



**Gitau v Gitau & 2 others (Environment & Land Case 15 of 2021)  
[2023] KEELC 16029 (KLR) (2 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 16029 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MURANGA  
ENVIRONMENT & LAND CASE 15 OF 2021**

**LN GACHERU, J  
MARCH 2, 2023**

**BETWEEN**

**MARGARET NJERI GITAU ..... PLAINTIFF**

**AND**

**JULIUS MBURU GITAU ..... 1<sup>ST</sup> DEFENDANT**

**FRANCIS WAIRAGU GITAU ..... 2<sup>ND</sup> DEFENDANT**

**LAND REGISTRAR MURANG'A ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiff herein Margaret Njeri Gitau, filed this suit vide a Plaint dated June 18, 2021, against the Defendants, herein Jointly and Severally and sought for the following orders;
  1. A declaration that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants respectively have been holding a portion measuring 2.5 acres out of land parcel numbers LOC.4/Kiranga/793 and land parcel number LOC.4/Kiranga/869 and LOC.4/Kiranga/870 respectively in trust of the Plaintiff as her elder brothers
  2. An order for dissolution of the existing trust, subdivision and transfer of a portion measuring 2 acres from land parcel numbers LOC.4/Kiranga/793 and another portion measuring half (1/2) an acre from LOC.4/Kiranga/870 respectively to the Plaintiff
  3. Costs of the suit and interest
  4. Any other order this Court may deem fit to grant
2. It is the Plaintiff's claim that their mother Joyce Njoki Gitau alias Josephine Njoki Gitau, was the registered owner of all that parcel of land known as LOC.4/Kiranga/227. That in 1978, her brothers, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, coerced their mother who was elderly to sub-divide the land into two



portions giving rise to land parcels LOC.4/Kiranga/793 and LOC.4/Kiranga/794 at the exclusion of the Plaintiff. Subsequently the 2<sup>nd</sup> Defendant sold his portion LOC.4/Kiranga/794, to other persons and once the Plaintiff was on the know, she informed her mother. That her mother directed her siblings to give him 2.5 acres and out of the instructions, the Defendants have always held the land in trust for her.

3. The 1<sup>st</sup> Defendant Entered Appearance through the Law Firm of Kithunka Kithunka & Co Advocates, denying the contents of the Plaint in totality. He averred that their deceased mother had during her lifetime sub-divided the land and the Plaintiff had enough time to enforce the trust before the death of their mother. He invited the Plaintiff to strict proof of the contents of the Plaint. It was his averments that the suit is res judicata to Thika Civil Case No 257 of 1992 and Kandra land case no 1 of 2011. The 2<sup>nd</sup> Defendant entered appearance through the Law Firm of Kamau Mwangi & Co Advocates admitting the contents of the Plaint and added that he holds only ½ acre.
4. The 3<sup>rd</sup> Defendant Entered Appearance and denied the substances of the Plaint and invited the Plaintiff to strict proof of the contents thereof.
5. The matter was set down for hearing.
6. PW1 relied on her witness statement dated June 18, 2021, as her evidence in chief. She added that she was to get equal share of the land like her brothers, but she has not received the share to date.
7. On cross-exam, she told the Court that she had sued the 1<sup>st</sup> Defendant at Thika claiming land from him. Through Mr Gachango she informed this Court that the entire parcel of land measures 7.5 acres. She added on cross-exam that the 1<sup>st</sup> Defendant ought to give her 2.0 acres while the 2<sup>nd</sup> Defendant ought to give her 0.5 acres. She confirmed during re-examination that the land was sub-divided in 1978 when her mother was still alive.
8. DW1 Julius Mburu Gitau adopted his witness statement dated November 22, 2021, as evidence in chief. He added that he gave the 2<sup>nd</sup> Defendant 3 acres after he sued him and he was left with 4 acres. It was his testimony that he got the largest share since his brother had been allocated 0.7 acres in Makindi being Loc.4/Kiranga/351.
9. On cross-exam by counsel for the Plaintiff, he informed the Court that he would not give land to the Plaintiff. He suggested that he was given a bigger portion since he took care of their deceased mother during her lifetime.
10. On re-exam, he testified that the Plaintiff never claimed any land during their mother's lifetime.
11. DW2 Francis Wairagu Gitau adopted his witness statement dated September 9, 2021, as evidence in chief and produced the documents filed alongside with the Defence as evidence. He testified that the land should be shared equally.
12. On cross-exam, he maintained that their deceased mother had expressed interest that the land be shared among the three of them and that he was willing to transfer 0.5 acres to the Plaintiff. He told the Court that he has sub-divided his portion and he is in the process of leasing a part of it to Shell Petrol Station.
13. DW3 Pancras Wairachu Kimani adopted his witness statement dated August 27, 2021 as evidence in chief. He testified that the land be divided into three as per her aunt's wishes expressed to his father.
14. On cross-exam, he informed the Court that the parties were disputing over the land even during their mother's lifetime. He testified that he was present when the deceased expressed her interest to have the land sub-divided among the siblings.



