



In re Estate of Kirior Arap Magesa (Deceased) (Environment and Land Case Civil Suit 106 of 2017) [2024] KEELC 3283 (KLR) (4 April 2024) (Judgment)

Neutral citation: [2024] KEELC 3283 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

ENVIRONMENT AND LAND CASE CIVIL SUIT 106 OF 2017

MC OUNDO, J

APRIL 4, 2024

IN THE MATTER OF THE ESTATE OF KIRIOR ARAP MAGESO (DECEASED)

RECHO CHERONO RONO.....PLAINTIFF

VERSUS

SAMWEL CHELULE MUTAI.....DEFENDANT

JUDGMENT

1. The Plaintiff commenced this suit by way of Originating Summons dated 28th August 2017 pursuant to the provisions of Order 37 1(a)(g) and Rule 2(b) and (c) and Section 3A and 63(e) of the Civil Procedure Rules Act (sic) seeking determination of the following questions;
 - i. Whether the deceased Kibii Mutai was the beneficial owner of 7.3 acres of land comprised in LR No. Kericho/Sosiot/90 having acquired the same through his own efforts before registration.
 - ii. Whether the said 7.3 acres of land comprised in LR No. Kericho/Sosiot/90 was registered in the name of Kirior arap Mageso, the deceased herein, to hold in trust for the late Kibii Mutai.
 - iii. Whether the said 7.3 acres of land comprised in LR No. Kericho/Sosiot/90 was physically demarcated by the Applicant's deceased father-in-law in or about 1960 in cognizance of the Applicant husband's right and interest whereupon the Applicant's husband took exclusive possession of the said 7.3 acres.
 - iv. Whether the Applicant is entitled to inherit 7.3 acres and the balance of 16.4 acres be shared equally by all the dependents of the deceased.
 - v. Whether the Applicant is entitled to costs of this suit.
2. The Originating Summons is premised on the Supporting Affidavit of Recho Cherono Rono sworn on 28th August 2017.



3. The Defendant's Replying Affidavit sworn on the 25th October 2018 was to the effect that the Plaintiff was his sister in law, a wife to his deceased brother Kibii Arap Mutai who died in 1988 and that the whole suit land LR No. Kericho/Sosiot/90 measuring 25 acres, was still registered to their late father's name (Kirior Mageso)
4. That although the Plaintiff had a right to a portion of the suit land having been in occupation of the same together with him and other family members, she had however taken a larger portion despite the fact that they were all entitled to inherit equal shares of the deceased's estate as his beneficiaries.
5. The Defendant deponed that the proper mode of distribution of their late father's land would have been through the Kericho Succession Cause No. 265 of 2004.
6. Directions on the originating summons were taken on 12th April 2018 wherein the matter proceeded for hearing on the 31st January, 2019 when Erick Kiptoo Arap Rotich testified as PW1 to the effect that he came from Keben village in Kericho County, was aged 77 years old and a retiree who was currently engaged in farming. That both the Plaintiff and the Defendant were his neighbors whom he had known for many years since they lived in the same village and they shared a common boundary. That he was the first registered owner of his own parcel of land No. Kericho/Sostiot/88.
7. He testified that the suit land herein had initially belonged to the Plaintiff's father in law one Arap Mageso but before the said title could be registered in his name, his son Kibii Arap Mutai had also laid claim to a portion of it. That the said Kibii Arap Mutai had died in the year 1988 while his father Arap Mageso had died in the year 1992.
8. His testimony had been that previously the suit land had been a forest which had been cleared by the said Kibii who had then proceeded to plant a hedge in the early 1950s and that the land had never been used by anyone else apart from the family of Arap Mutai who had planted tea bushes on about 2 acres and had put up several houses on about one acre. That Kibii Arap Mutai wife's name was Recho Mutai (the Plaintiff herein). He also confirmed that Kibii Arap Mutai had another wife who had died leaving behind two sons and a daughter who had also been living on the same land with the Plaintiff. He however could not remember when she died.
9. That apart from the tea bushes, the suit land was also used for subsistence farming as well as grazing. That Kibii Arap Mutai also owned a smaller portion of land on the southern side. That the suit land had exclusively belonged to Kibii Arap Mutai and that he was aware that some meetings had been held at the chief's office to resolve the dispute between the Plaintiff and her brothers-in-law for which meetings he had attended one in the year 2000 after he had retired.
10. When cross-examined, he confirmed that Kibii Arap Mutai, who had never gone to school and was much older than him had cleared the suit land in the early 1950s. That Arap Mageso was older than his father who was born in the year 1911. He further confirmed that the said Arap Mageso had died in the year 1992.
11. That in the year 1960s there had been a lot of forest land which anyone could have cleared and owned. He confirmed that Kibii Arap Mutai was Arap Mageso's eldest son and that the said Kibii Arap Mutai was clearing the suit land for himself. That he was not aware if one could plant tea or build on his father's land without a title. That it was common to have a hedge round one's shamba. On being probed further, he confirmed that although he knew Arap Mageso's sons, he did not know how many they were but that each of them had his own portion of land demarcated by a hedge.
12. That further, while he had been working away from home, he had heard that there had been a dispute between the Plaintiff and her brothers in law. He confirmed that he had only attended one meeting



