Luka v Waikayu (Environment and Land Appeal E020 of 2023)
[2024] KEELC 635 (KLR) (8 February 2024) (Judgment)

Neutral citation: [2024] KEELC 635 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANGA

ENVIRONMENT AND LAND APPEAL E020 OF 2023

LN GACHERU, J

FEBRUARY 8, 2024

BETWEEN

PETER NDUNGU LUKA ..... APPELLANT

AND

WILSON MUCHOKI WAIKAYU ..... RESPONDENT

(Being an Appeal from the whole Judgment delivered by the Hon. J. IRURA SPM, in Kigumo MELC No. 284 of 2017, on 8th day of June 2023)

JUDGMENT

1. This Appeal emanates from the Judgement of the trial Court (Hon. I. Irura, SPM) in Kigumo SPMELC NO. 284 of 2017, wherein, the Respondent herein Wilson Muchoki Waikayu and his Mother Felister Wanjira Waikayu (deceased), had sued the Appellant herein Peter Ndungu Luka, who is a son and brother to the Plaintiffs at the trial Court.

2. The Respondent (Plaintiffs) had sought for the following orders as against the Appellant (Defendant); -

    a. A declaration that the Defendant (now Appellant) holds land parcel No. Loc 6/ Gikarangu/773, in trust for himself, Simon Njoroge, the 2nd Plaintiff and Lukas Waikayu.

    b. That the trust be dissolved and the Defendant be subsequently ordered to transfer 0.5 acres to the 2nd Plaintiff, 0.5 acres to Simon Njoroge and 0.5 acres to Lukas Waikayu, out of land parcel No. Loc 6/Gikarangu/ 773.

    c. Costs of the suit.

    d. Further relief as may be just.

3. The Appellant as a Defendant denied the Plaintiff's(Respondent's) claim by filing a Defence dated 13th December 2017, and denied existence of a trust. He averred that the suit land was registered in his name min 1967, as a sole proprietor, but he was not to hold the same in trust for the family or any other person. He urged the Court to dismiss the Plaintiffs claim with costs.

4. The matter proceeded for viva voce evidence wherein parties gave their evidence and on 8th June 2023, the trial Court entered judgement in favour of the Plaintiffs (Respondent herein) and found that there is a trust in existence and she allowed the whole of the Plaintiffs claim.

5. The Appellant as the Defendant at the trial Court was aggrieved by the said judgment of the trial Court and he preferred this Appeal against the whole Judgement of the trial Court vide a Memorandum of Appeal dated 29th June 2023.

6. In his Memorandum of Appeal stated above, and the Record of Appeal filed before this Court on 18 July 2023, the Appellant sought for the following prayers.

> "(a) The Appeal be allowed with costs.
>
> (b) The Judgment of the Honorable Senior Principal Magistrate be set aside and this Court be pleased to substitute it with a judgment in favour of the appellant against the respondent dismissing the entire civil suit with costs."

7. In the aforementioned Memorandum of Appeal, the Appellant averred; -

   i. That in the, the learned Senior Principal Magistrate erred in law and in fact by holding that the suit land is encumbered by a Customary Trust.

   ii. That the learned Senior Principal Magistrate erred in law and in fact by holding that the suit property be subdivided and transferred to various parties without sufficient evidence to support such a drastic and far-reaching directive.

   iii. That the learned Senior Principal Magistrate erred in law and in fact by failing to take into consideration the Appellant's written submissions placed on record in Civil Case Number 284 of 2017.

   iv. Further that the learned Senior Principal Magistrate erred in law and in fact by holding that a Customary Trust existed in respect to land parcel number LOC.6/Gikarangu/773, without sufficient proof thereof being adduced by the Respondent herein.

   v. That the learned Senior Principal Magistrate erred in law and in fact by disregarding the totality of evidence adduced by the Appellant and relying on hearsay as the basis of the decision rendered on 8th June 2023 in Civil Case Number 284 of 2017.

   vi. That the learned Senior Principal Magistrate erred in law and in fact by failing to consider that the Appellant has been in exclusive possession of the suit land parcel LOC.6/Gikarangu/773 from year 1979 to date.

