



**Mbatia v Ngatu & another (Sued as the personal representative of the Estate of Gicheru Mbatia (Deceased) & another (Environment and Land Case Civil Suit 417 of 2014) [2024] KEELC 4017 (KLR) (2 May 2024) (Judgment)**

Neutral citation: [2024] KEELC 4017 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND CASE CIVIL SUIT 417 OF 2014  
OA ANGOTE, J  
MAY 2, 2024**

**BETWEEN**

**JOSEPH KIBIRU MBATIA ..... PLAINTIFF**

**AND**

**JENNIFER MUTHONI NGATU AND PETER MBATIA GICHERU (SUED AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF GICHERU MBATIA (DECEASED) ..... 1<sup>ST</sup> DEFENDANT**

**JAMES KIMANI KURIA ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiff, through the Amended Plaint dated 15<sup>th</sup> April 2015, has sought for the following orders:
  - a. A declaration that the 1<sup>st</sup> Defendant is holding half share of the Title Number Dagoretti/ Waithaka/ 508 in trust for the Plaintiff.
  - b. The Defendants be and are hereby ordered to ensure the Title Number Dagoretti/ Waithaka/508 is subdivided into two portions measuring 0.08 of a hectare and 0.06 of a hectare and the Defendants shall execute all transfer documents and other necessary documents in favour of the Plaintiff to transfer the portion measuring 0.08 of a hectare to the Plaintiff and in default, the Deputy Registrar of this Court to execute all the necessary documents for transfer for and on behalf of the Defendants.
  - c. The costs of this suit.
  - d. Such further or other reliefs as this Honourable Court may deem appropriate.



2. The Plaintiff has averred that he was born in 1943 and that his father, Mbatia Gicheru (deceased) had five wives; that he is the son of the youngest wife, Wanjiku Mbatia; that the 1<sup>st</sup> Defendant is his elder brother and that they have four other siblings.
3. The Plaintiff averred in the Complaint that the family agreed that the parcel of land known as Dagoretti/Waithaka/190, registered in the name of his father, Mbatia Gicheru, would be registered in the joint names of the eldest sons of each of the five families in trust of their respective family members and that this was in accordance with Kikuyu Customary law.
4. It was averred by the Plaintiff that on 30<sup>th</sup> July 1970, F.G. Mbatia (representing the 3<sup>rd</sup> family), Wamwea Mbatia (representing the 1<sup>st</sup> Family), Gicheru Mbatia, his brother (representing the 5<sup>th</sup> family) and Minnie Watiri (the wife of Moses Njoroge Mbatia, who had passed on, representing the 2<sup>nd</sup> family), were registered as joint proprietors, in trust for all five families.
5. The Plaintiff stated that Wamwea Mbatia and Minnie Watiri Njoroge are deceased and their respective death certificates were registered on the suit property; that as F.G. Mbatia and the 1<sup>st</sup> Defendant were the only surviving joint proprietors, they were registered as proprietors on 18<sup>th</sup> April 1990, with the latter having 53 shares and the former having 7 shares respectively and that they are holding the same in trust for all five families.
6. According to the Plaintiff, in 1990, a meeting of Mbatia's family was held where all five families were represented; that it was unanimously agreed that the property should be divided into eight portions, namely, Title Number Dagoretti/Waithaka/ 506, 507, 508, 509, 510, 511, 512 and 513 and that these parcels of land were distributed to the respective families.
7. He averred that the parcel of land known as Dagoretti/ Waithaka/508 was transferred to the 1<sup>st</sup> Defendant, who was registered as proprietor to hold half a share in his trust, pending the subdivision of the land into two equal portions.
8. It is the Plaintiff's case that he constructed a semi-permanent house of four rooms on the suit property and lived in one of the rooms, but the 1<sup>st</sup> Defendant took over possession of the other rooms; that he lived in the said room until 2013 when the 1<sup>st</sup> Defendant threatened to harm him if he continued to live there and that he reported the matter to Satellite Police Station under OB No. 27/29/7/2013 and later left the suit property after incessant threats and is currently employed by his sister as a herdsman.
9. He deposed that the family met again on 18<sup>th</sup> June 2010 and resolved that the 1<sup>st</sup> Defendant should transfer an equal share of the suit property to him as agreed in previous family meetings; that the 1<sup>st</sup> Defendant has declined to transfer his rightful portion and that the Area Chief wrote a letter dated 22<sup>nd</sup> January 2013 confirming that the 1<sup>st</sup> Defendant failed to give him his share of the suit property.
10. The Plaintiff averred that he later learnt in 2013, upon conducting a search on the suit property, that the 1<sup>st</sup> Defendant had sold a portion of the suit property measuring 0.06 of a hectare to James Kimani Kuria at a consideration of Kshs 300,000 and that the remaining 0.08 of a hectare is still in the 1<sup>st</sup> Defendant's name.
11. The Plaintiff averred that the said transfer was done fraudulently with a motive to disinherit him of his rightful share in the suit property.
12. The 1<sup>st</sup> Defendant opposed the suit by filing an Amended Statement of Defence dated 22<sup>nd</sup> July 2020. The 1<sup>st</sup> Defendant averred that Gicheru Mbatia (now deceased) is the joint registered owner of parcel of land number Dagoretti/ Waithaka/508 with 0.08-hectare stake. The 1<sup>st</sup> Defendant denied that the deceased held the property as a trustee of the Plaintiff.



