



Mwangi (Suing on her own Behalf and on Behalf of Joseph Mwangi Wainaina, - Deceased) v Kamau & 2 others (Environment & Land Case E010 of 2021) [2023] KEELC 17250 (KLR) (4 May 2023) (Judgment)

Neutral citation: [2023] KEELC 17250 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE E010 OF 2021**

JG KEMEL, J

MAY 4, 2023

BETWEEN

MARY WANJIRU MWANGI (SUING ON HER OWN BEHALF AND ON BEHALF OF JOSEPH MWANGI WAINAINA, - DECEASED) PLAINTIFF

AND

SAMUEL WAINAINA KAMAU 1ST DEFENDANT

TERESIAH WAIRIMU KAMAU (LEGAL REPRESENTATIVE OF THE ESTATE OF FRANCIS KAMAU WAINAINA, DECEASED) 2ND DEFENDANT

THE LAND REGISTRAR, GATUNDU 3RD DEFENDANT

JUDGMENT

1. *Vide* an amended Originating Summons the Applicant/Plaintiff filed suit against the Defendants seeking the following orders;
 - a. A declaration that a customary trust existed in respect to land parcel Number Kiganjo/Gahcika/805 that by operation of law the applicant is entitled to 1.35 Ha (3.26 acres) out of the suit land.
 - b. An order for determination of the trust and that the suit land be transferred to the applicant to hold in trust for herself and the children of Joseph Mwangi Wainaina.
 - c. That the Court be pleased to grant any other relief that is deemed to be in the interest of justice
 - d. Costs be provided.



2. The application is premised on the grounds annexed to the application and to the Supporting Affidavit of the Plaintiff sworn on the 4/3/2021 and the Further Affidavit in support of the amended originating summons sworn on the 26/5/2021.
3. The Plaintiff deponed that she is the wife of Joseph Mwangi Wainaina (Joseph) deceased. She is also the legal administrator of the estate of the said Wainaina. That she and Wainaina got 4 children.
4. She stated that the 1st and 2nd Defendants are the son and daughter in law of Francis Kamau Wainaina (Francis) respectively.
5. Francis Kamau Wainaina was the elder brother of Joseph Mwangi Wainaina. The suit land was registered in the name of Francis to hold in trust for himself and his brother Joseph
6. That the original owner of the land was their father Wainaina who had authorized the same to be registered in the name of Joseph to hold in trust.
7. That the dispute was brought before the Land Dispute Tribunal (LDT) in 2003 which decided that the land should be shared equally between the two brothers. On appeal the decision was upheld by the Provisional Land Dispute Tribunal. That the decision was later quashed without any notification to the Plaintiff and that the Defendants are now in the process of transferring the suit land that is now subdivided into 8 portions through transmission in Succ. Cause No 1785 of 2015. The Plaintiff has instead been given only 2 acres as opposed to 3.26 acres which is her rightful share. That the Defendants have confirmed that the land is trust land.
8. Maintaining that she and her family have been in occupation of the 3.26 acres, she stated that the land was subdivided in 1972 into 2 equal portions wherein a Ngoima was slaughtered in line with Agikuyu ceremony to signify a covenant between the parties in the presence of witnesses who included Wanjiru Mungai, Johana Igamba, Luka Kairu and the surveyor namely; Peter Kibubi Muita.
9. That she stands to be deprived of 1.26 acres of land that is lawfully hers and has been in occupation and made significant developments.
10. In denying the Plaintiff's suit, the 1st Defendant filed a Replying Affidavit on the 28/9/2021 in which he deponed that he is a co-administrator with his mother of the estate of the late Francis Kamau Wainaina having been appointed on the 9/11/2015. That she has the authority of the 2nd Defendant to depone to this Affidavit.
11. Giving the history of the suit land he confirmed that the ruling of the Provisional Land Dispute Tribunal was quashed by the High Court on account of jurisdiction. That the Plaintiff has not challenged the decision of the High Court for over 13 years.
12. Further he averred that the suit as filed is *resjudicata* on account of the previous proceedings at the Land Dispute Tribunal.
13. That there is no evidence to support any form of trust on the suit land in favour of the Plaintiff or her deceased husband. That they have allocated the Plaintiff two acres in the succession cause which allocation is the biggest share amongst the beneficiaries. Moreover, that the Plaintiff was married only for 3 years having been married in 1972 and her husband died in 1976 and her two children were born long after the demise of her husband.
14. That the suit land was registered in the name of Joseph absolutely who out of his generosity gave the Plaintiff 2 acres. That she lives on the 2 acres and does tea farming. That the Plaintiff relies on unauthenticated survey report to support her claim.