   vii. That the learned Senior Principal Magistrate erred in law and in fact by failing to consider that the suit land No. LOC.6/Gikarangu/773, was acquired by the Appellant following several family meetings wherein consensus was developed by the participants, some of whom have since died, that the Appellant herein was to be registered as the sole owner of the suit land.

viii. That the learned Senior Principal Magistrate erred in law and in fact by failing to consider the crucial fact that during the first registration of the suit land in 1965, the subject land was registered under the name of Makungu Waikayu and not in the name of Ndungu Waikayu.

ix. That the learned Senior Principal Magistrate erred in law and in fact by failing to consider that when the Appellant assumed possession of the suit land in year 1979, he took possession as the sole proprietor and not as trustee; and that same was done with the consent of the entire family including the Respondent herein.

x. That the learned Senior Principal Magistrate erred in law and in fact by providing for a share, out of the suit property, for the late Simon Njoroge Luka who died on 13th November 2012 without leaving behind any dependants or successor-in-title.

8. The Respondents (Plaintiffs) case at the trial was that, Felister Wanjira Waikayu, was the mother to the 2nd Plaintiff and the Defendant(Appellant)herein. That her husband was Waikayu Ndungu, who died in 1964, and she was left with her children and among them were the four sons, Peter Ndungu, the Defendant, Simon Njoroge, Wilson Muchoki and Bernard Mwaura(deceased).

9. It was alleged that on 27th January 1967, the Defendant, who was the eldest son was registered as the owner of the land Parcel No. Loc 6/ Gikarangu/773, to hold in trust for himself and his siblings in equal shares. Further that the same was a first registration. That the said registration was caused by the Felister Wanjira Waikaydu, their mother.

10. However, the Defendant (Appellant) caused the parcel of land to be registered in his current name on 14th November 1995, and he took a title deed to that effect. Further, that the Defendant's siblings have been cultivating on their defined portions of land and therefore, the title deed held by the Defendant is not absolute, as is subject to Customary trust.

11. The Plaintiffs also averred that the Defendant (Appellant) had failed or refused to dissolve the trust and transfer to the other siblings their respective share of 0.5 acres each, and hence the suit before the trial Court. It was also alleged that the share of Bernard Mwaura, who is deceased should go to Lukas Waikayu. That the Defendant had even been paid for the land that was compulsorily acquired by the government.

12. The Defendant on his part had denied the Plaintiffs' claim and he filed a defence wherein he averred that the suit was registered in his name in 1967, to hold it absolutely and not to hold in trust at all as alleged by the Plaintiffs. He had also averred that he moved into the suit land in 1979, after their mother directed him to built his home on the suit land.

13. That in 1995, their mother surrendered all the documents to him such as adjudication register form and payment receipts, and she authorized the Defendants to obtain the title deed in his name. Therefore, the Defendant is legally registered as the absolute owner of the suit property.

14. The Defendant (Appellant) had averred that their family was brought up in another parcel of land at Saba Saba area – being Loc.17/Saba Saba/657, which is the ancestral land, and that their mother had bought other parcels of land in Meru, which are occupied by two of his siblings.

15. Further, the Defendant averred that he has been in exclusive possession of the suit land, where he has extensively developed and built a permanent house, planted crops and trees, and rear livestock. It was his contention that the Plaintiffs are not entitled to the orders sought as they have no legal interest over the said parcel of land. He urged the Court to dismiss the Plaintiffs' suit with costs.

16. The instant Appeal was canvassed by way of written submissions. The Appellant, Peter Ndungu Luka, filed his submissions in person on 14th August 2023, and urged the Court to allow the Appeal. The Respondent filed his submissions through T.M Njoroge &Co Advocates, on 4th September 2023, and urged the Court to dismiss the instant Appeal.

17. The Appellant submitted that the learned the trial Court erred in law and in fact by holding that the suit land parcel comprised ancestral or family property in the face of insufficient evidence or proof thereof. He further submitted that there was no enough evidence placed before the Court to infer the existence of a Customary trust with regard to the suit land.