- after he had retired which meeting had been chaired by the chief. That the meeting which had also been attended to by arap Too had been held long after Arap Mageso had died.
13. In re-examination, he confirmed that Arap Mageso had been older than his own father. He also confirmed that his late father and Kibii Arap Mutai had a boundary dispute whereby they had gone to the chief to resolve the same. He further confirmed that Arap Mageso had not been involved in the said boundary dispute.
 14. Kimutai Arap Torogei testified as PW2 on 27th March 2019 to the effect that he lived in Sosiot, Cheptenye in Kericho County and was a farmer. That he had known the deceased Kirior Arap Mageso who had been his neighbor since birth. That he had also known Kibii Arap Mutai the Plaintiff's deceased husband although he could not remember when he had died. He confirmed that the said Kibii Arap Mutai owned a parcel of land whose registration number he did not know and upon which he had planted some tea bushes and used to graze his cattle thereon. That he had been present when Kibii had divided the land between his two wives. That whereas, the suit land had been registered in the name of Kirior Arap Mageso, Kibii Arap Mutai had fenced the same and had been using it. Further that Kibii's father one Arap Mageso had acknowledged that the suit land had belonged Kibii.
 15. He also confirmed that before Kibii's death, a dispute had arisen over the suit land known as land parcel number Kericho/Sosiot/90, between different neighbors namely; Kipkemoi Arap Rono and Ezekiel Kirui wherein Kibii Arap Mutai had been jailed after he had fought with Wilson Rono and Kipkemoi Rono. That when Kibii Arap Mutai planted tea bushes on the suit land, none of his family members or neighbors had objected. He testified that the suit land was currently occupied by the Plaintiff and her co-wife's children.
 16. That there had been a meeting held at the District Officer's office which meeting had been attended to by Kirior Arap Mageso and some village elders. That he had been present at the said meeting wherein it had been resolved that Kibii Arap Mutai's land measuring 7.3 acres be excised from his father's land. That before his death, Arap Mageso had gone to the Land Control Board with the Plaintiff husband in order to obtain consent to sub-divide the land so that the same could be transferred to Kibii Arap Mutai, unfortunately, he had died before the process of transfer had been completed. His evidence was that the suit land belonged to the Plaintiff and her co-wife's children as members of the family of Kibii Arap Mutai. He adopted his witness statement dated 15th January, 2019 as his evidence in chief.
 17. On being cross-examined, he stated that he did not know how the suit property had been acquired although he had been aware that it had originally belonged to Kirior Arap Mageso and that both Arap Mageso and Kibii Arap Mutai had cleared their respective portions of land. That Kibii's brothers had been present when Kibii and Arap Mageso were clearing their respective portions of land. He confirmed that Kibii was the eldest son of Arap Mageso although he did not know how old the said Kibii was when he had acquired the suit land through clearing the forest.
 18. He confirmed that Kibii Arap Mutai pre-deceased his father Kirior Arap Mageso. He further confirmed that a dispute relating to Kibii's parcel of land had arisen after Kibii's death but Kibii's father, Arap Mageso had been categorical that the land had belonged to Kibii Arap Mutai. That notwithstanding the fact that he had not produced any document relating to the meeting, the said meeting had been attended by Arap Mageso's brother- Zephania in the company of others including Kipsiele Joseph Arap Mutai and Kimalel Arap Mageso among others.
 19. He confirmed that the suit land was registered in the name of Kirior Arap Mageso and that Kibii Arap Mutai had died before the title could be transferred to his name. He maintained that before his death, Arap Mageso had taken the Plaintiff herein to the Sosiot Land Control Board although he had not been in attendance, but that he had learnt of the same in his capacity as an elder. He admitted that he