15. DW4 Alice Gisemba the Land Registrar Murang'a adopted her witness statement dated September 29, 2022, as evidence in chief. She gave testimony on the history of the land and how the land and was registered to the current ownership. She added that the land was an ancestral land and she was not aware whether the Plaintiff was entitled to any share. It was her testimony of cross-exam that the transfer could not indicate whether the land was held in customary trust or not.
16. After the viva voce evidence, parties filed their respective submissions as directed by the Court. The Plaintiff filed her submissions on the November 23, 2022, maintaining that she was entitled to equal share of the land. It was her submissions that her claim is allowable under Section 28 of the [Land Registration Act](#). That she did not have to be in physical possession of the land for the claim of trust to suffice. Reliance was placed on the case of [Isack M'inanga Kieba vs Isaaya Theuri M'Lintari & Another {2018}](#). She invited this Court to look at the principles for grant of customary trust that were laid out in the foregoing case.
17. The 1<sup>st</sup> Defendant through his submission filed on November 18, 2022, submitted that the Plaintiff's testimony was contradictory. He brought out the issue of gift inter vivos and relied in the Odunga's Digest in [Civil Case Law and Procedure Vol \(III\)](#) where the learned judge noted that a gift of registered land becomes effective after execution and cannot be recalled thereafter. He submitted that the Plaintiff had not led any evidence to show that their mother had intended to transfer land to her.
18. The 3<sup>rd</sup> Defendants filed their submissions on the November 1, 2022, and raised two issues for determination by the Court.
19. On whether the Plaintiff was entitled to a share in the suit property, the 3<sup>rd</sup> Respondent submitted that the Plaintiff was entitled to share in the land. On the issue of trust, the 3<sup>rd</sup> Defendant submitted that customary trust, is one of the overriding interest that may defeat a proprietor's title to land protected under Section 25 of the [Land Registration Act](#). They reiterated the principles of trust espoused in Isaac Kieba M'inanga vs Isaya Theuri M'Lintari, supra. In submitting that the Plaintiff had met out a case for customary trust, reliance was placed in the case of [Susan Mumbi Waititu vs Mukuru Ndata & 4 Others](#), where the Court held that for a claim of trust to succeed, the Plaintiff ought to demonstrate that the land was ancestral and family land.
20. Having considered the available evidence and the written submissions, it is evident from record that the Plaintiff and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are siblings and children of Josephine Njoki Gitau. The suit land was originally referenced as Loc. 4/ Kiranga/227, and was first registered in the name of Muuti Muchiri on March 13, 1967. The land was subsequently registered in the name of Njoki w/o Gitau on January 15, 1977 by dint of a Succession Cause before it was closed for sub-division on July 28, 1978.
21. Consequently, to the sub-division the land, two portions emanated being Loc. 4/ Kiranga/793 and Loc. 4/ Kiranga/794. Loc. 4/ Kiranga/794 measuring 1.21Ha was registered in the name Njoki Gitau on July 28, 1978 and on June 18, 1982, there was a correction of names to Josephine Njoki Gitau. The parcel was then registered in the name of the 2<sup>nd</sup> Defendant on June 21, 1982 as a gift and a title deed was issued the same day. On July 7, 1988, the mother title was closed for sub-division giving rise to parcels 869 and 870.
22. Loc. 4/ Kiranga/793 measuring 1.80Ha was registered in the name of Njoki Gitau on July 28, 1978 before the name was cancelled. As per entry 2 on the green card, Mburu Gitau became the registered owner and title deed was issued seemingly in 1978. On July 10, 2006 the 1<sup>st</sup> Defendant was registered as the proprietor and title was issued on the same day. The Plaintiff now wants a total of 2.5 acres to be excised from Loc. 4/ Kiranga/793, Loc. 4/ Kiranga/869 & Loc. 4/ Kiranga/870 on the premise that the Defendants were holding the land in trust for her.



23. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants seem to be in agreement that the Plaintiff is entitled to 2.5 acres from the suit land. Conversely, 1<sup>st</sup> Defendant objects to the Plaintiff's proposition and maintains that the land was given to him by his mother as a gift and the Plaintiff has no share on it. He contended that the suit is res judicata to Thika CMCC No 257 of 1992 and Kandara Land Case No 1 of 2011.
24. Before delving into the issues for determination by this Court, it is relevant to first analyse the cases put forward by the 1<sup>st</sup> Defendant.
  - a. Thika Civil Case No 257 of 1992: in this suit the Plaintiff herein sued the 1<sup>st</sup> Defendant claiming 2 acres from Loc. 4/ Kiranga/793, on the basis that the land was an ancestral land. The Court in its judgment dismissed the suit and held that the Plaintiff had not proven her case on a balance of probability.
  - b. Kandara Land Case No 1 of 2011: from the otherwise patchy evidence, it appears the Plaintiff moved the Court to adopt a Tribunal's award which was found in her favour against the 1<sup>st</sup> Defendant herein. The elders had directed the 1<sup>st</sup> Defendant to transfer 2.0 acres to Plaintiff. The Court in declining to adopt the award held that the Tribunal did not have jurisdiction to make such an award.
  - c. Murang'a ELC No 293 of 2017: the 2<sup>nd</sup> Defendant filed the suit against the 1<sup>st</sup> Defendant claiming 0.3 acres from Loc. 4/ Kiranga/793, which he averred was his rightful entitlement. This Court dismissed the suit on the premise that the 2<sup>nd</sup> Defendant had not proved his case.
25. It is thus right to conclude that the suit land has been subject of various litigations and a reading of the foregoing pronouncement informs this Court that the Plaintiff and the 1<sup>st</sup> & 2<sup>nd</sup> Defendants have been fighting over the suit property for some time now. Undoubtedly, the land originally belonged to their deceased mother who as it appears from the 3<sup>rd</sup> Defendants documents transferred the land to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants during her lifetime.

### **Whether the suit is res judicata**

26. The issue of Res judicata came up in the 1<sup>st</sup> Defendant's Defence and even though none of the parties addressed it, in their submissions it worth for this Court to determine. The elements of Res Judicata are laid out in section 7 of the [Civil Procedure Act](#), which provides;
 

'No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.'
27. In the case of [The Independent Electoral and Boundaries Commission v Maina Kiai & 5 others, Nairobi CA Civil Appeal No. 105 of 2017 \(\[2017\] eKLR\)](#) the Court of Appeal held that:
 

'Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms;

  - a) The suit or issue was directly and substantially in issue in the former suit.
  - b) That former suit was between the same parties or parties under whom they or any of them claim.



- c) Those parties were litigating under the same title.
- d) The issue was heard and finally determined in the former suit.
- e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.'

28. The Court went on to set out the rationale for res judicata as:

'The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and commonsensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to them. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute or calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice.'

29. Further in the case of *John Florence Maritime Services Limited & another V Cabinet Secretary for Transport and Infrastructure & 3 Others [2015] e KLR* the Court of Appeal set out the ingredients of res judicata as follows:

'From the above, the ingredients of res judicata are firstly, that the issue in dispute in the former suit between the parties must be directly or substantially be in dispute between the parties in the suit where the doctrine is pleaded as a bar. Secondly, that the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title and lastly that the court or tribunal before which the former suit was litigated was competent and determined the suit finally (see *Karia & Another v the Attorney General and Others [2005] 1 EA 83*.'