18. The Appellant also submitted that the Respondent herein failed to controvert the Appellant's evidence to the effect that when the Appellant took possession of the suit land in 1979, it was with the consent of the entire family, which included the Respondent; and to rebut the evidence that the Appellant has been living on the suit property since 1979, to date with the consent of the whole family. Further, that the trial Court failed to consider the Appellant's evidence in regard to his possession of the suit property, and his peaceful stay therein from 1979 to date which went unchallenged by the Respondent.

19. It was also submitted that the trial Court failed to consider the Appellant's evidence that the suit land does not comprise family or ancestral land and, also disregarded the Appellant's evidence which demonstrated that ancestral of the family in question is located in Sabasaba, Murang'a County and Maua, Meru County.

20. The Appellant further submitted that the trial Court failed to consider the Appellant's evidence to the effect that the Respondent's claim that the suit land comprised of family or ancestral was informed by ill-motives as the said claim was brought in 2017, whereas the Appellant has been living on the suit property since 1979, and that the Respondent's claim was brought long after the deaths of key family members, who could testify to the family consensus referred to by the Appellant at the trial Court, namely Simon Njoroge Mwangi, elder paternal uncle to the parties herein, who died in year 2000, and an uncle to the parties Mwaura Mukaru, who died in year 2004.

21. Reliance was placed in the case of Jemutai Tanui v Juliana Jeptepkeny & 5 Others – ELC No 44 of 2013 (Formerly HCC no. 60 of 2012) Eldoret, wherein the Court held that a Customary trust cannot be implied by the Court unless there was an intention to create a trust in the first place.

22. The Appellant also relied in the following cases: Peter Ndungu Njenga Vs Sophia Watiri Ndungu (2000) eKLR; Njenga Chogera Vs Maria Wanjira Kimani and 2 others (2005) eKLR; and, Muthuita Vs Muthuita (1982-88) 1 KLR 42 Court of Appeal.

23. On his part, the Respondent filed his written submissions dated 4th September 2023, and submitted that the trial Court's decision was right and just and further that the Court discharged its due duty in hearing and determining the matter.

24. The Respondent set out two main issues for determination namely:

    a) Was there evidence of a Customary Trust?

    b) Did registration of the suit land in the name of the Appellant herein extinguish the Trust?

25. The Respondent further submitted that the main issue in contention in Civil Case Number 284 of 2017, was whether a Customary trust existed with regard to the suit property; and whether the Respondent proved the existence of the said trust to the required standard of balance of probabilities.

26. Reliance was placed on the holding of the Court in both Njenga Chokera Vs Maina Wanjiru Kimani and 2 others (2005) eKLR; and Muthuita Vs Muthuita (1982-88) 1 KLR 42 Court of Appeal, on the constitutive elements of a Customary trust and the evidential burden of proving the existence of a Customary trust.

27. It was the Respondent's submissions that the evidence as placed before the trial Court by the Respondent demonstrated that the suit land is family land as it was purchased by the mother (deceased) to the parties herein. The Respondent also submitted that at the hearing, the Appellant herein admitted that he was a minor at the time the suit land was first registered, and that the Appellant admitted at the hearing that he got the suit land from the grandparents.

28. It was further submitted that the evidence presented was not insufficient as averred by the Appellant, and that the aforesaid evidence is unshakeable and demonstrated the existence of Customary trust in respect of the suit land to the required legal standard of proof.

29. Reliance was placed in the case of Kanyi Vs Muthiora 1984) KLR 712, to the effect that registration of land in the name of the Appellant under the Registered *Land Act*, did not extinguish the Respondents rights under Kikuyu Customary Law and neither did it relieve the Appellant of his duties or obligations under section 28, as a trustee under Customary trust.

30. In conclusion, the Respondent submitted that the instant Appeal has no merit and implored the Court to dismiss the same with costs to the Respondent.

31. The above are the pleadings and the rival written submissions which this Court has carefully considered. The Court too has considered the Memo of Appeal, together with the Record of Appeal, and finds the issues for determination are as follows: -

    i. Is there evidence that Customary Trust exist with respect to the suit property?

    ii. Is the Appeal merited?

    iii. Who should pay costs of this Appeal.