- had not produced any document to show that there had been a meeting at the Land Control Board. He confirmed that Kibii Arap Mutai had fenced the suit land with Mauritius thorns. He reiterated that he could neither remember when Arap Mageso died nor the number of years that had passed since Kibii's death.
20. In re-examination, he reiterated that the suit land had been acquired when he was young. He confirmed that Kibii Arap Mutai was the eldest son of Arap Mageso. That he was aware that the minutes of the Land Control Board meeting had been produced in court by the Plaintiff. That a surveyor had come to the suit land after Kibii Arap Mutai had died. He maintained that Kibii Arap Mutai and his father Kirior Arap Mageso had gone to the Land Control Board for purposes of having Kibii's portion of land registered into his name and that he had been present in the meeting where Kirior Arap Mageso had stated that the suit land belonged to Kibii Arap Mutai.
 21. Recho Cherono Rono, the Plaintiff herein, testified as PW3 to the effect that she was a farmer and lived at Sosiot. That she had instituted the present suit in respect of land parcel number, Kericho/Sosiot/90 (the suit land). That the said land was registered in the name of her father in law, the deceased Kirior Arap Mageso. She produced a certified copy of the land register dated 5th September, 2017 as Pf exh 1.
 22. She confirmed to having sued Samwel Chelule Mutai who was her brother in law and with whom they had taken out letters of Administration to the estate of Kirior Arap Mageso. She produced a copy of the grant issued to them in Kericho HC Succession Cause No. 265 of 2004 as Pf exh 2.
 23. She testified that Kibii Arap Mutai who had died in the year 1988 was her husband and that she had instituted the instant suit on behalf of her later husband's estate. She produced the ad litem grant issued in Kericho Chief Magistrate Ad Litem Cause No.29 of 2017 as Pf exh 3.
 24. She adopted her supporting affidavits to the originating summons sworn on 28th August, 2017 and her further Affidavit sworn on 22nd November, 2019 as her evidence in chief. She then produced the annexure marked 'RCR 4' annexed to her Supporting Affidavit, which had shown the preferred mode of distribution of the estate of Kirior Arap Mageso, as Pf exh 4. She further produced letters dated 16th February, 1990 and 20th September, 2013 annexed to her Further Affidavit, as Pf exh 5 and 6 respectively and sought that she be declared as entitled to a portion measuring 7.3 acres out of the 9.6 acres comprised in land parcel number Kericho/Sosiot/90.
 25. On being cross-examined, she stated that her late husband had acquired 7.3 acres of land comprised in LR No. Kericho/Sosiot/90 by helping his father to clear the forest. That the Defendant was one of her late husband's brothers although she did not know what position he was occupying in the family. That she did not know how old the Defendant had been when her father in law acquired the land. She confirmed that her husband had died in the year 1988 while her father-in-law had died in the year 1999.
 26. She confirmed that her father in law had not transferred the suit property to her husband's name by the time he died. She asserted that her father in law did not write any will but on being probed further, she admitted that nothing had stopped her father in law from transferring the title of the land in her husband's name. She also confirmed that she had lodged a caution over the suit land on 14th November, 1989 to secure her interest therein.
 27. She confirmed that all her brothers in law were living on the suit land but none of them had a title deed. That according to the Defendant's affidavit sworn in High Court Succession Cause No. 265 of 2004, the said Defendant had suggested that the suit land be shared equally among the 9 beneficiaries of the deceased but she had not agreed with the proposal. That none of her brothers in law had been living on the 7.3 acres portion of the suit land as each of them lived on their own portions of land. She