15. Denying the Plaintiffs claims the 3rd Defendant vide its Replying Affidavit sworn by Faith Mutei Land Registrar, Gatundu. She stated that the register was opened in 1958 in the name of Kamau Wainaina and a certificate was issued on the 30/10/1964. In 2002 a caution was registered in favour of the Plaintiff claiming beneficial interest.
16. In a further Replying Affidavit sworn on the 2/2/2022 the 1st Defendant added that his father planted tea on the land in 1968 as shown by the KTDA verification certificates dated the 28/6/95. He refuted the Plaintiffs claims that her husband planted tea in 1972. That a Government officer one Wathua wa Kibathi wa Gitangu supervised the tea planting in Gatundu.
17. Further that the lands was registered in the name of his father and there was never any subdivision on the ground and the alleged customary practices are but a fertile imagination of the Plaintiff.

The evidence

18. The Plaintiffs evidence was led by herself As PW1. She relied on her witness statement dated the 29/11/2021 as her evidence in chief. In support of her case she produced a list of documents on pages 9-27 of her trial bundle marked as PEX No 1-5.
19. She introduced herself as the wife and legal administrator of the estate of Joseph Mwangi Wainaina, now deceased. That she resides on the suit land. The title of the suit land is registered in the name of Kamau Wainaina to hold in trust for himself and his brother Joseph.
20. That in 1972 her husband Joseph and Francis being brothers decided to subdivide and demarcate the suit land. That the land was demarcated in the presence of witnesses, elders and one Peter Kabubi, a government surveyor who was under the instructions of Francis and Joseph to subdivide the land into two equal parts. That after the subdivision “Mikungugu” trees were planted at the boundary of the two parcels which trees subsist todate. Thereafter the agricultural officer one Peter Kagoi Njoroge showed them where to plant tea on their portion and obtained his own tea growing number. That she has occupied 3.26 acres of land since then todate. That Francis planted his tea in 1959
21. In further testimony she stated that she entered the suit land on the 30/8/67 at the age of 20 years and upon marrying the late Joseph. She got two children with her husband before he died in 1976 and later got two others children of her own.
22. That in 2002 she lodged a caution because she was unhappy on how her mother in law was subdividing the land and thereafter filed suit in the Land Dispute Tribunal in Gatundu which tribunal agreed with her that the Land should have been subdivided into two equal parts between the two brothers. She informed the Court that it is herself and the 1st Defendant who are in occupation of the land.
23. PW2 – Peter Kagoi Njoroge testified and relied on his witness statement dated the 29/11/2021 as evidence in chief. That he was an agricultural officer in charge of the area then. That in 1973 on the individual instructions of Joseph and Francis he supervised the tea growing on the land. That before the exercise started a boundary had to be erected on the parcel of land to mark each of the brothers share. That he was present in 1973 when Mr Kibubi, the government surveyor, now deceased was invited for a subdivision ceremony of the suit land in the presence of elders where the land was subdivided into two parts. That he gave each brother a growing number for their teas.
24. He stated that he retired as an agricultural officer in 1969 having worked for 32 years. That he was not involved in the demarcation ceremonies but to show that brothers how to plant the tea. That he knew the mother of the brothers and that there was tea already planted on the land before the 1973.