32. This is a first appeal, and therefore this Court is mandated to re-evaluate, and re-consider the evidence placed before the trial Court, as well as the judgment and arrive at its own independent judgment on whether or not to allow the appeal. Section 78 of the *Civil Procedure Act* empowers a Court of first appeal to appreciate the entire evidence and arrive at a different conclusion See the case of Selle & Another v Associated Motor Boat Co. Ltd & Others {1968} EA 123., where the Court held;

> " ...this court is not bound necessarily to accept the findings of fact by the Court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."

33. In the case of Peters v Sunday Post Limited {1958} E.A. Page 254., the Court of Appeal for East Africa held as follows:

> " It is a strong thing for an appellate Court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing witnesses. An appellate Court has, indeed jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a

jurisdiction which should be exercised with caution; it is not enough that the appellate Court might itself have come to a different conclusion."

34. In the Indian case of Santosh Hazari Vs Purushaottam Twari (Deceased) by L. Rs (2001) 3 SCC 179, which was cited with approval in the case of Bwire Vs Wayo and Saloki (Civil Appeal 032 of 2021 [2022], the Court set out the duties expected of a Court sitting on a first appeal as follows:

> " Firstly, during the hearing of a first appeal, the whole case is open for rehearing both on questions of fact and law. Secondly, the judgment of the appellate Court must reflect its conscious application of mind and record its findings supported by reasons on all the issues arising along with the contentions put forth by the parties. Thirdly, in revising a finding of fact, the appellate Court must come into close quarters with the reasoning assigned by the trial Court and then assign its own reasons for arriving at a different finding."

35. Further, in the case of Kurian Chacko Vs Varkey Ouseph AIH 1969 Kerala 16, which was cited with approval in Bwire Vs Wayo and Saloki (Civil Appeal 032 of 2021 [2022], the Court held that; a first appellate Court is the final Court of fact ordinarily and therefore, a litigant is entitled to a full, fair, and independent consideration of the evidence at the appellate stage, and that anything less than a full re-evaluation of the entire evidence by the appellate Court would amount to visiting an injustice upon a litigant.

36. Therefore, the duty of this Court is to re-evaluate, reconsider and re analyze, the evidence adduced before the trial Court and then comes up with its own independent determination, while considering that it never saw, nor heard the witnesses. See the case of Mbogo & Another vs Shah (1968) EA pg 15, the court held: -

> " an appellate court will not interfere with the exercise of the trial courts discretion unless it is satisfied that the court in exercising its discretion misdirected itself in some matters and as a result arrived at a decision that was erroneous, or unless it is manifest from the case as a whole that the court has been clearly wrong in the exercise of judicial discretion and that as a result, there has been mis justice"

37. Before, delving into the issues for determination, this Court will point out the issues that are not in dispute. It is evident that the parties herein are related, they are brothers, the sons of Felister Wanjira Waikayu, who was the 1st Plaintiff before trial Court. She however passed on 6th May 2018, and was substituted by Simon Njoroge Luka vide a Court Ruling of 12th May 2022.

38. It was also averred that the substituted Plaintiff Simon Njoroge Luka, later died during the pendency of this case before the trial Court. However, this Court has not seen any death certificate confirming such death. The matter proceeded for hearing with the remaining Plaintiff, Wilson Muchoki Waikayu, who is the Respondent herein.

39. Further, it is not in doubt that the suit land was registered in favour of the Appellant in 1967, who went by the name of Ndungu Waikayu. Later in the year 1995, the suit property was registered in the name of Peter Ndungu Luka, and title deed was issued to that effect under the provisions of Registered *Land Act*, Cap 300 Laws of Kenya.

40. It is evident that the suit herein had been filed by the Felister Wanjira Waikayu, as the first Plaintiff, and she averred that the Defendant, her elder son was registered as a proprietor of the suit land to hold in trust for himself and his other siblings. This allegation was denied by the Defendant (Appellant herein) and thus the suit before the trial Court, and later this Appeal. Appreciate

41. This Court will now turn to the determination of the identified issues.

I) Is there evidence that Customary trust exists in respect of the suit property?