- confirmed that she had been living on the said 7.3 acres portion of the suit land together with her late co-wife and 8 children including her own.
28. That she was not certain about the date when her father in law died but maintained that her husband had assisted his father to clear the land. That the land that they had cleared measured 7.3 acres. That her husband and her father in law owned separate and district parcels of land. She confirmed that her brothers in law had been living on her father in law's parcels of land. She also confirmed that the entire parcel of land was registered in the name of her father in law. That the suit land had been surveyed sometime in the year 1990 following a dispute which had been resolved the same year.
 29. PW4, Joseph Kimutai Rop testified to the effect that he lived in Itande in Sosiot within Kericho County. That although he was not related to the Plaintiff, he knew her since they came from the same village. That he also knew the Defendant who was also from the said village.
 30. He testified that the suit land No. Kericho/Sosiot/90 was registered in the name of Arap Mageso (deceased) and that the Plaintiff's husband one Kibii Arap Mutai (deceased) was a son to the said Arap Mageso. That the Plaintiff and the Defendant had a boundary dispute. He explained that Kibii Arap Mutai's portion of the suit land measuring 7 acres was the subject of the dispute herein. That the said Kibii had predeceased his late father one Arap Mageso.
 31. He confirmed that whereas, the process of registration of the suit land had started where a surveyor had gone to the land, Kibii Arap Mutai had not been registered as the proprietor of the said portion of the suit land and there had been nothing that had prevented the said Kibii Arap Mutai from being registered as the proprietor of the 7 acres portion of the suit land.
 32. That the suit land had been jointly owned during the lifetime of Arap Mageso and that in those days, land was not sold, that people used to go to the Chief, whereby a certain area would be measured and given out to anybody. That Kibii Arap Mutai had been given a portion of the suit land measuring 7 acres in the year 1976. He explained that upon being given land, one was expected to plant tea bushes to signify that he/she owned the land. That he had been young when Kibii Arap Mutai was given the suit land.
 33. When examined by the court, he confirmed that he was 71 years having been born in the year 1955.
 34. He proceeded to testify that the chief known as Johanna Arap Moiben had been the one giving out the land. That Kibii Arap Mutai had planted tea and maize and had fenced his "shamba" hence he had been given the 7 acres portion of the suit land whose boundary was still intact.
 35. In response to cross-examination by the Defendant's Counsel, he reiterated that the Plaintiff's late husband was called Kibii Arap Mutai, the eldest son of Arap Mageso. He also confirmed that there had been a dispute over the suit land during the life time of Arap Kibii and Arap Mageso. He clarified that Kibii Arap Mutai was also known as Ali and that he was a son to Arap Mageso who was the registered owner of the suit land.
 36. His further testimony was that Kibii Arap Mutai did not contribute to the acquisition of the suit land, that he did not know the exact year when the suit land had been acquired, although the same had been acquired before the year 1976 when he had been around 20 years old. He confirmed that Kibii Arap Mutai had planted tea bushes on the suit land around the year 1976 and had also planted Mauritius thorn fence around the 7 acres portion of the suit land in the same year which fence was intact to date. He confirmed that the Defendant had been living on a portion of land which had been shown to him by his deceased father and had never occupied the 7 acres portion of the suit land.



The Plaintiff thus closed her case.