- 30. In a nutshell, res judicata is intended to bring litigation to a halt; it is intended to bar a person who has had his day in a court of competent jurisdiction where his case was concluded from re-litigating his case afresh. In essence, it saves judicial precious time and protects the sanctity of the court. In sum, it prevents the abuse of the court process.
- 31. Having stated the above, this court will now investigate whether the 1<sup>st</sup> Defendant in the instant suit has met the threshold for the application of the doctrine of res judicata. As found herein above, parties to this suit have litigated against each other in various suits but what is relevant is whether the issue of trust between the parties herein has been litigated on.
- 32. A cursory look at the 1<sup>st</sup> Defendant's List of Documents informs this Court that, in the aforementioned suits, the main issue that arose was the contention that there was an agreement that the land would be shared equally among the siblings.
- 33. In Thika Civil Case No 257 of 1992, the parties were the Plaintiff and the 1<sup>st</sup> Defendant. Therein the Plaintiff alleged elders had litigated on the matter and she was entitled to get 2.0 acres from the Defendant therein. The trial Court faulted the alleged agreement by elders on the basis of custom and opined that the elders could not compel the 1<sup>st</sup> Defendant to share land to the Plaintiff. The Court dismissed the Plaintiff's claim and there is no evidence that an appeal was ever preferred or the judgment set aside. The parcel in question was Loc.4/ Kiranga/793, and the suit was heard and determined by a competent jurisdiction.



34. In Kandara Land Case No 1 of 2011, it appears the Plaintiff herein in an attempt to counter the judgment in Thika Case, sought to enforce the award issued by the Tribunal. The same was not allowed on the basis of jurisdiction. In Murang'a ELC No. 293 of 2017, the Plaintiff was not a party and the same was decided by a Court of competent jurisdiction, and the issue of trust never came up therein. As result therefore, the issue of trust has never been raised and/or litigated on by parties or determined by any Court of competent jurisdiction.
35. The upshot of the foregoing is that the instant suit is not res judicata and does not offend the provisions of Section 7 of the Civil Procedure Act.
36. Having determined that the suit is not res judicata the issues for determination are
- i. Whether land parcel no. Loc.4/Kiranga/227 was a customary and/ or family land?
  - ii. Whether the 1<sup>st</sup> and 2<sup>nd</sup> Defendants coerced their mother into transferring land to them?
  - iii. Whether the 1<sup>st</sup> and 2<sup>nd</sup> Defendants held their respective lands in trust for the Plaintiff?
  - iv. Whether the Plaintiff is entitled to the prayers sought?

**i. Whether land parcel no. Loc.4/Kiranga/227 was a customary and/ or family land?**

37. Customary trust is one of the overriding interests contemplated under the Land Registration Act. Section 28 provides:

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

- a. .
  - b. Trusts including customary trusts;
  - c. .
38. Registration of the suit land was done under the old land regimes. The Registered Land Act(Repealed) under Section 30 made provisions for overriding interest even though it did not expressly state customary trust as one of the overriding interest, Courts have interpreted that Section 30(g) of the Act referenced to customary trust. The Section provides
- (g). He rights of a person in possession or actual occupation of land to which he is entitled in right only of such possession or occupation, save where inquiry is made of such person and the rights are not disclosed;

39. The Court in Kanyi Muthiora Vs Maritba Nyokabi Muthiora [1984] eKLR; held:

'The registration of the land in the name of the appellant under the Registered Land Act (Cap 300) did not extinguish the respondents rights under Kikuyu Customary law and neither did it relieve the appellant of her duties or obligations under section 28 as trustee. The Trustee referred to in section 28 of the Act could not be fairly interpreted and applied to exclude a trustee under customary law, if the Act had intended to exclude customary law rights it would have been clearly so stated.'

40. This was confirmed by the Supreme Court in Isack M'inanga Kiebia Vs Isaaya Theuri M'lintari & another [2018] eKLR, when it included customary rights as part of rights under Section 30(g) above.



41. Whether this land was ancestral or family land can be established from evidence. The Court in *Mbui Mukangu v Gerald Mutwiri Mbui [2004] eKLR*

'It is significant, we think, that unlike the Muriuki Marigi case (supra) where the father had his own land and could therefore do whatever he wished with it, the land registered in the name of Mbui was ancestral land that devolved to him on the death of his father. It was unregistered land held under custom but the tenure changed during the land consolidation process and subsequent registration under the Registered Land Act. It is a concept of intergenerational equity where the land is held by one generation for the benefit of succeeding generations.'