13. The 1<sup>st</sup> Defendant averred that the Plaintiff is not and has never been a son, beneficiary or dependant of Gicheru Mbatia (deceased) and that the Plaintiff was born after the passing on of Gicheru Mbatia.
14. The 1<sup>st</sup> Defendant averred that the suit property was excised from the parcel of land No. Dagoretti/Waithaka/190 measuring 1.2 hectares and registered in the name of Gicheru Mbatia, the deceased's father and that the suit property was divided in 1983 into 8 parts as follows:
  - a. LR No. Dagoretti/Waithaka/506 measuring 0.15 hectares was registered to Minnie Watiri
  - b. LR No. Dagoretti/Waithaka/507 measuring 0.10 hectares was registered to Fredrick Gicheru Mbatia
  - c. LR No. Dagoretti/ Waithaka/508 measuring 0.14 hectares was registered to Gicheru Mbatia
  - d. LR No. Dagoretti/ Waithaka/509 measuring 0.10 hectares was registered to Wamwea Mbatia
  - e. LR No. Dagoretti/ Waithaka/510 measuring 0.10 hectares was registered to Wamwea Mbatia
  - f. LR No. Dagoretti/ Waithaka/511 measuring 0.10 hectares was registered to Fredrick Gicheru Mbatia
  - g. LR No. Dagoretti/ Waithaka/512 measuring 0.10 hectares was registered to Fredrick Gicheru Mbatia
  - h. LR No. Dagoretti/ Waithaka/513 measuring 0.13 hectares was registered to Fredrick Gicheru Mbatia
15. The 1<sup>st</sup> Defendant asserted that the suit property had already been subdivided in 1983, and therefore the claim that the family held a meeting in 1990 is false and misleading; that it is not true that the property was registered in the names of the firstborn sons of the five families because F.G. Mbatia was given 4 plots while Wamwea Mbatia was given two plots and that no one from the 4<sup>th</sup> family was given any plot.
16. The Defendants argue that if indeed the 1<sup>st</sup> Defendant held the suit property in trust, he would have held it on behalf of all members of the 5<sup>th</sup> Family and not just on the Plaintiff's behalf; that the 1<sup>st</sup> Defendant had been solely in possession of the suit property since the 1980s and established a home thereon and that all his children have similarly established homes and businesses thereon.
17. The 1<sup>st</sup> Defendant argued that the land was demarcated in 1960 and registered in 1963; that the Plaintiff is therefore statute barred as this suit has been filed over 50 years since the registration of the land; that the 1<sup>st</sup> Defendant and his estate have been paying all rates and statutory payments to the Government or local authorities; that the Plaintiff was only accommodated by the 1<sup>st</sup> Defendant on or about 2010 after the death of the Plaintiff's wife, and that until 2010, the Plaintiff was always residing in Mai Mahiu.
18. The 1<sup>st</sup> Defendant averred that on 19<sup>th</sup> May 2006, the deceased entered into a sale agreement with the 2<sup>nd</sup> Defendant for the sale of a portion of the land; that they obtained all the necessary consents and approvals and legally transferred the portion to the 2<sup>nd</sup> Defendant and that the latter was duly registered as the proprietor of a portion of the suit land on 21<sup>st</sup> November 2011 and has since constructed rental houses on the subject property.
19. The 2<sup>nd</sup> Defendant stated in the affidavit that he bought the suit property from the 1<sup>st</sup> Defendant, now deceased, in 2007, after due diligence in an open and lawful process and that the Plaintiff is a stranger and that he only saw him when he testified in court.