37. Samuel Chelule Mutai, the Defendant herein testified as DW1 on 7th November, 2023 to the effect that he lived in Sosiot sub-division in Kericho County and was a farmer. That Kirior Arap Mageso was his father and the Plaintiff was his sister in law by virtue of being the wife of his late brother Kibii Mutai. That his father had 7 sons and 3 daughters. That land parcel numbers Kericho/ Sosiot/1257 and Kericho/Sosiot/90 were his father's parcels of land. That he had lived on land parcel number Kericho/ Sosiot/90 (the suit land), which measures 21 acres, since birth.
38. That he was 71 years old and had been utilizing 3 acres, out of the 21 acres comprised in the suit land the land, for farming. That the Plaintiff had been utilizing 6 acres of the suit land where she had planted tea bushes, while the rest of the suit land was utilized by his siblings.
39. That the Plaintiff who was Kibii Arap Mutai's second wife had been married in the year 1982 after Kibii's first wife, one Esther Mutai died in the year 1970. That the said Esther who had left behind 3 children, who were now adults, had been utilizing 3 acres portion of the suit land. That both Esther and the Plaintiff had cumulatively been utilizing 6 acres portion of the suit land. That the rest of the land had been used by William Mutai who was utilizing about 2 ½ to 3 Acres which portion was the cattle grazing ground.
40. That his other sibling Isaiah Mutai was utilizing about 2 ½ Acres. That although the acreage had not been measured, the said Isaiah had planted tea bushes and grass for feeding cattle.
41. That another sibling, Joseph Mutai was also utilizing about 2 ½ Acres wherein he had planted tea bushes and had kept cattle therein.
42. That further, one Stanley was utilizing about 1 acre to plant tea bushes.
43. His evidence was that Richard Mutai who had passed away and who had been survived by his children, had planted tea on about 1 Acre portion and had preserved another portion of the land for cattle. That cumulatively, the said Richard had been utilizing about 2 ½ acres of the suit land. He explained that her sisters had been married and did not have any land.
44. That land parcel Number Kericho/Sosiot/1257 measuring about 0.3 Hectares, was near the river where his nephews and his sons had planted trees therein on different sections.
45. On cross examination, he maintained that in reference to the suit land, the Plaintiff had been utilizing about 6 acres although the suit land had not been surveyed. That the late Esther Mutai's sons had also been utilizing the suit land. That Kibii Mutai who had died between the year 1990 and 1992 had been utilizing the suit land whereby he had planted the tea bushes in the year 1964. That having been born in the year 1946, he had been 18 years old when Kibii had planted the tea bushes. That he had completed primary school in standard 8 in the year 1963.
46. His testimony was that his father had told Kibii Arap Mutai not to plant tea bushes but he had planted the same by force and that at that time, the title to the suit land had already been issued. On being probed further, he explained that the original tea bushes had been planted on the suit land in the year 1964 wherein Kibii had planted the other tea bushes, by force, in the year 1985. That the tea bushes had therefore been planted in two phases.
47. That in the first phase, his father had told Kibii to plant the tea bushes on his share of the suit land but the second phase had been planted for the Plaintiff despite his father's refusal that the same should not be planted. He was categorical that it had been his father who had cleared the bush and acquired



- the suit land, but acknowledged that since Kibii Mutai had been their first born sibling, he may have helped his father to clear the bush.
48. That during the second phase of tea planting, force had been used and a fence had been erected. He confirmed that he knew PW2 whom he heard testifying and who had not been born at the time. That the lower farm had been 3 acres while the portion that Kibii Mutai had planted tea bushes by force had been about 4 acres.
 49. That he knew PW1 who was his age mate and whose father's land bordered his fathers. That PW1's father was called Ezekiel Kirui and together with the deceased Arap Mageso they had created a boundary. That there had neither been a dispute between his father and the said Ezekiel nor between Ezekiel and Kibii. He confirmed that his father Arap Mageso had died in the 1980's.
 50. That in the year 1984, there had been a dispute between them and his brother Kibii because they had wanted to sub-divide the suit land among the seven siblings as per the wish of their father. They did not succeed because their mother had fallen sick.
 51. That the Plaintiff had brought surveyors to measure her 7 acres portion of the suit land by then, they had finalized the dispute with the elders and the District Officer which dispute had arisen after Kibii Mutai had passed on.
 52. He maintained that the suit land belonged to his father who had been alive at the time of the dispute and who he had opposed the elders' award stating that the suit land had belonged to his 7 children. His evidence was that the survey had been conducted because there had been money paid (bribe) and although he had no evidence to show that they had objected to a sub-division of 7 acres being given to the Plaintiff, the objection however stemmed from the fact that they had wanted the suit land to be divided equally amongst themselves.
 53. In re-examination, he confirmed that Kibii had two wives and they had wanted them to take a portion measuring 1 ½ acres each but they had been utilizing 3 acres each. That they had wanted all the sons to get 3 acres each hence Kibii would have taken the 3 acres and divided it amongst his wives. That although Kibii had helped his father to clear the bush, his father had not given him any land. He confirmed that Kibii had been an adult when they had been clearing the said land, which was subsequently allocated and registered to his father.
 54. That he was no aware whether Kibii had been on the land when the same was allocated. That he had helped Kibii to plant tea bushes on 1 acre which land his father had permitted him to plant therein. He maintained that the second phase of the tea plantation by Kibii, which had been done in the year 1985, had been done by force. That the said Kibii had started planting maize, then tea bushes on 1 acre portion of the suit land.
 55. He reiterated that PW2, who used to help the elders was younger than him. That although there had been a meeting before the elders wherein the District Officer had been present and where his father had stated that the suit land be subdivided among his 7 children, yet he did not know the outcome of the award that had been issued thereafter.
 56. He denied having been involved in the procurement of the surveyor but stated that the said surveyor had just measured where the fence had been placed. He maintained that they had not brought the surveyors to subdivide the land.
 57. The Defence thus closed his case and parties were directed to file their written submissions.