42. The Supreme Court in *Isack M'inanga Kiebia Vs Isaaya Theuri M'lintari & another*, supra when listing down some of the elements to take into consideration when determining the issue of trust held
43. 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:
- i. 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 claimant 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 some intervening circumstances.
  - v. The claim is directed against the registered proprietor who is a member of the family, clan or group.
44. In this case, it is not clear whether the said Josephine Njoki Gitau, was married or not. However, as per the Green Card 'Dex4(3)' attached to the 3<sup>rd</sup> Defendant's List of Documents, on January 15, 1977, the land was registered in the name of Njoki w/o Gitau who became the registered owner through a succession process. None of the parties to this suit have shed light on this to the Court. It is therefore safe for this Court to find that the land belonged to the husband of Njoki Gitau as documented in the Green card.
45. It was common ground that the land belonged to their deceased mother. As a matter of evidence, the Land Registrar DW4 in her testimony told this Court that the land was an ancestral land. The Plaintiff and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are all siblings. It matters not whether the Plaintiff was born of a different father or not. It is also prudent to consider that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants live on the suit property and it was evident that their deceased mother used to live on the suit property before moving to the house of the 1<sup>st</sup> Defendant perhaps due to old age. With the testimonies of the parties and the records held by the 3<sup>rd</sup> Respondent it is correct for this Court to find that the original land Loc. 4/Kiranga/227 was a family land.



## ii. Whether the 1<sup>st</sup> and 2<sup>nd</sup> Defendants coerced their mother into transferring land to them?

46. The Plaintiff's claim is that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants coerced their mother to transfer the land in their names. Order 2 Rule 10(1) requires that:

'Subject to sub rule (2), every pleading shall contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing-

- (a) Particulars of any misrepresentation, fraud, breach of trust, wilful default or undue influence on which the party pleading relies; and
- (b) Where a party pleading alleges any condition of the mind of any person, whether any disorder or disability of mind or any malice, fraudulent intention or other condition of mind except knowledge, particulars of the facts on which the party relies.'

47. Coercion cannot be simply inferred, but it must be strictly pleaded and proved. This was the position in *Patel & another v MJC & another (Suing as the guardians of PJP) (Civil Appeal 182 of 2019) [2022] KECA 364 (KLR) (4 February 2022) (Judgment)*

48. The Plaintiff ought to have placed material evidence before this Court to demonstrate that indeed the Defendants took advantage of their mother's old age to convince her to exclude her in the share. It is not clear why the Plaintiff did not during the lifetime of their mother raise this claim. The 2<sup>nd</sup> Defendant now seems to be acting in favour of the Plaintiff, but throughout the proceedings there is nowhere he suggested that they coerced their mother to transfer the land to them. According to DW4, the process of transfer and registration was not illegal.

49. The legal burden of proof is static and is rested with the Plaintiff and since she did not bring any evidential proof, the burden of proof remained with her throughout the proceedings. To this end, it is the findings of this Court that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants did not coerce their mother to transfer land to them.

## iii. Whether the 1<sup>st</sup> and 2<sup>nd</sup> Defendants held their respective lands in trust for the Plaintiff?

50. Interestingly, the 2<sup>nd</sup> Defendant conceded and maintained that he is willing to give the Plaintiff 0.5 acres of his share. The 3<sup>rd</sup> Defendant in their submissions urged this Court to find in favor of the Plaintiff. The 1<sup>st</sup> Defendant on the other hand maintained that the land was given to him by his mother as a gift and by dint of the registration, he became an absolute owner. As per the list of Documents filed by the 3<sup>rd</sup> Defendant, it is evident that the deceased signed all the relevant documents to effect transfer to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. It is not clear why the deceased never transferred the land to the Plaintiff during her lifetime. It is equally not clear why the deceased was never called at least as a witnesses in the cases referenced to by the 1<sup>st</sup> Defendant. Even though, this Court takes judicial notice of the age of the deceased at the time of the cases.