25. DW1 – Samuel Wainaina Kamau testified and relied on his witness statement dated the 24/9/2021 as his evidence in chief. In support of his defence he produced documents on page 17-24 of the Defendant’s bundle marked as PEX No 1-9.
26. He stated that he is the co- administrator of the estate of the late Francis Kamau Wainaina together with the 2nd Defendant who is his mother. That the estate has not been fully distributed because of the current dispute and the caution lodged on the suit land by the Plaintiff. That the Plaintiff was given two acres out of the generosity of their father and her pursuit of additional land is born out of sheer greed.
27. He stated that the Plaintiff is not entitled to the 3.26 acres he is claiming and should be contend with the 2 acres already given to her. He stated that the applicant occupies half of the land even before he was born. That his father inherited the land from his grandfather. That his father was entitled to 5 acres.
28. The witness confirmed that the land has not been formerly subdivided because of the caution lodged by the Plaintiff. Further he stated that though the land was held by his father in trust for the family, the Plaintiff was not included. He confirmed that the Plaintiff has erected a house on the land. That his father was the eldest of the two brothers.
29. DW2 – Anthony Njuguna Kamau testified and stated that he is the third born of Francis Kamau Wainaina and relied on his witness statement dated the 24/9/2021 as his evidence in chief. He stated that though Lucia Wanjiru Mburu lives at her matrimonial home, she was given ½ acre of the land in line with his fathers (Francis) wishes. That the Plaintiff occupies land that is more than 2 acres. That he heard the tea was planted in 1968. He was born in 1969 and ever since the family of the Plaintiff has been in occupation of the land. That his uncle (Joseph) died in 1976. That his father was present when his uncle constructed his house on the land and he is not aware of any opposition from him. That the distribution of the land in the estate of Francis was intestate as he died without a will. That the proposed distribution of the estate is in line with what was agreed in the family.
30. DW3 – Faith Muteti, The Land Registrar testified on behalf of the 3rd Defendant and produced the green card for the suit land which showed that it was registered in the name of Francis since 1958. That the Plaintiff registered a caution on the land in 2002 claiming beneficiaries’ interest. The property was charged to the bank between 1974-1975 but discharged. The suit land is still registered in the name of Francis and there is no subdivision. That land demarcation took place in Gatundu in 1958.

The written submissions

31. At the close of the hearing parties elected to file written submissions which I have read and considered together with the evidence on record.
32. In her submissions, the Plaintiff submitted that she has been in possession and occupation of the suit property for over 50 years; the land was subdivided into two after which a boundary/hedge dividing the two portions was planted in 1973 in the presence of elders and the 2nd Defendant.
33. As to whether or not a customary trust is an overriding interest the Plaintiff placed reliance on the provisions of section 28 of the *Land Registration Act* which states that unless the contrary is expressed in the register all registered land shall be subject to overring interests which in this case includes trusts such as customary trusts. That once proved such rights are capable of challenging a title of a proprietor. That in this case the interest of the Plaintiff being based on customary trust need not have been registered on the title to confer an overriding interest in her favour.
34. As to whether the Plaintiff had proved her case on a balance of probabilities, reliance was placed on Section 3 (2) and (3) of the *Evidence Act* as follows;



- (2) A fact is proved when, after considering the matters before it, the court either believes it to exist, or considers its existence so probable that a prudent man ought, in the circumstances of the particular case, to act upon the supposition that it exists.
- (3). A fact is disproved when, after considering the matters before it, the court either believes that it does not exist, or considers its non-existence so probable that a prudent man ought, in the circumstances of the particular case, to act upon the supposition that it does not exist.”
35. In line with the provisions set out above the Plaintiff submitted details of a customary ceremony held to demarcate the land which evidence was corroborated by PW2. That though the 2nd Defendant was present during the ceremony she elected not to testify to disprove the evidence hence no probable reason was advanced by the Defendants to explain her occupation of the land for over 50 years. *Inter alia*, that the suit land as displayed in the survey report shows it is split between the two brothers and the Plaintiff occupies her deceased husband's portion of the property, a position that was upheld by the Land Dispute Tribunal in both the district and provincial levels.
36. That the 2nd Defendant's husband was the eldest son in the family and therefore was registered to hold the land in trust for his younger brother. That the parties being of Kikuyu ancestry were bound by the Kikuyu customs and the Plaintiff placed reliance in buttressing this proposition in the case of [*Gitimu Wangare Vs Martin Munene Wangara & Others*](#) (2013) eKLR .
37. The Court was urged that equity shall not suffer a wrong without a remedy. This Court was further urged to find in favour of the Plaintiff.
38. The 1st and 2nd Defendant's written submissions were filed by the law firm of Patrick M Karanja & Associates.
39. The 1st and 2nd Defendant's submitted that the Plaintiff has cautioned the land for over 20 years hence preventing them from distributing the estate of their father.
40. They contended that customary trust can only be proved by way of evidence or acquiescence to it by the respondent, neither of which has been established by the Plaintiff. That the late Francis is the registered owner of the suit land absolutely.
41. The 1st and 2nd Defendant's relied on the case of [*Samuel Ngugi Vs Anthony Muchina Kamau & Anor*](#) ELC 36 OF 2020; [*Isack Kieba M'anga Vs Isaya Theuri M'Lintari & Anor*](#) (2018) eKLR in their proposition that the legal burden to prove customary trust rests with the one who asserts. That the Plaintiff has failed to discharge that burden. The Court was urged to dismiss the Plaintiff's case because it was founded on shaky ground.
42. The 3rd and 4th Defendant's filed their submissions and submitted that the Plaintiff has not discharged the burden of proof to establish a customary interest in the suit land. Reliance was placed in the case of [*Peter Nyaga Kairu Vs Esther Wanjiku Njau & 5 others*](#) (2019) eKLR; [*Mbothu & 8 Others Vs Wairimu & 11 Others*](#) (1986) KLR 171. That the Court cannot infer a trust save to give effect to the intention of the parties.
43. It was their proposition that occupation is not necessarily a requirement for one to establish an interest in customary trust. In the end the 3rd and 4th Defendant's concluded that having no interests in the suit land, it was up to the Court to determine whether the Plaintiff had proved trust in the suit land.
44. The key issue for determination is whether the Plaintiff has proven customary trust over the suit land.