Plaintiff's written submissions.

58. Upon the Plaintiff having summarized the evidence adduced in court she framed her issue for determination as to whether 7.3 acres in the property known as LR No. Kericho/Sosiot/ 90 was registered in the name of Kirior Arap Mageso (deceased) to hold in trust for Kibii Mutai (deceased).
59. The Plaintiff then proceeded to submit that indeed suit land was registered in the name of Kirior Arap Mageso (deceased) to hold in trust for Kibii Mutai (deceased). That it was not in dispute that the said suit land LR No. Kericho/Sosiot/ 90 was family land. There was ample evidence through the testimonies of PW 1, 2 and 4 proving that the deceased Kibii Mutai had acquired a portion measuring 7.3 acres comprised in the suit land having cleared it through his own effort and that his father the deceased Kirior Arap Mageso had only been registered to the same by virtue of being the head of the family.
60. That there had been no dispute from the evidence adduced that the deceased Kibii Mutai and his family had developed and had been in peaceful and uninterrupted occupation of a clearly demarcated portion of the suit land whose boundaries were well known to all the parties. That this evidence was not controverted by the Defendant.
61. That it had also come out in evidence that the deceased Kirior Arap Mageso had acknowledged Kibii Mutai's (deceased) portion of land for which he had initiated the transfer process of 7.3 acres to him and had even conducted a survey. That there had further been evidence that the dispute that had a reason after the demise of Kibii Mutai had been resolved in Kibii Mutai's favour as evidenced in the letters herein produced as P/exh 5 and 6. In support of their submissions the Plaintiff relied on the decision by the Supreme Court in the case of Isack M'inanga Kiebia vs Isaaya Theuri M'lintari & another [2018] eKLR wherein the Court had upheld the High Court and Court of Appeal's decision on the elements that qualified claimant as a trustee.
62. That granted that the parties herein were closely related, the claim was not tenuous and the Plaintiff's husband would have been registered as proprietor of 7.3 acres save for the fact that his father was registered as the head of the family. That the Plaintiff had thus established the elements as expressed by the Supreme Court and the prayers in her suit should be allowed.

Defendant's submissions.

63. In opposition to the claim made by the Plaintiff the Defendant herein upon giving the factual background of the matter, submitted that the suit land herein LR No. Kericho/Sosiot/ 90 having been registered to the deceased Kirior Arap Mageso, the Plaintiff now lay claim to a portion of the same as a widow to Kibii Mutai (deceased) who was the deceased's son and who had also passed away in the year 1988.
64. That he acknowledged the Plaintiffs right to their share of the suit land given her status as the widow of the late Kibii Mutai, however he disputed her assertion that she was entitled to a larger portion than other beneficiaries as is established under Section 29 of the *Law of Succession Act*.
65. That her claim that the late Kibii Mutai supported the late Kirior Arap Mageso in acquiring the suit land was unsubstantiated as well as her claim that the late Kirior Arap Mageso had resolved the dispute affirming her claim to a portion of 7.3 acres. No documentation to support the legal procedures had been produced in evidence. That the proposed mode of distribution was currently before the honorable High Court sitting in Kericho in Succession Cause No. 265 of 2004.



Determination.