51. It is trite law that customary trust must be proved by evidence. What is mutual throughout the proceedings is that the land was first registered in the name of their deceased mother before the land was sub-divided and title issued to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.



52. The effect of registration of land in their name is elaborated in Sections 27 of the Registered Land Act, Cap 300(now repealed), which is a replica of Section 24 of the [Land Registration Act](#) 2012 which provides as follows:-

24. Subject to this Act

(a) 'The registration of a person as proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.'

53. Section 25(1) which mirrors section 28 of CAP 300, (repealed) provides that such a registered owner's rights are indefeasible and are held free from all other interests and claims and that the rights can only be defeated in the manner provided under the Act. The manner contemplated includes overriding interests declared by section 28 of the [Land Registration Act](#). Section 28 of the [Land Registration Act](#) which is similar to Section 30 of Cap 300(repealed) provides that:

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

(a) .

(b) 'Trusts including customary trusts;'

54. Even though the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are the registered proprietors of the suit land, customary trust may take away their proprietary right if it is adequately proved to this Court.

55. As admitted by the Land Registrar, customary trust need not be specifically noted down in the register. In the case of [Njenga Chogera vs Maria Wanjira Kimanui & 2 Others {2005} eKLR](#), which quoted with approval the holding in the case of [Mutbuita -vs- Mutbuita \[1982 - 88\] 1 KLR 42](#), the Court of Appeal held that customary trust is proved by leading evidence. Trust is a question of fact, which must be proved by whoever is claiming a right under customary trust. A trust can never be implied by the Court, unless there was intention to create a trust in the first place. In [Peter Ndungu Njenga vs Sophia Watiri Ndungu{2000} eKLR](#) the Court held:

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

56. Further, In [Juletabi African Adventure Limited & Another vs Christopher Michael Lockley{2017} eKLR](#) the Court also held that

'It is settled that the onus lies on a party relying on the existence of a trust to prove it through evidence. That is because:-'The law never implies, the Court never presumes, a trust, but in case of absolute necessity. The Courts will not imply a trust save in order to give effect to the intentions of the parties. The intention of the parties to create a trust must be clearly determined before a trust will be implied.'

57. What this Court should have in mind when seeking to answer whether the land was held in trust is:How was the land first registered? Was it clan, communal or family land before registration? Was the



land inherited or passed down from the family lineage? How did the 1<sup>st</sup> and 2<sup>nd</sup> Defendants acquire this land? Did they inherit or he acquired by way of purchase or a gift?

58. This Court has already established hereinabove that the original land was a family land and even though it appears unclear, the land belonged to the deceased husband before it passed to Njoki Gitau. It is uncontroverted that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants acquired the land from their mother and as indicated in the Letter of consent held by the 3<sup>rd</sup> Defendant, they acquired the land through gift.
59. 1<sup>st</sup> Defendant submitted that the land forms part of a gift inter vivos and the effect of such registration extinguished any claim over the land. The Court in *Mary Muthoni Wachira v Francis Mwangi Muthara [2016] eKLR* had this to say on gift inter vivos
- 'The property was registered under the Registered Land Act, Cap 300, Laws of Kenya. Gifting of property under customary was not subjected to writing as African traditional societies were pre-literate; therefore such gifts were made orally. The bringing of property under a registration regime meant that any gifting of property was thereafter to be in writing. So that, if the deceased intended to benefit the respondent during her lifetime, she ought to have reduced the gift into writing or caused the transfer of title during her lifetime.'
60. Taking cue from the foregoing, it is not in doubt that the deceased had caused the land to be transferred to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants during her lifetime. This means that the gift became absolute with the registration. This gave the 1<sup>st</sup> Defendant the absolute right over the land and thus his title to land became indefeasible with the registration.
61. However, the Plaintiff avers that once she learnt of the foregoing, she complained. On November 6, 1997, the Plaintiff registered a caution over the property of the 1<sup>st</sup> Defendant claiming beneficial interest over the suit property. It was the testimony of the Plaintiff, DW2 and DW3 that the Plaintiff was to get an equal share from the mother land. DW3 testified that he was present during the meeting that they agreed to share the land equally and this Court has no reason to doubt his testimony. There were no minutes of the meeting availed to this Court to show that indeed there was an agreement arrived at.
62. DW2 called a witness who confirmed that they agreed to share land to the Plaintiff. As per the ruling of the Court in *Kandara Land Case No 1 of 2011*, the Court faulted the jurisdiction of the Tribunal and failed to adopt the award. The Court noted in its ruling that the elders had directed the 1<sup>st</sup> Defendant herein to transfer 2.0 acres to the Plaintiff. This guides this Court in concluding that the Plaintiff made attempts to stop the gifts from taking effect even though late in time, she was simply attempting to assert her right to benefit from the land.
63. Additionally, applying the pronouncement above, customary trust is one of the overriding interests that can take away indefeasibility of title. It is clear from the testimonies that the suit land was a family home which means even the Plaintiff could be registered as a beneficiary of the same. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants are agreeable to having the Plaintiff given a share from the suit land.
64. The 1<sup>st</sup> Defendant admitted in cross-exam by counsel for the 3<sup>rd</sup> Defendant that their mother had attempted to reconcile them, but she was unable to do so. He also admitted that children are supposed to inherit from their parents, but also maintained that he was not willing to give land to his sister. It is not clear why the 1<sup>st</sup> Defendant is so opposed to giving land to the Plaintiff. Article 27 of the *Constitution* bars this Court from discriminating against the Plaintiff.
65. Without belabouring on the issue of trust, it is indisputable that the Plaintiff has met the elements of customary trust established in the *Isack M'inanga Kiebia v Isaaya Theuri M'lintari & another*, supra.