20. He argued that if there are any disputes between the family members of Mbatia Gicheru deceased, and the Plaintiff, he should not be dragged into the dispute and that he was not aware of any succession proceedings concerning Mbatia Gicheru to which the 2<sup>nd</sup> Defendant could have learned whether Gicheru Mbatia was lawfully or otherwise registered as proprietor of the suit property.

### **Hearing and Evidence**

21. The Plaintiff presented the evidence and viva voce testimony of three witnesses. The Plaintiff, PW1, relied on his Witness Statement dated 2<sup>nd</sup> April 2014 as his evidence in chief. In his witness statement, he reiterated the facts as set out in the Plaintiff, which I have summarized above.
22. PW1 also produced a bundle of documents as PEXB1, which the court allowed, except the documents at page 6 and 7 which are in Kikuyu language and whose purported translation did not have the name of the person who translated them.
23. The Plaintiff's documents include a copy of his identity card; a copy of the register of title number Dagoretti/Waithaka/190 dated 14<sup>th</sup> February 2014; a copy of the register of Dagoretti/Waithaka/508 dated 22<sup>nd</sup> November 2013; a copy of the letter from the chief dated 22<sup>nd</sup> January 2013; a copy of the demand letter and a photograph of the suit property.
24. In cross-examination, PW1 averred that he was born in 1943 and he was about twenty years old when his father died and that his father died in 1939/1940. During re-examination, he stated that his father died sometime between 1940 and 1950.
25. PW2, Joseph Mbatia Muthiora, relied on his statement dated 2<sup>nd</sup> April 2014 as his evidence in chief. He stated that the Plaintiff is his uncle and his father is Muthiora Mbatia, who is of the second family; that that he was given Plot 511 by Gicheru Mbatia and that the land was sub-divided in 1958 to the five families.
26. He stated that he attended many meetings at the Chief's place and at home; that his father's share was plot 512 and that Fredrick Gicheru Mbatia was a trustee for all of them.
27. PW3, Stephen Ndwaru Gicheru, relied on his statement dated 2<sup>nd</sup> April 2014. He stated that his grandmother, Ngonone Ruguru Mbatia was the second wife. He averred that he was the secretary of all meetings pertaining to the parcels of land which are the subject of this suit.
28. PW3 stated that the family agreed that Title Number Dagoretti/Waithaka/190 would be registered in the joint names of the eldest sons of each family in trust of their respective family members, according to Kikuyu customary law.
29. He deponed that his father is Fredrick Gicheru Mbatia, from the 3<sup>rd</sup> family, and was given three plots. He stated that his father gave a share to Muthiora Mbatia and that the 4<sup>th</sup> family was given Plot number 507.
30. In re-examination, he stated that there was a previous suit and as his father played a bigger role in that suit, he was given more land; that each family was given land according to its contribution to the suit; that other family members were given land somewhere else and that Gicheru Mbatia was to give a portion of the land to his brother, the Plaintiff.
31. DW1, Peter Mbatia Gicheru, relied on his statement dated 20<sup>th</sup> September 2021 as his evidence in chief. In his statement, he deponed that he is a co-administrator of the estate of the deceased, the 1<sup>st</sup> Defendant, and he was acting with the authority of his co-administrators. DW1 reiterated the facts as set out in the Statement of Defence.



32. In his statement, DW1 averred that his father, the late 1<sup>st</sup> Defendant, told him that the Plaintiff, his uncle, was not Mbatia Gicheru's son, having been born 10 years after his grandfather died. He averred that the land was sub-divided in 1983 as seen on the mutation form and that his father has been on the land since the 1980s.
33. The 2<sup>nd</sup> Defendant testified as DW2. He relied on his witness statement dated 26<sup>th</sup> April 2022. In his statement, he stated that he sought out Gicheru Mbatia in 2006 and who agreed to sell to him a portion of the suit land.
34. He stated that the late 1<sup>st</sup> Defendant gave him a copy of the title deed and he confirmed the same through a search, that the parcel of land was registered in his name; that he applied for and received a consent from Dagoretti Land Control Board and that he paid for stamp duty; that they were advised that the parcel of land could not be subdivided according to Physical Planning Regulations, but a title deed could be issued in their joint names.
35. He testified that he bought his interest in the suit property lawfully and openly and that he should not be a party in this suit; that he never met the Plaintiff and only met him in court and that he did not know about other family members, except the deceased's wife and son.