45. It is not in dispute that the suit land was registered in the name of Francis in 1958 under the [Land Registration Act](#).
46. It is not in dispute that the Parties are related. The Plaintiff is the wife of Joseph Mwangi Wainaina deceased. The 1st and 2nd Defendants are the son and wife of Francis Kamau Wainaina. Francis Kamau Wainaina was the elder brother of Joseph Mwangi Wainaina. The Plaintiff and the 1st and 2nd Defendants have filed the suit as the legal representatives of the respective estates of the two brothers who are both deceased.
47. It is commonly acknowledged that the Plaintiff is in occupation of part of the land since 1970s.
48. It is also not in dispute that the estate of Francis has been administered and what remains is the distribution to the beneficiaries, an action that the 1st and 2nd Defendants aver has been hampered by the long-standing caution filed by the Plaintiff in 2002, a period of 20 years now.
49. Customary trust is a concept through which land may be acquired in Kenya. It is anchored in statute. It is an overriding interest in land which need not be registered. It subsists on and binds the land. Article 60 (1) (a) of the [Constitution](#) alludes to this concept when it refers to intergenerational and intra-generational equity. In the case of [Mbui Mukangu vs Gerald Mutwiri Mbui](#) C.A No. 281 of 2000 the Court of appeal stated that customary trust is a concept of intergenerational equity where the land is held by one generation for the benefit of succeeding generations. If land was passed down from the family member to another, the presumption of trust subject to evidence is high.
50. Section 28 (b) of [Land Registration Act](#) provides as follows;
- a. 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—
 - b. ...
 - c. trusts including customary trusts.
51. Similarly in the case of [Peter Gitonga Vs Francis Maingi M'Ikiara](#) Meru HCCC NO. 146 of 2000- it was stated that:-
- “A “trust” can be created under customary law and the circumstances surrounding registration must be looked at to determine the purpose of the registration. This was what led Muli J. to say this; “Registration of titles are a creation of law and one must look into the considerations surrounding the registration of titles to determine whether a trust was envisaged”. (emphasis is mine).
52. Finally, the concept of customary trust has found firm approval in the Supreme Court of Kenya in the case of [Issack Kieba M'Inanga Vs Isaaya Tbeuri M'Linturi & Anor](#) Supreme Court of Kenya No. 10 of 2015 where the Lord Justices of the Supreme Court held as follows;
- “Each case has to be determined on its own merits and quality of evidence. It is not every claim of a right to land that will qualify as a customary trust. In this regard, we agree with the High Court in Kiarie v. Kinuthia, that what is essential is the nature of the holding of the land and intention of the parties. If the said holding were 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: the land in question was before registration, family, clan or group land; the claimant belongs to such family, clan, or group; 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; the claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances; the claim is directed against the registered proprietor who is a member of the family, clan or group.”