42. The Respondent in their claim has alleged that the Appellant is holding the suit land parcel No Loc 6/ Gikarangu/773, in trust for himself and his other siblings in equal shares. They had urged the trial Court to dissolve the said Customary trust so that each of the brothers would get an equal share of 0.5 acres, from the suit land. The Appellant denied the Respondent's claim, but the trial Court found for the Respondents(Plaintiffs).

43. Courts in this country have consistently held that Customary trust is an encumbrance on the land, and that this a non- registrable right, which run with the land, and it is an overriding interest which does not have to be noted in the register. See the case of Kanyi vs Muthiora(1984) Klr 712.

44. From the findings in the above stated case, it is evident that Customary trust is one of the overriding interests pegged on the land that is registered in favour of a proprietor, but that registration cannot defeat the right of a Customary trust. Further, Courts in this Country have held too that the concept of Customary trust is an intergenerational equity, wherein the land is held by generation for the benefit of succeeding generation. This was held so in the case of Mbui Mukangu vs Gerald Mutwiri Mbui C.A 281 of 2000, where the Court held;

> " customary trust is a concept of intergenerational equity, where the land is held by one generation for the benefit of the succeeding generations. The Court also held that possession and occupation are key elements in determining the existence of customary trust."

45. The Courts have further held that the burden of proving Customary trust lies with the person asserting existence of such trust. In the instant case before the trial Court, the burden of proof rested with the Respondents. See the case of Alice Wairimu Macharia vs Kirigo Philip Macharia (2019) eklr, where the Court held that the legal burden to prove the existence of a trust rests with the one who is asserting a right under customary trust and that person must prove that the suit property was an ancestral land and that one family member was designated to hold it on behalf of the rest of the family.

46. It is evident that Customary trust is proved by leading of evidence, and trust is a question of fact that must be proved by whoever is asserting it, and it is never implied by the Court, unless there was an intention to create a trust in the first place. In the case of Mbothu and others v Waitimu & 11 others 1980 K.L.R. 171, the Court of Appeal stated as follows:

> " 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 intention of the parties. The intention of the parties to create a trust must be clearly determined before a trust will be implied".

47. On the question of proving the existence of Customary trusts, the Supreme Court in the case of Isack M'inanga Kieba v Isaaya Theuri M'lintari & another [2018]eKLR, 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 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 possession of the land. Some of the elements that would qualify a claimant of as a trustee are:

1. The land in question was before registration, family, clan, or group land.
2. The claimant belongs to such a 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".

48. The suit land is registered under the Registered *Land Act*, CAP 300 (repealed). The Green Card shows the land was first registered in the name of Ndungu Waikayu in 1967, and later Peter Ndungu Luka in 1995. As a registered proprietor, Section 27, of the said Cap 300(repealed), provided that the registration of Peter Ndungu Luka, the Appellant herein vested in him the absolute ownership of the suit property, Loc. 6/Gikarangu/773, together with all rights and privileges appurtenant thereon. Therefore, the Appellant is deemed to be the absolute owner of the suit property. This is now mirrored in Section 24 of the *Land Registration Act* 2012.

49. As provided by Section 28 of the Registered *Land Act*, a registered proprietor's title is free from all other interests and claims whatsoever subject to leases, charges and encumbrances shown in the register and such overriding interests need not to be noted in the register. The rights of such registered proprietor cannot be defeated except as provided by the Act, but subject to the provisions of Section 30 of the said Cap 300(repealed). This provision of law is now found in section 25 of the *Land Registration Act*, 2012.

50. Further, Section 30(g) of the said Registered *Land Act*(repealed) provides as follows:

> " unless the contrary is expressed in the register, all registered land shall be subject to such of the following interest as may for the time being, subsist and affect the same, without their being noted on the register: -
>
> > 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 enquiry is made of such person and the rights are not disclosed."
>
> Courts have variously held that Section 30(g) of Cap 300 (Repealed), provide for Customary trust as an overriding interest which do not have to be recorded in the register. This right attaches to the land, see the case of Kanyi vs Muthiora (1984) KLR 712, where the Court stated;
>
> > " the registration of land in the name of the Appellant under the Registered *Land Act* (Cap 300), did not extinguish the Respondent's right under Kikuyu Customary law and neither did it relieve the Appellant of her duties or obligations under section 28 of the said Act"

See also the case of Mbui Mukangu vs Gerald Mutwiri Mbui; C.A No. 281 of 2000, held that; -

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

Further, section 28 of *Land Registration Act*, 2012, as captured in 28(b) states that Customary trust is an overriding interest, and therefore, it is clear that once a Customary trust is proved, the same will definitely defeats a proprietors absolute and indefeasibility of his title.

