>st</sup> appellant to hold the same in trust for the respondents and other family members. The respondents contended that during his lifetime their father acquired the said land having been allocated the same in a special area and caused it to be registered in the appellants' names. They further contended that the registration of the land in the 1<sup>st</sup> appellant's name gave rise to a trust which is protected under Sections 25 and 28 of the Land Registration Act No. 3 of 2012 as the land is ancestral land and the respondents are entitled to a share therein.
  4. The respondents enumerated the particulars of the trust which are, that the suit parcels of land are ancestral family land as the same originally belonged to the respondent's father, that the 1<sup>st</sup> appellant at all times held the land in trust for himself and the respondents, the respondents' home has been on the land for a considerable long time, the respondents have proprietary interests in the land having been in actual possession and occupation of part of the said land; the respondents rights on the said family land were guaranteed by the members of the family and clan elders, that the respondents' rights also arose under Kimeru Customary Law and therefore the 1<sup>st</sup> appellant was not at liberty to dispose off the land without prior approval of the respondents and members of their family and that the respondents grew up and lived on the land.
  5. The respondents further pleaded that in flagrant and fundamental breach of the trust, the 1<sup>st</sup> appellant without prior notice and knowledge of the respondents or other family members was seeking to deal with the suit land and thereby deprive the respondents their ancestral rights, which action amounted to breach of trust. The particulars of breach on the part of the 1<sup>st</sup> appellant were enumerated as failing to recognize the respondents' rights of occupation and developments on the suit land in spite of the same being of considerable long time, filing Succession Cause No. 435 of 2015 at Chuka secretly, failing to include the respondents as part of the beneficiaries of the estate of the deceased; failing to respect the directions of the family and clan elders and give the respondents their share of the land, seeking to attend to Land Control Board secretly and transfer the land to other parties without the respondents knowledge; failing to respect the customary norms pertaining to ownership of the said family and trust land; breaching the decisions by the clan elders regarding the said family land, and secretly transferring LR. No. ABOGETA/U-CHURE/3494 and 3496 to the 2<sup>nd</sup> and 3<sup>rd</sup> appellants respectively while the suit was pending in court.
  6. The respondents also enumerated particulars of their developments on part of the suit land as tea plantation, trees and piped water.
  7. The appellants entered appearance and filed a defence dated 14<sup>th</sup> May, 2019 and a joint statement of defence dated 28<sup>th</sup> January 2021, in which they denied the respondents claim and put the respondents to strict proof thereof.
  8. At the hearing, the 2<sup>nd</sup> respondent testified on behalf of the respondents who also called three witnesses. The 1<sup>st</sup> appellant testified on behalf of the appellants who also called four witnesses.
  9. Upon considering the matter the trial court found that the respondents had proved their claim against the appellants to the required standard and granted the orders sought in the amended plaint.