53. The legal burden to prove the existence of the trust rests with the one who is asserting a right under customary trust. To discharge this burden, the person must prove that the suit properties were ancestral/ clan land; that during adjudication and consolidation, one member of the family was designated to hold on behalf of the family; that the registered persons were the designated family members who were registered to hold the parcels of land on behalf of the family. See the case of Issack Kieba (*supra*).
54. In this case the Plaintiff has set out a claim for an interest in customary trust over a portion of ½ of the suit land. It is commonly acknowledged that she has been awarded 2 acres in the estate of the late Francis the registered owner of the suit land. She insists that she is entitled to 3.26 acres of the land and not 2 acres on account of customary trust in favour of her deceased husband Joseph. It is her case that though Francis was the registered proprietor of the suit land he held the land on his own behalf and in trust for Joseph.
55. The 1st and 2nd Defendants case is that the suit land belonged to Francis absolutely and out of his generosity gave the Plaintiff's husband two acres because the land he was given was auctioned. It is their view that the Plaintiff should contend with the said 2 acres instead of asking for ½ the size of the land.
56. This land having been registered in 1958 was registered under the [Registered Land Act](#) (RLA) Cap 300 which provided under Sections 27, 28 and 30 as follows;
27. Subject to this Act
- (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;
 - (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied and expressed agreements, liabilities and incidents of the lease.
28. 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.

30. Unless the contrary is expressed in the register, all registered land shall be subject to such of the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register –
- (a) rights of way, rights of water and profits subsisting at the time of first registration under this Act;
 - (b) natural rights of light, air, water and support;
 - (c) rights of compulsory acquisition, resumption, entry, search and user conferred by any other written law;
 - (d) leases or agreements for leases for a term not exceeding two years, periodic tenancies and indeterminate tenancies within the meaning of section 46;
 - (e) charges for unpaid rates and other moneys which, without reference to registration under this Act, are expressly declared by any written law to be a charge upon land;
 - (f) rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription;
 - (g) the rights of a person in possession or actual occupation of land to which he is entitled in right only of such possession or occupation, save where inquiry is made of such person and the rights are not disclosed;
 - (h) 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:
57. The above section mirror Sections 24, 25 and 28 of the [Land Registration Act](#) which provide as follows;
- 24.
- (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and
 - (b)
- 25.
- (1) The rights of a proprietor, whether acquired on first registration or 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) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.

28. “Unless the contrary is expressed in the Register all registered land shall be subject to the overriding interest without being noted in the register which include rights acquired or in the process of being acquired by virtue of any written law relating to the Limitation of Actions or Prescriptions.”
58. It is trite that a customary trust need not be registered on the title. It is an overriding interest that subsists on the land. It binds the land. This was the decision of the Court in the case of *Kanyi Vs Mutbiora* 1984 KLR 712 CA, where the Court held that the registration of land in the name of a proprietor under the *Land Registration Act* did not extinguish rights under Kikuyu Customary law and neither did it relieve the registered proprietor of the duties or obligations as trustee.
59. It therefore follows that in as much as Francis was registered as owner of the land, the very registration does not impede the existence of an interest of a customary nature. The reason is found in Section 28 of the *Land Registration Act* which defines such interests as overriding interest on the land. They need not be registered as they are embedded in the land. It binds the land and cannot be seen on the face of the title. All registered land are subject to overriding interests, one of which is customary trust.
60. In Civil cases the onus of proof is on the part of the one who asserts. See Section 107, 108 and 109 of the *Evidence Act*.
61. How is customary trust proven? In the case of *Njenga Chogera -Vs- Maria Wanjira Kimani & 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 law trust is proved by leading evidence on the history (root) of the suit property and the relevant customary law on which the trust is founded and the claimants subscribe to.
62. The Court will now assess the evidence of the parties to determine if customary trust has been proven on the balance of probabilities.
63. The Plaintiff led detailed evidence that the two brothers occupied the suit land and in 1972/73 agreed to subdivide the land into two equal parts. The reason for the subdivision were that; each would get individual tea growing licences / numbers; to avoid future family conflicts. The ceremony that preceded the subdivision was done in the presence of elders and family members including the two brothers and their wives (Plaintiff and the 2nd Defendant respectively). Among the witnesses were Mwangi wa Kimani, Ngai Wa Kibuthi, Kamau Wa Kimani, Luka Kiiru Wainaina, Igamba Wainaina Thece, Peter Mwege Thece. Among those present was the Government Surveyor namely Peter Kabubi and Peter Kagoi Njoroge, the agricultural officer then for the area.
64. That upon completion of the measurements by the said Surveyor the Mikungugu trees were planted along the boundary of the suit lands to delineate the same into two. At the end of the ceremony a kikuyu ceremony was conducted in which a Ngoima goat was slaughtered to cement the agreement between the two brothers.
65. Further that the agricultural officer then proceeded to instruct them on how to plant tea on their part of the land and eventually got their own tea growing number/licence.
66. It would appear for 3 decades the parties lived peacefully until 2003 when the Plaintiff sued Francis in the District Land Dispute Tribunal seeking 1/2/ of the land to be transferred to her. Her claim was that