### **Submissions**

36. Counsel for the Plaintiff's counsel submitted that the Plaintiff testified that he was born in 1943; that the late Mbatia Gicheru bought the property known as Dagoretti/Waithaka/190 on 9<sup>th</sup> October 1958 and that the Plaintiff was born when Mbatia Gicheru was alive.
37. Counsel relied on the Supreme Court case of Isack M'inanga Kiebia v Isaaya Theuri M'lintari & Another [2018] eKLR which addressed itself to the nature of the doctrine of customary trust.
38. Counsel argued that the evidence by DW1 as to whether the Plaintiff is a son of Mbatia Gicheru, is hearsay evidence, which is not admissible; that the suit property is family land and that the 1<sup>st</sup> Defendant was registered as the proprietor of the suit property and held it in trust for himself and the Plaintiff under Kikuyu customary law. He relied on the case of Kareu Ndebu vs Ndege Ndebu [2020] eKLR.
39. Counsel also argued that it is a non-issue whether the Plaintiff was in actual possession and occupation of the suit property in order to prove a customary trust. He relied on the case of Monica Mukulu Muteti v Mutava Maingi [2019] eKLR. Counsel also relied on the case of Synergy Industrial Credit Limited vs Oxyplus International Limited & 2 Others [2021] eKLR.
40. Counsel for the 1<sup>st</sup> Defendant submitted that the Plaintiff is not the son of Gicheru Mbatia (deceased); that he never stated the year and date when he was born or provided proof that he was born during the deceased's lifetime and that in the Plaintiff's testimony, he admitted that he was born after the death of Mbatia Gicheru.
41. It was Counsel's further submission that although the Plaintiff argued that the property was subdivided into eight plots and was distributed amongst the eldest sons in the five families, he did not provide any evidence to support the said allegation.
42. It was also Counsel's argument that the Plaintiff has failed in his duty to prove that in the registration of the subject plot, there was the intention to create a trust. Counsel relied on the cases of Njenga Chogera vs Maria Wanjira Kimani & 2 others [2005] eKLR and Juletabi African Adventure Limited & Another vs Christopher Michael Lockley [2017] eKLR.



43. Counsel for the 2<sup>nd</sup> Defendant submitted that the Plaintiff's claim that the 2<sup>nd</sup> Defendant purportedly defrauded him of his share in the property is vague and that when fraud is alleged, it must be proved to a threshold above a balance of probability but below beyond reasonable doubt. Counsel relied on the cases of *Kinyanjui Kamau vs George Kamau* [2015] eKLR and *Kuria Kiarie & 20 others v Sammy Mugeru* [2018] eKLR.
44. In conclusion, counsel argued that the Plaintiff failed to prove that the 2<sup>nd</sup> Defendant was aware that the 1<sup>st</sup> Defendant held the property in trust for another and that the 2<sup>nd</sup> Defendant, despite such knowledge, went ahead to purchase the suit property.