10. The appellants were aggrieved by the said Judgment and filed this appeal on the following grounds:-
1. That the learned Trial Magistrate erred in Law and fact by finding that M'kiambati Ndirai (deceased) was the one who acquired L.R No. Abogeta/ U-Chure/88 despite the Respondents not adducing any iota of evidence to prove the said assertion.
  2. That the learned trial magistrate erred in law and fact by failing to consider material evidence which was extremely weighty and of significant importance when the Appellants witness DW2 who stated he was a member of the committee that used to allocate land and that at no any given time was the land in question allocated to M'kiambati Ndirai (deceased) and nowhere was he holding the same in trust for the Respondents since there would be an entry at the lands registry demonstrating the same.
  3. That the learned magistrate erred in law and fact in failing to consider and ignoring to record the evidence of DW3 for reasons well known to him since the said witness stated that he was given L.R No Abogeta/U-Chure/87 which is next to L.R No. Abogeta/U-Chure/88 and they were given the said parcels of land with M'kirera M'kiambati (deceased) at the same material time and that at no material time did the said M'kiambati Ndirai (deceased) apply for any land in the said area.
  4. That the learned magistrate erred in law and fact by recording bits of the Defendants and leaving out the crucial part for instance where DW4 evidence stated on how they mowed in L.R No. Abogeta/U-Chure/88 at the invitation of M'kirera M'kiambati (deceased) and left their father at Kothine and who moved into the subject matter later and resided at the portion given to deceased Silas Mwititi & Frankline Kiragu whereby each had been given one acre each by M'kirera M'kiambati (deceased) prior to his demise.
  5. That the learned Magistrate erred in Law and fact by holding that DW5 denounced his statement which was not the case since his evidence was anchored on a statement duly filed in court and which was relied upon.
  6. That the learned Magistrate erred in Law and fact by finding that the said M'KIAMBATI NDIRAI (deceased) denounced his interest in respect to his land in Omo area but no evidence was tendered such as to whom did he denounce the said interest to nor when he denounced the said interest but the Honourable Court failed to appreciate that a Succession Cause hands been filled in respect to what was allegedly denounced but mysteriously the said evidence was never captured in the final judgement and in the same breath the court stated that the same was left to his siblings that he did so after acquiring the suit property but there is no evidence on how he acquired the subject property.
  7. That the learned Magistrate erred in Law and fact by finding that a Succession Cause in relation to the estate of M'KIRERA M'KIAMBATI (deceased) was filed in Chuka secretly and fraudulently yet the same was filed and those whom M'KIRERA M'KIAMBATI (deceased) during his life time had stated were entitled to a share in his land together with their families all benefited from his estate as per his wishes.
  8. That the learned Magistrate erred in Law and fact by importing his own evidence which was never presented during trial for instance where the Honourable Court stated that it was M'KIAMBATI NDIRAI (deceased) who moved first in to the locus in quo which is not the truth since both the plaintiffs side and the Defendants side testified that it was M'KIRERA M'KIAMBATI (deceased) who moved into the subject first then was followed by his brothers at his invitation.



9. That the learned Magistrate erred in Law and fact by failing to appreciate that a registered owner can utilize and transfer his property in whoever manner provided the transfer are legal and the requisite procedures had been followed and that the said M’KIREKA M’KIAMBATI (deceased) was correct in giving his land to his brothers and that he never violated any Law.
  10. That the learned Magistrate erred in Law and fact by failing to consider that the Plaintiffs evidence was not only debunked and was fully rebutted when the Defendants witnesses testified and even during cross examination of the plaintiffs witnesses but choose mysteriously not to record the evidence adduced by the Defendant witnesses which was squarely captured in their individual statement and which evidence was proffered in court during trial.
  11. That the learned Magistrate erred in Law and fact by stating that the said M’KIAMBATI NDIRAI (deceased) transferred L.R No. Abogeta/U-Chure/88 to M’KIRERA M’KIAMBATI (deceased) yet no material evidence was put on record to support the said assertion and which was never presented before court by the Plaintiffs but the Learned Magistrate based his finding on mere beliefs as opposed to concrete evidence thus negating the standard of proof required in such matters.
  12. That the learned Magistrate erred in Law and fact by centering his findings on the 1<sup>st</sup> defendant as if the 1<sup>st</sup> defendant was the one on trial and the role he played in filing Succession Cause in Chuka yet the family of M’KIRERA M’KIAMBATI (deceased) was privy of the arrangement and since he had left all his family affairs to be managed by the 1<sup>st</sup> Defendant herein.
  13. That the learned Magistrate erred in Law and fact by importing his own evidence and findings and which evidence and averments were never adduced in Court especially on the alleged contradictions by the Defence witnesses.
  14. That the learned Magistrate erred in Law and fact in descending into the arena of the Succession court and faulting the Succession court decision of transferring the subject parcels to the Defendants whereas no appeal or review was lodged against the subject decision.
  15. That the learned Magistrate erred in law and fact in shifting the burden of proof from the plaintiffs to the Defendants to show that the land was not trust land..
  16. That the Learned Magistrate erred by importing his own findings not anchored on any known law or facts and arriving at an irregular judgement aimed introducing new facts which were never pleaded nor adduced in court.
11. The appellants pray for the judgement and decree of the lower court to be set aside and substituted with an order dismissing the respondents’ case with costs, an order directing the matter to be heard before an impartial Magistrate de novo as well as costs of the appeal and of the lower court to be borne by the respondents.
  12. The appeal was canvassed by way of written submissions. The appellants filed their submissions dated 5<sup>th</sup> December, 2023 through the firm of Munene Kirimi & Company Advocates while the respondents filed theirs dated 4<sup>th</sup> December, 2023 through the firm of Kiogora Arithi & Associates Advocates.