51. The question as to whether registration of land extinguishes a Customary trust has been answered definitively by the Courts. In the case of Kanyi v Muthiora (1984) KLR CA, cited by the Respondent, it was held that the registration of land in the name of a proprietor does not extinguish rights arising under the Kikuyu Customary Law and neither does registration relieve the aforesaid proprietor of the obligations of trustee of the land in question.

52. In her judgment, the trial Court considered that the Respondent presented a Green Card of the suit property which showed that the suit property was registered in the name of the Appellant in 1967, when the Appellant was still a minor. Further, the trial Court noted that the father to the parties herein, who are siblings, died in 1964. Further, the trial Court held that in accordance with Kikuyu Customary Law, the Appellant was registered as proprietor of the suit property in 1967, while still a minor because he is the eldest son in the family, and that was the practice or custom then.

53. In her witness statement, which was later adopted by Wilson Muchoki Waikayu, who gave evidence for the Plaintiffs (Respondent herein) Felister Wanjira Waikayu, the mother to the parties stated that she caused the suit land to be registered in the name of the first Defendant (now Appellant), as the owner to hold it in trust for himself and her other three sons in equal shares, because he was the eldest son.

54. It had been alleged that the said Felister was not registered as the proprietor because she did not have an Identity card. This Court takes Judicial Notice of the fact that indeed at that time, women never owned identity cards, and most of the parcels of land were registered in the name of the elder son to hold in trust for the rest of the family. See the case of Henry Mwangi vs Charles Mwangi C.A 245 of 2004, where the Court held that under Kikuyu Customary Law, to which both parties are subject to, the eldest son inherits the land as a muramati to hold it in trust for himself and the other heirs. It follows that even when the suit land was under the name of a registered proprietor, it was subject to customary trust.

55. Though the Appellant had alleged that the land was absolutely owned by him and he did not hold it in trust for anyone, it is clear that in 1967, when he was first registered as a proprietor, he was a minor of about 15 years of age. He could certainly not have purchased the land. Their mother, Felister was the only surviving parent, as their father had died in 1964. She was thus the one responsible on the issue of registration of land. She stated in her witness statement that she caused the land to be registered in the name of the Appellant to hold it in trust for himself and his other three brothers. This is the scenario described in the case of Henry Mwangi(supra). The Appellant did not avail any evidence to prove that his registration as the proprietor of the suit land was supposed to be absolute.

56. This Court finds no reason to doubt the evidence of the mother to the parties herein as she was the adult in 1967, when the suit land was first registered. Customary trust is proved by evidence, and intention of the parties. It is evident that the intention of Felister, the mother to the parties was to

create a customary trust, wherein, the Appellant would be registered as a sole proprietor of the suit land Loc 6/Gikarangu/773, but to hold it in trust for himself and his other three brothers.

57. Further, there was evidence that the other brothers have been using their definite portions of land from the suitland. Though the Appellant has put up a permanent house on the suit land, that did not defeat the right to customary trust, and the Court finds and holds that he might have built on the portion that was rightly his. Further, the Appellant had also adduced evidence that he has used the suit land since 1979, but this is not a claim for Adverse Possession, and his long occupation of the suit land did not extinguish the Respondent's rights under customary trust nor alleviates the Appellants duties and obligations as a trustee.

58. The lower Court found and held that the Appellant herein did not inherit the suit land from his grandparents as claimed. The trial Court also held that the suit land had never belonged to the grandparents of the Appellant and, therefore, could not have been bequeathed to the Appellant by his grandparents as was alleged. Indeed, the registration in favour of the Appellant was the first registration, and there was no evidence that he was bequeathed the suit land by his grandparents. The proviso to Section 28 of Registered *Land Act*(repealed) is clear that nothing shall relieve a proprietor from any duty or obligations to which he is subject as a trustees, not even building and owning a permanent house, would relieve the Appellant herein of his duties as trustee.