### **Analysis and Determination**

45. Upon consideration of the pleadings, evidence and submissions filed by the parties, the issues for this court's determination are:
  - a. Whether this suit is statute-barred
  - b. Whether the 1<sup>st</sup> Defendant was holding the suit property in trust for the Plaintiff.
  - c. Whether the 2<sup>nd</sup> Defendant is a bona fide purchaser.
46. The Plaintiff's case is that his father, the late Mbatia Gicheru, was the registered proprietor of LR No. Dagoretti/ Waithaka/190. He avers that this property was divided into eight portions and registered in the names of the first born sons of each of the five families of Mbatia Gicheru.
47. His claim is that the suit property, Title Number Dagoretti/ Waithaka/508, which was registered in the name of his brother, the 1<sup>st</sup> Defendant (deceased), is being held in trust for him. He asserts that contrary to his interest in a half share of the suit property, the 1<sup>st</sup> Defendant fraudulently sold 0.06 hectares of the suit property to the 2<sup>nd</sup> Defendant. The Plaintiff is seeking that the remaining 0.08 ha of the suit property be transferred to his name.
48. The 1<sup>st</sup> Defendant has denied that the deceased, Gicheru Mbatia, held the suit property in trust for the Plaintiff. He avers that the Plaintiff is not a son, beneficiary or dependant of Gicheru Mbatia (deceased).
49. They additionally aver that if indeed the 1<sup>st</sup> Defendant held the suit property in trust, he would have held it on behalf of all the five members of the 5<sup>th</sup> Family and not just on the Plaintiff's behalf. The 1<sup>st</sup> Defendant argues that the land was demarcated in 1960 and registered in 1963 and the Plaintiff is therefore statute barred as this suit has been filed over 50 years since the registration of the land.
50. The 1<sup>st</sup> Defendant has argued that this suit is statute barred because the suit property was registered in 1963. It is however noteworthy that the suit property, Dagoretti/Waithaka/508, was in fact registered in the 1<sup>st</sup> Defendant's name on 13<sup>th</sup> September 1990, and the title was issued to him under the Registered *Land Act*. This is clear from the copy of the suit property's register, as adduced in the Plaintiff's bundle of documents and the copy of title presented by the 2<sup>nd</sup> Defendant in his bundle.
51. It is also apparent that the subject matter of this suit is a claim under customary trust. The Plaintiff asserts that the 1<sup>st</sup> Defendant fraudulently sold a portion of the suit property to the 2<sup>nd</sup> Defendant.
52. Section 20 of the *Limitation of Actions Act* prescribes that an action by a beneficiary under a trust in respect of a fraudulent breach of trust or to recover from the trustee trust property, may not be brought after the end of six years from the date on which the right of action accrues. It provides as follows:

“



- “(1) None of the periods of limitation prescribed by this Act apply to an action by a beneficiary under a trust, which is an action—
- (a) in respect of a fraud or fraudulent breach of trust to which the trustee was a party or privy; or
  - (b) to recover from the trustee trust property or the proceeds thereof in the possession of the trustee or previously received by the trustee and converted to his use.
- (2) Subject to subsection (1), an action by a beneficiary to recover trust property or in respect of any breach of trust (not being an action for which a period of limitation is prescribed by any other provision of this Act) may not be brought after the end of six years from the date on which the right of action accrued: Provided that the right of action does not accrue to a beneficiary entitled to a future interest in the trust property, until the interest falls into possession.”

53. Section 26 of the Limitation of Actions additionally prescribes that an action that is based upon the fraud of a defendant does not begin to run until the Plaintiff has discovered the fraud or mistake.

54. The undisputed facts in this case, are that the 1<sup>st</sup> Defendant sold a portion of the suit property to the 2<sup>nd</sup> Defendant in 2007. The Plaintiff avers that he only learnt of the said transfer in 2013, upon conducting a search on the suit property. As this suit was filed in 2014, the purported discovery of the alleged fraud falls within the six year window prescribed in the Act. The suit cannot therefore be said to be statute barred.

55. It can also be argued that the nature of a customary trust is such that it cannot be said to be statute-barred. The Supreme Court in *Isack M’inanga Kiebia v Isaaya Theuri M’lintari & another* [2018] eKLR held that 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*.

56. Section 28 of the Registered *Land Act* (repealed) provides that:

“The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject -

- (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
- (b) unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 not to require noting on the register:

Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee.”

57. On this basis, a claim under customary trust is not subject to statutory limitation and cannot be said to be statute barred. The Court of Appeal in *Mbui Mukangu v Gerald Mutwiri Mbui* [2004] eKLR



agreed with the decision of Khamoni J. in *Gathiba v Gathiba* [2001] 2 EA 342 in which the Judge held as follows:

“...But since the same registration recognizes trusts in general terms as is done in the proviso to Section 28 and 126(1) of the Registered *Land Act* without specifically excluding trusts originating from customary law and since African customary laws in Kenya, generally, have the concept or notion of a trust inherent in them where a person holding a piece of land in judiciary capacity under any of the customary laws... such registration does not relieve a proprietor from any duty or obligation to which he is subject as a trustee.”

58. The 1<sup>st</sup> Defendant’s claim that this suit is statute barred therefore fails.

59. The Supreme Court in *Isack M’inanga Kiebia v Isaaya Theuri M’lintari & Another* [2018] eKLR considered the body of jurisprudence on customary trust and articulated that the existence of a customary trust is to be proved by way of evidence. It held that:

“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.”

60. On the first element, as to the nature of the suit property before registration, it is not disputed that the suit land Dagoretti/ Waithaka/508 was excised from Dagoretti/Waithaka/190, which was registered in the name of the late Mbatia Gicheru in 1958.