### **Appellants’ Submissions**

13. On whether the Learned Magistrate erred in finding that there was existence of trust in the land while the subject matter was registered in the name of M’KIRERA M’KIAMBATI (Deceased) while he was alive, learned counsel for the appellants submitted that it was imperative and prudent for the trial court



to unpack this legal issue properly guided by the law and evidence as to whether indeed there was existence of trust in relation to LR. No. ABOGETA/U-CHURE/88 when the same was registered in the name of M’KIRERA M’KIAMBATI (Deceased) while he was alive. That there was no iota of evidence adduced to demonstrate that M’KIAMBATI NDIRAI (Deceased) the family patriarch was the one who had acquired the suit land. The appellants counsel submitted the tangible evidence on record which was disregarded by the trial court points to demonstrate that at no time was M’Kiambati Ndirai allocated the said land. That according to DW2 who was a member of the committee that used to allocate lands in the area the suit land was allocated to M’KIRERA M’KIAMBATI (Deceased) only and was not holding the same in trust for the respondents. It was their submissions that the law is that he who alleges customary trust must prove and that there was no existence of customary trust proven to the expected set legal threshold. That the ancestral land lies in Upper Chure OMO area as demonstrated by the respondents’ uncle namely M’TWERANDU NDIRAI.

14. The appellants counsel submitted that since there was no trust created and proved in respect of LR. NO. ABOGETA/U-CHURE/88 in favour of the respondents or their father, then the 1<sup>st</sup> appellant was not in any position of breaching any trust as was averred by the respondents. That the 1<sup>st</sup> appellant honored the wishes of the registered proprietor on how he wanted his land subdivided and which he had subdivided during his life time and that neither the respondents nor their late father challenged it. The appellants counsel relied on the case of Juletabi African Adventure Limited & Another Versus Christopher Michael Lockley (2017)eKLR and Isack M’Inanga Kiebia Versus Isaya Theuri M’Lintari & Another (2018)eKLR and submitted that the respondents did not discharge the burden of proving that the land was ancestral land or the existence of a customary trust. The respondents were accused for acting with malice and unbridled greed towards unjust enrichment.
15. The appellants counsel also faulted the trial magistrate for faulting a decision made by a Succession Court which was of a higher status. It is submitted that had the trial court adhered to the laid down legal dictates, it would not have arrived to the findings it arrived at since the same are not anchored on any known law or evidence adduced in court. That the trial court decided the matter devoid of looking holistically at the evidence at its disposal and tendered by the parties alongside examining the demenaour of the parties to arrive to a justified conclusion which is in tandem with the deceased’s wishes on the mode of distribution of the deceased estate which the deceased had done during his life time. The appellants’ counsel urged the court to allow the appellants appeal in its entirety with costs both in the trial court and this court to the appellants.

### **Respondents Submissions**

16. It is the respondent’s submission that the parties relationship is not in issue. That the respondents are sisters to the 1<sup>st</sup> appellant except that they are of different mothers.
17. It was submitted by counsel for the respondents that the respondents adduced overwhelming evidence to support their case in respect of parcel No. ABOGETA/U-CHURE/88. It is further submitted that the appellants assertion in ground 2 of the Appeal that there would have been entry at the lands registry to demonstrate trust is not supported by the law, adding that it is settled law that existence of trust is a question of fact to be proven by evidence. That there is nothing in the Registered *land Act* Cap 300 (now repealed) and The *Land Registration Act* NO. 3 of 2012 to prevent a declaration of trust. In support of of their submissions, learned counsel for the respondents relied on the supreme court case of Isack M’Inanga Kiebia Versus Isaya Theuri & Another Petition No. 10 of 2015 and Court of Appeal holding in Mumo Versus Makau [2002]170 and urged the court to dismiss grounds 1 and 2 of the appeal.