Francis held ½ the land in trust for her deceased husband. That the family patriarch who sired 4 sons and one daughter owned two parcels of land parcel No 805 and 909. That parcel 909 was registered in the name of Philip Njoroge Wainaina to hold in trust for himself and his brother Emmanuel Kuria Gathoni. On the other hand Francis confirmed to the tribunal that he held parcel No 805 in trust but had decided to subdivide the same into 4 portions and allocate to 4 members of his family to the exclusion of the Plaintiff. A witness by the name John Wanyoike informed the tribunal that there was a case that was before the clan in 1972 where it was agreed that the suit land be subdivided into two among Francis and Joseph and a local surveyor was called in to carry out the subdivision. Luka Kiiru Wainaina stated that Francis held the land in trust for himself and Joseph and the other two brothers, Philip and Emmanuel were given parcel 909 to share. Igamba Wainaina These also agreed that the land was held by Francis in trust for self and Joseph and that the land was subdivided in 1972 and a Ngoima goat as per Kikuyu traditions. Peter Mwega These corroborated the evidence of Igamba and added that both brothers have constructed permanent homes on the suit land, Peter Kabubi Muita, the Surveyor, stated that he subdivided the land on instructions of the two brothers in 1972 and that a Ngoima was slaughtered to witness the occasion (Mbari wa Tatha). That both brothers have built permanent houses where they reside with their families.

67. On appeal the same witnesses recounted their evidence before the Provincial Land Dispute Tribunal who agreed with the decision of the District Land District Tribunal.
68. In the JR No 85 of 2007 Francis sought orders to quash the decision of the Provincial Land Dispute Tribunal on grounds of jurisdiction and in his Supporting Affidavit sworn on the 21/12/2007 he confirmed that though he was the registered owner of the land he held it in trust for the family and not for the Plaintiff.
69. The 1st and 2nd Defendant have refuted the evidence of the subdivision of the land and the Kikuyu traditional involving goat slaughter. They relied on the evidence of PW2 , who stated in cross examination that as follows;

“I was called due to the planting of tea as an agricultural officer and not the demarcation. I was not involved in the goat ceremonies of the family.”

70. The above statement does not state that the ceremony did not take place. The witness states that he was not involved in the ceremony and the Court finds that this evidence goes to support the evidence of the Plaintiff that the Surveyor was present during the subdivision though his role as he clarified was to assist the brothers (read Joseph) to plant tea on his portion. I say so because as at 1968, Francis had already planted 10,000 tea bushes as per the Kenya Tea Development Authority (KTDA) verification certificate No 149772 dated the 28/6/95.
71. DW1 and DW2 were born in 1961 and 1969 respectively and therefore were minors in 1972/73 when the subdivision took place. DW1 stated that in 1973 he was only 14 years and therefore not aware of the demarcation. That he was not aware of the trust and that the Plaintiff got the 2 acres out of the generosity of his father and not that she is entitled by way of customary trust. I find that the 1st and 2nd Defendant failed to dislodge the evidence of the subdivision and the Kikuyu traditional ceremony that was performed to seal the subdivision. I have warned myself of the High Court decision that quashed the award of the Land Dispute Tribunal on account of jurisdiction. However, the evidence of the proceedings on record in my view is admissible evidence the same having been admitted in the case and no objection raised by the Defendants. This evidence when taken and read with the evidence of PW1, PW2, DW1 and DW2 create a high probability or in other words probative value that weighs in favour of the Plaintiff and goes to establish that indeed the land was subdivided into two portions, a traditional ceremony where a goat was slaughtered was performed to seal the agreement of the two brothers,



Mikungugu trees were planted at the boundary of each portion and that both families occupied their distinctive portions and have constructed permanent houses. This evidence was confirmed by not less than DW1 and DW2.