To this end this Court finds and holds that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants hold their respective share of the property in trust for the Plaintiff.

#### **iv. Whether the Plaintiff is entitled to the prayers sought?**

66. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants already have titles to their lands and interestingly the 2<sup>nd</sup> Defendant has already caused sub-division on his land. Having found that the Plaintiff is entitled to the land this Court should make pronouncement to give effect to its finding. It is not clear how the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are occupying the land but what is clear is that the Defendants have occupied this land and tentatively done their developments thereon.
67. Dissolution of trust will result in cancellation of titles, which will have far reaching effect especially on the part of the 1<sup>st</sup> Defendant who is strongly opposed to sharing out his share of the land. But since this Court has already established existence of Customary trust hereinabove, sub-division will result. However, this Court notes the period of time the 1<sup>st</sup> Defendant has been in occupation of his share of his position of land and in the spirit of doing equity it would be unfair to demand a total of 2.0 acres from him. For the interest of doing justice the 1<sup>st</sup> Defendant to share 1.0 acres of his land being Loc. 4/Kiranga/870.

#### **v. Who should pay costs?**

68. Section 27 of the *Civil Procedure Act* requires that costs to follow event, but the Court have the discretion to rule otherwise. This Court notes the circumstances that led to the finding of this Court and shall exercise its discretion and direct that each party to bear their own costs. To this end, this Court finds and holds as follows:
- a. A declaration be and is hereby issued that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants respectively have been holding a portion measuring 1.5 acres out of land parcel numbers LOC.4/Kiranga/793 and land parcel number LOC.4/Kiranga/869 and LOC.4/Kiranga/870 respectively in trust of the Plaintiff as her elder brothers
  - b. An order be and is hereby issued dissolving the existing trust, directing subdivision and transfer of a portion measuring 1 acre from land parcel numbers LOC.4/Kiranga/793, belonging to 1<sup>st</sup> Defendant and another portion measuring half ( $\frac{1}{2}$ ) an acre from LOC.4/Kiranga/869 and LOC.4/Kiranga/870 belonging to 2<sup>nd</sup> Defendant respectively to the Plaintiff and the resultant subdivision of 1.5 acre be registered in the name of the Plaintiff.
  - c. Each party to bear their own costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 2<sup>ND</sup> DAY OF MARCH, 2023.**

**L. GACHERU**

**JUDGE**

Delivered virtually in the presence of;

Joel Njonjo - Court Assistant

Plaintiff – Absent

M/s Kinthuka for the 1<sup>st</sup> Defendant



2<sup>nd</sup> Defendant – Absent

M/s Njuguna for the 3<sup>rd</sup> Defendant

**L. GACHERU**

**JUDGE**

**2/3/2023**