18. On grounds 3 and 4 of the appeal, the respondents counsel submitted that the allegation to the effect that the trial court left out crucial part of the evidence is not supported by the evidence on record. It is the respondent submissions that the registration of the land in the names of the 1<sup>st</sup> appellant did not extinguish or dissolve the trust thereof. The respondents counsel relied on the case of Justus Maina Muruku Versus Jane Waithira Mwangi ELC Case No. 5 of 2017 Muranga.
19. On whether the suit land is customary trust land, counsel for the respondents submitted that the registration of the land in the name of the 1<sup>st</sup> appellant as proprietor did not preclude him from holding it in trust for the respondents and other family members some of whom are buried on the land. It is submitted that the said registration neither relieved the 1<sup>st</sup> appellants his fiduciary duty owed to the respondents and other family members as their trustee nor did it extinguish the respondents right under Meru Customary Law. The respondents counsel submitted that the 1<sup>st</sup> appellant held the suit land in customary law trust for himself and for the benefit of the respondents and other family members. The respondents counsel cited sections 27, 28 and 30 of the Registered *Land Act* (repealed) and Sections 24, 25, 26 & 28 of the *land Registration Act* which provide for overriding interest as may subsist in land and relied on the case of Justus Maina Muruku (Supra), M’Ikiugu M’Mwirichia & Moses Marangu Kiara Versus Esther Nthira M’ikiugu & 2 Others, Isaack M’Inanga Kibo (Supra) and urged the court to dismiss grounds 3 and 4 of the appeal.
20. On ground 5 of the appeal, 2<sup>nd</sup> respondents counsel submitted that the trial court analysed the evidence of DW5 whose evidence they submitted was of no probative value because it was contradictory. That there is no evidence to impeach the findings by the lower court.
21. Regarding grounds 6, 7, 8, 9, 10, 11,12 and 13 of the Appeal counsel for respondents submitted that there is no dispute that the respondents are sisters to the appellant and the basis on which the 1<sup>st</sup> appellant got land and transferred part of the land to his children is a clear breach of trust and the same amounted to discrimination against the respondents which the law does not allow. It is submitted that the 1<sup>st</sup> appellants intention all along was to deny the respondents a share of their father’s land when they lived on the land all their life and urged the court to find that the said grounds have no merits.
22. On grounds 14, 15 and 16 of the appeal the respondents counsel submitted that the respondents suit was based on trust and the breach of trust on the part of the 1<sup>st</sup> appellant who was sued as the legal representative of the estate of KIRERA KIAMBATI alias M’KIRERA M’KIAMBATI. That the suit was therefore properly before the court as the law was settled by the Court of Appeal in inter alia the case of M’Inoti Ntai Versus Naomi Karegi M’Manyara CA. No. 54 of 2011. The respondents counsel urged the court to find that there is no basis to impeach the lower court to the effect that the court descended into the area of the Succession Court and that to challenge the 1<sup>st</sup> appellant’s conduct over the suit land, the proper court was the ELC – Court.
23. It was further submitted that prayer (b) by the appellant for the matter to be heard before an impartial magistrate is an afterthought as the issue of bias was not raised before the lower court and the same is being raised on appeal for the first time. It is submitted by the respondents that the appellants appeal is devoid of any merits and prayed for the same to be dismissed with costs to the respondents.

### **Analysis & Determination**

24. I have perused the Record of Appeal and the grounds of appeal. I have also considered the submissions made and the authorities relied on and the law. This being a first appeal, I am obliged to evaluate, re-assess and re-analyse the evidence on record to determine whether the conclusions reached by the



learned trial magistrate were justified on the basis of the evidence presented and the law. This was settled in the case of *Selle & Another Versus Associated Motor Boat Co. Ltd.* [1968]EA123.