66. I have carefully and anxiously considered the Plaintiff's claim against the Defendant, the Defendant's defence, the evidence, submissions as well as the applicable law and the authorities herein cited.
67. The gist of the matter in question which is not disputed is that that suit land herein being LR No. Kericho/Sosiot/ 90 measuring 9.6 hectare approximately 23.7221 acres was registered to the deceased Kirior Arap Mageso on the 2nd June 1972 wherein he had been issued with a certificate of title produced to as Pf exh 1, on 20th September 1976.
68. It is not in dispute that the deceased proprietor of the suit land Kirior Arap Mageso was a father in law to the Plaintiff by virtue of the marriage between her and his deceased son one Kibii Mutai. It is further not in dispute that the deceased, the proprietor of the suit land was also the Defendant's father and therefore it goes without saying that the Defendant and the deceased Kibii Mutai were brothers.
69. The Plaintiff brings suit against the Defendant to ascertain her right to a portion measuring 7.3 acres as the widow of the deceased Kibii Mutai alleging that the deceased Kibii Mutai had assisted his father the deceased Kirior Arap Mageso in acquiring the suit land by clearing the forest. She had however confirmed that the land was family land, and for which her husband and his family had been in possession and occupation of a demarcated 7.3 acres of the same.
70. The Plaintiff's allegation further was that after Kibii's death, there had arisen a dispute relating his portion of land wherein his father, Arap Mageso had been categorical that the portion had belonged to Kibii Arap Mutai. No evidence had however been produced to substantiate this allegation.
71. She had sought therefore that there be a determination, by virtue of their occupation on a demarcated portion of the suit land coupled with her father in law's wish that 7.3 acres comprised in the suit land herein registered in the name of deceased Kirior Arap Mageso had been held in trust for the late Kibii Mutai.
72. The Defendant's case on the other had was that LR No. Kericho/Sosiot/90 was registered to his father the deceased Kirior Arap Mageso as an absolute proprietor and therefore the same ought to be equitably distributed amongst his beneficiaries, the Plaintiff herein included, and in accordance to the law of succession for which a Succession Cause No. 265 of 2004 was pending at the High Court sitting in Kericho. That the Plaintiff in bringing this suit sought entitlement to a larger portion than the other beneficiaries which was a disproportionate share and was not justified in law or equity and more so in the absence of any documentary evidence.
73. What is disputed herein and which forms the issue for determination is whether the Plaintiff herein is entitled to a share of 7.3 acres of land to be excised from land parcel LR No. Kericho/Sosiot/90 by virtue of the same having been encumbered by customary trust.
74. It must also be remembered that Court is not sitting as a succession Court and further, that the deceased Kirior Arap Mageso died intestate when the suit land was registered to his name.
75. The provisions of Section 25 of the [Land Registration Act](#) do not relieve a proprietor off any duty or obligation to which she/he is subject to as a trustee.



76. The overriding interests alluded to in Section 25 are set out in Section 28 of the *Land Registration Act* which provides as follows :-

“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. spousal rights over matrimonial property;
- b. trusts including customary trusts ;
- c. rights of way, rights of water and profits subsisting at the time of first registration under this Act;
- d. natural rights of light, air, water and support;
- e. rights of compulsory acquisition, resumption, entry, search and user conferred by any other written law;
- f. leases or agreements for leases for a term not exceeding two years, periodic tenancies and indeterminate tenancies;
- g. charges for unpaid rates and other funds which, without reference to registration under this Act, are expressly declared by any written law to be a charge upon land;
- h. rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription;
- i. electric supply lines, telephone and telegraph lines or poles, pipelines, aqueducts, canals, weirs and dams erected, constructed or laid in pursuance or by virtue of any power conferred by any written law; and
- j. any other rights provided under any written law.

77. It will be noted that trusts are among the overriding interests provided for in Section 28 above, and for which a proprietor holds land subject to, as provided in Section 25 above. A trust is essentially a situation in which one person holds property on behalf of, or for the benefit of another. Trusts are of different types and can be created in a variety of ways (See for example Hansbury & Maudsley, Modern Equity, 10 Edition, Chapter 4)

78. The nature of the trust that the Plaintiff was alluding to has not been disclosed either in her suit or evidence. She merely pleaded that since she was a daughter in law to the deceased proprietor’s son, and that her late husband had helped his father to acquire the land by helping him clear the forest, wherein he had been in occupation of a portion of the same measuring 7.3 acres, that her father in law’s registration as proprietor of the said land had therefore been to hold in trust of a portion of 7.3 acres for his deceased son.