59. Upon a re-evaluation of the entirety of evidence, documents and submissions tendered before the trial Court, it is the finding and holding of this Court that the trial Court did not commit an error of fact or law in finding that the suit property is family land and therefore, not falling under the exclusive ownership of the Appellant herein.

60. This Court has taken the following factors to be material facts worthy of consideration in the instant appeal: firstly, that no consideration was paid by the Appellant to acquire the suit land; secondly, that the Appellant was registered as the proprietor of the suit land whilst a minor; thirdly, the suit land was not bequeathed to the Appellant by his grandparents as claimed.

61. This Court finds and holds that a Customary trust was created over the suit land during the process of registration in the Appellant's name in 1967, and he was registered as such, because he was the elder son, and that was the practice. Further, his mother, who was entitled to be registered as such proprietor was not registered as such, since she did not hold an identity card. This was a family land, and therefore, the Appellant was registered to hold the suit land for himself and his three brothers. The intention of their mother, Felister, was very clear; she intended to create a Customary trust, and entrusted her elder son, the Appellant herein.

62. The registration of the suit property, which is family land, in the Appellant's name in 1967 could not have been intended to be absolute as the Appellant's siblings were also living. Since there is evidence that the registration of the Appellant was subject to holding the same in trust to his other three brothers, then his ownership is not absolute and the indefeasibility of the title is defeated by existence of trust. Therefore, this Court as an Appellate Court finds and holds that there is evidence of existence of Customary trust in favour of the Appellant's brothers(Respondent) as stated in their claim herein.

ii. Is the Appeal merited?

63. This Court has analyzed the available evidence and has concluded that there is indeed a customary trust in existence. The Appellant is holding the suit property in trust for himself and his three brothers. Therefore, the trial Court did not err both in law and in fact, in arriving at the determination it arrived at. The trial Court finding was sound, both in fact and in the law. Having addressed and dealt with

the highlighted issues, contained in the body of the Judgment, it is therefore apparent and evident that the instant appeal is not merited.

64. Consequently, this Court as an Appellate Court finds and holds that the instant Appeal is not merited. The Court finds no reasons to set aside and/or upset the trial Court's judgement of 8th June 2023. The said Judgement is upheld and the instant Appeal is dismissed entirely.

ii. Who should pay costs of this Appeal.

65. Section 27 of the *Civil Procedure Act*, provides that costs is granted at the discretion of the Court. Further, it is apparent that costs follow the event and is granted to the successful litigants unless circumstances dictate otherwise. See the case of Republic vs Rosemary Wairimu Munene (exparte applicant) Ihururu Dairy Farmers Cooperative Society Ltd (2014) eKLR, where the court held that the principle that costs follow the event is not to be used to penalize the losing party but rather to compensate a successful party for the trouble taken in prosecuting or defending the suit.

See also the case of Nedbank Swaziland Ltd verses Sandile Dlamini No. (144/2010) [2013] SZHC30 (2013) Maphalala J. referred to the holding of Murray C J in the case of Levben Products VS Alexander Films (SA) (PTY)Ltd 1957 (4) SA 225 (SR) at 227, who stated as follows;

> "It is clear from authorities that the fundamental principle underlying the award of costs is two-fold. In the first place the award of costs is matter in which the trial Judge is given discretion (Frippvs Gibbon & Co., 1913 AD D 354). But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could have come to the conclusion arrived at.... In the second place the general rule that costs should be awarded to the successful party, a rule which should not be departed from without the exercise of good grounds for doing so."

66. In this case, there are no special circumstance to warrant denial of costs to the successful litigant. The Respondent is the successful litigant, and is consequently entitled to costs.

67. The end results is that the Appeal herein is found not merited and is dismissed entirely with costs to the Respondent. Judgement of the trial Court dated 8th June 2023, is thus upheld.

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:

Absent for the Appellant

Mr Kinuthia H/B for T.M. Njoroge for Respondent

Joel Njonjo – Court Assistant

L. GACHERU

JUDGE

8th/02/2024.