61. Neither the Plaintiff nor the Defendants have indicated or proved that the suit property was clan or ancestral land before its initial registration in 1958. There is however no doubt that the suit property was family land which was registered in the name of the late Mbatia Gicheru, and which was shared between his beneficiaries upon his demise.

62. The second element of customary trust is that the claimant must belong to the family, clan or group. The Plaintiff has asserted that he is a son of the late Mbatia Gicheru and a brother to the 1<sup>st</sup> Defendant. The 1<sup>st</sup> Defendant has however disputed this relationship and claimed that the Plaintiff is not a son of the deceased, Mbatia Gicheru. These claims of illegitimacy are alleged to have been made by the deceased 1<sup>st</sup> Defendant, who asserted that the Plaintiff was born after the death of Mbatia Gicheru and could not be his son.



63. It is trite that he who alleges must prove. Therefore, contrary to the argument by the 1<sup>st</sup> Defendant, the burden to prove that the Plaintiff was not the son of Mbatia Gicheru was on the 1<sup>st</sup> Defendant.
64. On his part, the Plaintiff has adduced a copy of his identification card which indicated that he was born in 1943. The 1<sup>st</sup> Defendant, while claiming that the Plaintiff was born after the death of Mbatia Gicheru, has not presented a copy of the deceased's death certificate to ascertain when he died. It is therefore difficult to definitively state when Mbatia Gicheru was demised.
65. All the same, from the Certificate of Title No. Dagoretti/Waithaka /190, the deceased was registered as the proprietor of the suit property in 1958. This raises the presumption that the deceased was alive as at that time and disproves the assertion that the Plaintiff was born after the deceased's death. It is only on 30<sup>th</sup> July 1970 that F.G. Mbatia, Wamwea Mbati, Gicheru Mbatia and Minnie Watiri were registered as joint proprietors of the land.
66. The 1<sup>st</sup> Defendant's claim that the Plaintiff is not the son of Mbatia Gicheru is therefore unsubstantiated. The assertions of the 1<sup>st</sup> Defendant, being wholly based on statements made by a person not before this court is hearsay evidence, which is inadmissible.
67. This court is therefore satisfied that the Plaintiff belongs to the family of the late Mbatia Gicheru. It is therefore apparent that the Plaintiff would have been entitled to be registered as a proprietor of the suit property.
68. This is all the more apparent upon consideration of Entry No. 11 in of Dagoretti/Waithaka/190 in the Plaintiff's Bundle, under which the suit property was severed, with 53 out of 60 shares in favour of F.G. Mbatia and 7 out of 60 shares in favour of Gicheru Mbatia.
69. The Plaintiff and the 1<sup>st</sup> Defendant have pleaded that indeed, the 5<sup>th</sup> Family consisted of seven persons, the matriarch, the late Wanjiku Mbatia, who bore Monica Wambui Gitura, Leah Njeri Gatiba, Alice Njambi Luka, Susan Nyokabi Thwagi, Gicheru Mbatia and Joseph Kibiru Mbatia.
70. This aligns with the 7 shares allotted to the 1<sup>st</sup> Defendant, and establishes, without a doubt, that the 1<sup>st</sup> Defendant was to hold the suit property in trust, not only for the Plaintiff, but all his siblings. The court is satisfied on the evidence presented by the Plaintiff that the suit property is subject to a customary trust.
71. The Plaintiff has claimed that the 1<sup>st</sup> Defendant fraudulently transferred the suit property to the 2<sup>nd</sup> Defendant without his knowledge and with intent to defraud him of his rightful share.
72. The 2<sup>nd</sup> Defendant has deponed that he rightfully and lawfully acquired an interest in 0.06 hectares of the suit property, which he acquired in 2013. He avers that he purchased the said portion after properly conducting due diligence, which did not raise the interests of the Plaintiff. In other words, he was a bona fide purchaser for value without notice of defect.
73. It is key to note that the import and tenor of the doctrine of bona fide purchaser for value and in particular the decision in *Katende vs Haridar & Company Ltd* [2008] 2 E.A 173, has since been reviewed by the Court of Appeal in *Mwangi James Njehia v Janetia Wanjiku Mwangi & Another* [2021] eKLR, as follows:

“...In *Lawrence P. Mukiri Mungai, Attorney of Francis Muroki Mwaura v. Attorney General & 4 Others*, Nairobi Civil Appeal No. 146 of 2014 this Court cited with approval the case of *Katende v. Haridar & Company Ltd* (2008) 2 EA 173, where the Court of Appeal in Uganda held that: “For the purposes of this appeal, it suffices to describe a bona fide purchaser as a



person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine as was held in the case of Hannington Njuki v William Nyanzi High Court civil suit number 434 of 1996, must prove that:

1. he holds a certificate of title;
2. he purchased the property in good faith;
3. he had no knowledge of the fraud;
4. he purchased for valuable consideration;
5. the vendors had apparent valid title;
6. he purchased without notice of any fraud; and
7. he was not party to the fraud.”