25. The issues I find for determination are: -
- i. Whether the existence of a trust had been proved.
  - ii. Whether the trial court failed to consider material evidence.
  - iii. whether the appeal is merited or not.
26. In this case, the respondents' content that their father acquired the suit land which was allocated in a Special area and caused it to be registered in the name of the 1<sup>st</sup> appellant to hold in trust for the respondents and other family members. The respondents evidence was that the land was bestowed upon Kirera Kiambati by the family Patriarch M'Kiammbati Ndirai to hold in trust for the entire family. The appellants disputed these facts.
27. The rights of a registered owner of property were clearly set out under Section 27 of the Registered [Land Act](#) Cap 300 (now repealed) which have now been mirrored in Section 24 of the [Land Registration Act](#) No. 3 of 2012 as follows:-
- 24 Subject to this Act,
- (a) The Registration of a person as proprietor of land shall vest in that person the absolute ownership of the land together with all rights and privileges appurtenant thereto"
28. Section 25(1) which mirrors Section 28 of the repealed Act provides that such a registered owners rights are indefeasible and are held free from all other interests and claims and that the rights can only be defeated in the manner provided under the Act. The rights of a registered owner are however subject to overriding interests declared by Section 28 of the Act as not requiring noting on the register. Section 28 of the [Land Registration Act](#) which is similar to Section 30 of Cap 300 (repealed) provides that:-
- “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 being noted on the register-
- (a) .....
  - (b) trust including Customary trusts”.
29. Customary trust was well explained by the Supreme Court 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.”
30. In this case, the respondents have pleaded customary trust in the suit land. The 1<sup>st</sup> appellant is a brother to the respondents. Whereas the registration of a person as proprietor of land vests in such person absolute ownership, it does not preclude him from holding an interest in trust for another. Customary trust is an encumbrance on land. These are non -registrable rights which run with the land. They are overriding. They subsist on the land.
  31. In the case of *Kanyi vs Muthiora* (1984) KLR 712, the Court stated that; “The registration of the land in the name of the appellant under the Registered *Land Act* (Cap 300) did not extinguish the respondents rights under Kikuyu Customary Law and neither did it relieve the appellant of her duties or obligations under section 28 as trustee.....The trustees referred to in section 28 of the Act could not be fairly interpreted and applied to exclude a trustee under Customary law, if the Act had intended to exclude Customary law rights it would have been clearly so stated.”
  32. This Court notes that while the title of the suit land did not overtly indicate the suit land was trust land, it indicated that the suit land was registered in the name of M’KIRERA M’KIAMBATI. This was the late brother to the 1<sup>st</sup> appellant whom the respondents stated the land was bestowed on by their father.
  33. The legal burden to prove the existence of the trust rests with the one who is asserting a right under customary trust. To discharge this burden, the person must prove that: -(a)the suit properties were ancestral clan land; (b) during adjudication and consolidation, one member of the family was designated to hold on behalf of the family;(c) the registered persons were the designated family members who were registered to hold the parcels of land on behalf of the family. In essence, one had to lay bare the root of the title to create the nexus or link of the trust to the title holder and the claimant.
  34. In the case of *Njenga Chogera –vs- Maria Wanjira Kimani & 2 Others* [2005] eKLR, which quoted with approval the holding in the case of *Muthuita –vs- Muthuita* [1982 – 88] 1 KLR 42, 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 is claiming a right under customary trust. A trust can never be implied by the Court, unless there was intention to create a trust in the first place. In *Peter Ndungu Njenga vs. Sophia Watiri Ndungu* [2000] eKLR, the Court held, “The concept of trust is not new. In case of absolute necessity, but only in case of absolute necessity, the Court may presume a trust. But such presumption is not to be arrived at 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.”
  35. Further, In *Juletabi African Adventure Limited & Another Vs Christopher Michael Lockley* [2017] Eklr, the Court also held that “ .... 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.”
  36. Going by the decision of the Supreme Court referred to herein above, it follows that evidence must be led that points to the root of the land. Pertinent questions that must concern this Court are such as; how was the land first registered? Was it clan, communal or family land before registration? Was