79. No evidence was led by the Plaintiff of any customary law that applied to the parties herein which infused a trust between her deceased husband and his father to enable the Court delve into whether a customary trust exists, and if so, the rights given under that custom as is provided for under Section 28(b) of the *Land Registration Act*.



80. Indeed the Supreme Court of Kenya, while faulting the decisions in *Obiero v. Opiyo*, and *Esiroyo v. Esiroyo*; held as following in the case in *Isaac M'inanga Kiebia vs Isaaya Theuri M'lintari & another* [2018] eKLR.

“Flowing from this analysis, we now declare that a customary trust, as long as the same can be proved to subsist, upon a first registration, is one of the trusts to which a registered proprietor, is subject under the proviso to Section 28 of the Registered *Land Act*. Under this legal regime, (now repealed), the content of such a trust can take several forms. For example, it may emerge through evidence, that part of the land, now registered, was always reserved for family or clan uses, such as burials, and other traditional rites. It could also be that other parts of the land, depending on the specific group or family setting, were reserved for various future uses, such as construction of houses and other amenities by youths graduating into manhood. The categories of a customary trust are therefore not closed. It is for the Court to make a determination, on the basis of evidence, as to which category of such a trust subsists as to bind the registered proprietor.

Each case has to be determined on its own merits and quality of evidence.”

81. It is clear from this decision that the Court had highlighted the relevant pointers to declare an existence of a customary trust as follows;
- i. That the land in question was before registration, family, Clan or group land
 - ii. The claimant belongs to such family, Clan or group
 - iii. The relationship of the claim and to such family, clan or group is not so remote or tenuous as to make his/her claim idle or adventurous
 - iv. The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for other intervening circumstances.
 - v. The claim is directed against the registered proprietor who is a member of the family, clan or group
82. From the above holding, I find that the Plaintiff herein had not ticked all the boxes herein above and therefore there was no evidence of an existence of a trust, she did not also establish that the portion of suit land had been reserved for family or clan uses, such as burials, building houses, cultivating, and other traditional rites or amenities and/or any valid claim to the suit property based on customary trust that subsisted at the time of first registration and which trust was rooted in customary law and was binding upon her deceased father in law as the registered proprietor of the said suit land.
83. Indeed the evidence on record was that the deceased Kirior Arap Mageso was the sole and absolute proprietor of L.R No. Kericho/Sosiot/90, I find that the suit land having been registered to the deceased Kirior Arap Mageso on the 2nd June 1972, was thus governed by the repealed Registered *Land Act*, Cap 300 which then constituted the deceased Kirior Arap Mageso as an absolute proprietor and conferred on him all rights, privileges and appurtenances thereto, free from all other interests and claims, which rights, privileges and appurtenances were not liable to be defeated except as provided in the Act.



84. The current land regime is set out in the *Land Registration Act*, and the *Land Act*. The rights of a proprietor are set out in Section 26 of the *Land Registration Act*, which provides as follows:-

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all Courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

- (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
- (b) Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

85. From the above provision of the law, it is clear that the deceased Kirior Arap Mageso herein having been registered as the proprietor of the suit land, became the absolute and indefeasible owner of the said property and could only be challenged as provided by Section 26(1) (a) & (b) of the *Land Registration Act*. In the instance case, none of the two scenarios have been pleaded.

86. There having been no categories of a customary trust disclosed in the evidence herein adduced for the court to make a determination so as to bind the registered proprietor of the suit land, what comes out clearly is the Plaintiff’s unbridled greed to reap where she did not sow and disentitle the Defendant and his siblings who are the deceased’s beneficiaries, their share of his estate by virtue of being the children to the late Kirior Arap Mageso.

87. I find that the Plaintiff has failed to prove her case on a balance of probabilities. Her suit is herein dismissed with costs.

DATED AND DELIVERED VIA TEAMS MICROSOFT AT NAIVASHA THIS 4TH DAY OF APRIL 2024.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