74. In this case, the 2<sup>nd</sup> Defendant indeed holds a title to a portion of the suit property, Despite the Plaintiff's assertions, he has not brought any evidence to establish that the 2<sup>nd</sup> Defendant acted in bad faith or had knowledge of the fraud. This court is satisfied that the 2<sup>nd</sup> Defendant purchased the portion of 0.06 hectares of the suit property for valuable consideration.
75. As rightly argued by the 2<sup>nd</sup> Defendant, the deceased 1<sup>st</sup> Defendant was the registered proprietor of the suit property and the interests of his relatives was not indicated on the register. It is then apparent that the 2<sup>nd</sup> Defendant had no notice of any fraud and was therefore not party to the fraud.
76. This court has found that a customary trust subsists with respect to the suit property. It has also found that the 2<sup>nd</sup> Defendant is a bona fide purchaser of 0.06ha of the suit property. The question that remains is with respect to the orders which this court should issue.
77. The Plaintiff has sought that the suit property be sub-divided and 0.08 ha of the suit property be registered in his favour. The 2<sup>nd</sup> Defendant has however indicated that despite buying a portion of the suit property, subdivision of the suit property was rendered impossible due to the Physical Planning Regulations with respect to the size of the plot.
78. Any order that this court would give will therefore be with respect to the portion of 0.08ha held by the 1<sup>st</sup> Defendant, noting that the size of the suit property would limit this court from dividing the property between the claimants.
79. Considering that the 1<sup>st</sup> Defendant sold a portion of the land to the 2<sup>nd</sup> Defendant despite holding the said land in trust, the 1<sup>st</sup> Defendant's Estate will not be allowed to benefit from the remaining portion of the land.
80. There is also the matter that the suit property is not only held in trust for the Plaintiff, but also for his sisters. This court is enjoined under Article 27(1) of *the Constitution* to accord equal protection and equal benefit of the law to the daughters of Mbatia Gicheru. A decision that would solely recognise the customary rights of the Plaintiff and the 1<sup>st</sup> Defendant to the suit property, to the exclusion of their four sisters would not only be discriminatory, but also repugnant to *the Constitution*.
81. Additionally, under Article 60(1)(f) of *the Constitution*, this court is specifically enjoined to apply the principle of elimination of gender discrimination in law, customs and practices related to land and property in land.



82. Finally, this court is bound to apply Article 21(2) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the Maputo Protocol), which Kenya has ratified. Article 21(2) of the Maputo Protocol stipulates that women and men shall have the right to inherit, in equitable shares, their parents' properties.
83. On the basis of the foregoing, the following orders are hereby issued:
- a. A declaration be and is hereby issued that the 1st Defendant's Estate is holding 0.08 ha of Title Number Dagoretti/Waithaka/508 in trust of all his siblings, being Monica Wambui Gitura, Leah Njeri Gatiba, Alice Njambi Luka, Susan Nyokabi Thwagi and Joseph Kibiru Mbatia (the Plaintiff) as tenants in common.
  - b. That in addition to the 2nd Defendant, Monica Wambui Gitura, Leah Njeri Gatiba, Alice Njambi Luka, Susan Nyokabi Thwagi and Joseph Kibiru Mbatia (the Plaintiff) shall be entered in the register as tenants in common, of the portion of 0.08 ha which is held by the 1st Defendant's estate.
  - c. That the 1st Defendant's name to be expunged from the register of the parcel of land known as Dagoretti/Waithaka/508, and vacate the said land within 90 days.
  - d. Each party to bear their own costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 2ND DAY OF MAY, 2024.**

**O. A. Angote**

**Judge**

**In the presence of;**

**Mr. Juma for 1<sup>st</sup> Defendant**

**Ms Abobo for Plaintiff**

**Court Assistant – Tracy**