- the land inherited or passed down from the family lineage? How did the 1<sup>st</sup> appellant acquire this land? Did he inherit or he acquired by way of purchase or a gift?
37. In this case, the respondents led evidence to the effect that the suit land was family land and was transferred to M’KIRERA M’KIAMBATI, being the eldest son of the late KIRERA KIAMBATI to hold it in trust for the entire family, hence the reason it was registered in his name. The evidence on record indicated that the family patriarch lived on the suit land and brought up his family thereon.
  38. I am guided by the decision of Justus Maina Muruku v Jane Waithira Mwangi [2018] eKLR cited with approval the Court of Appeal in Henry Mwangi vs Charles Mwangi CA 245 of 2004 where it stated 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 other heirs. It would follow that even when the suit land was under the name of the Plaintiff’s father it was subject to customary trust. The registration of the Plaintiff pursuant to the grant of administration did not extinguish the trust on behalf of the lineage of Romano Kung’u. The land was already subject to customary trust.”
  39. This state of affairs appears to be similar in some aspect with the instant case. The 2<sup>nd</sup> respondent testified that the original land title belonged to Kirera (deceased) who was her brother and the land had been allocated to him in trust to hold for the rest of the family members. It was her further evidence that they were all born and brought up on the land. It was her testimony that the land is family land and disputed that the land did not belong to their father.
  40. It was the 2<sup>nd</sup> respondent evidence that their father transferred the land to Kirera (deceased) being the 1<sup>st</sup> born to hold it in trust for the whole family. The 2<sup>nd</sup> respondent further testified that their late father was buried on L.R No.88 and that they all grew up on the land as a family.
  41. PW2 also gave evidence that the suit land initially belonged to M’KIAMBATI and that it was family land whereon he brought up his family. It was his evidence that the land was allocated by the clan. It was his testimony that Kirera did not have land of his own and customarily land was placed on his hands to hold in trust for his siblings since he was the first born. PW2 testified that the Kiambati (Deceased) lived on the land with his family and was even buried on the land in dispute. That, that was where he lived and brought up his family all his life.
  42. PW3 also testified that M’Kiambati gave the land to Kirera being the 1<sup>st</sup> born son to hold in trust for the family. PW3 further testified that M’Kiambati lived and brought up his family in the land and was buried on the land. It was his further evidence that the parties in the suit were born and brought up on the land in quo.
  43. PW4 gave evidence that the M’Kiambati (deceased) brought up his family on the land in dispute and that the same initially belonged to M’Kiambati who gave the land to the 1<sup>st</sup> born son Kirera to hold it in trust for the family. It was his evidence that the 1<sup>st</sup> born son would be allocated the land to hold in trust for the family and that it was normal for one to give the 1<sup>st</sup> born son land to hold in trust for the younger siblings.
  44. In their evidence, the appellants did not deny the relationship of the parties. However their explanation as to how the land was acquired by the 1<sup>st</sup> appellant was not convincing. I find the evidence of the respondents more credible than that given by the appellants
  45. From the evidence tendered by both parties, it is evident that is not in dispute that M’Kiambati Ndirai lived with his family on the land in question Abogeta/U-Chure/88 until his demise and his remains were interred there. The respondent’s evidence on record that the land was given to Kirera to hold in trust for the entire family in my view, has not been challenged satisfactorily.



46. From the above analysis and based on the evidence adduced and weighing it on a balance of probabilities, the Court finds and holds that customary trust subsists on the suit land in favor of the respondents herein. M’KIRERA M’KIAMBATI was holding the suit land in trust for his own behalf and his siblings. The Learned Trial Magistrate, therefore rightly held that the existence of a customary trust had been proved by the respondents.
47. Regarding the issue whether the trial court failed to take into account material evidence, this court has observed that DW2 adopted his statement dated 14<sup>th</sup> April,2021 in his evidence in chief wherein he stated that he was a member of the committee that used to allocate land and that the same land was allocated to the deceased and in turn sub divided amongst his brothers. The trial court further noted that it was DW3 evidence that the land was allocated to Kirera M’Kiambati and further that the family patriarch hailed from Kothine and that he must have had his own land. The trial court also considered the evidence tendered by DW4 and DW5
48. I have looked at the record and am certain that the trial court gave a true reflection of the material evidence as presented by the witnesses.
49. In the result, I find no merit in the appellant’s appeal and the same is dismissed with costs to the respondents.

**DATED, SIGNED AND DELIVERED AT MERU THIS 1<sup>ST</sup> DAY OF FEBRUARY, 2024**

**C. K. YANO**

**ELC JUDGE**

In the presence of:

Court Assistant: Kiragu

Kiogora Arithi for respondents

Munene for appellants