72. In the case of *Jason Gitimu Wangara Vs Martin Munene Wangara & Others* (2013) eKLR the Court stated as follows:-

“However the Plaintiff does not explain why only he was given the whole 35 acres of the suit land. It can only be that the “practice” of giving land to the first born that he himself alludes to arises out of Kikuyu custom. The Defendants did confirm that the Plaintiff as the eldest son was given the land by the clan to hold in trust for the family. In my view, there is sufficient evidence on record to make a finding that the Plaintiff holds the land in trust for the family. This is supported by the fact that the parties who are all family live on the suit land and so too did their father who was buried on the same land together with his six wives as well as other family members. There is also evidence that there are some twenty homesteads on the suit land. Under those circumstances, the only conclusion that this Court can arrive at is that the Plaintiff, though registered as proprietor of the suit land, holds the same in trust for the family and that registration does not relieve him of his duty as a trustee. As such, he cannot evict the Defendants from the suit land as he now seeks and his claim is therefore dismissed.”

73. From the above passage I find that the brothers belong to the Kikuyu community and therefore subscribe the same traditions and customs. Moreso, it was the practice to register land in the name of the eldest brother.

74. DW2 summed up his evidence as follows;

“During demarcation in 1954 my father was registered as the owner of the land. The land belonged to my grandfather. My father inherited the land from my grandfather. Since my childhood the Plaintiff’s family have always lived on the land.”

75. Earlier the said witness had informed the Court that the Plaintiff occupies roughly about 3 acres of land. The Plaintiff has pleaded that she occupies 3.25 acres which evidence is in conformity with the evidence of DW2.

76. Flowing from the decision of Supreme Court of Kenya in *Issack Kieba M’Inanga (supra)* I find that the Plaintiff has proved that:-

77. The land in question was before registration, family, clan or group land; the land belonged to the father of the two brothers. There is no evidence tendered to show that Francis purchased the land.

78. The claimant belongs to the family being the wife of Joseph and the sister in law of Francis.

79. The relationship of the claimant to the Defendants is not so remote or tenuous as to make his/her claim idle or adventurous; in other words the parties are related.

80. The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances; Evidence was led that Francis was older of the two brothers from one house. Evidence was also led that Philip was registered as owner of parcel 909 to hold on his own and in trust for his brother Emanuel and following the said practice the probability in this case is even higher and more believable. Even Francis admitted in his Affidavit that he held the land in trust for the family to the exclusion of his late brother’s family. His sons have adduced evidence that their father out of his generosity allocated 2 acres to the Plaintiff. This is at variance with the Affidavit evidence of



Francis and the evidence he held at the Land Dispute Tribunal where he allocated the land to other family members to the exclusion of the Plaintiff. The Court finds this is an afterthought to explain away the action of the estate of Francis in reducing the acreage due to the Plaintiff by 1.26 acres which has not been justified as the land was to be shared between the two brothers in half.

81. The claim is directed against the registered proprietor who is a member of the family clan or group; in this case the claim is against Francis, the registered owner. There is no dispute that the parties have occupied the land in the same portions from as far back as 1972/73.

Final disposal orders;

82. In the end I find that the Plaintiff has proven her case and I enter judgement as follows;
- a. A declaration be and is hereby made that a customary trust in respect to land parcel Number Kiganjo/Gahcika/805 in favour of the Plaintiff has been proven and she is entitled to 1.35 Ha (3.26 acres) out of the suit land.
 - b. An order for determination of the trust be and is hereby made and that the suit land be subdivided and the portion measuring 3.26 acres be transferred to the applicant to hold in trust for herself and the children of Joseph Mwangi Wainaina.
 - c. That the subdivision to follow as much as is practicable the occupation of the parties on the ground.
 - d. In default the Deputy Registrar of this Honourable Court is mandated to execute all the documents to effectuate the orders of this Honourable Court.
 - e. Costs shall be in favour of the Plaintiff.
83. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 4TH DAY OF MAY, 2023 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Muiruri for Applicant

M. Karanja for 1st and 2nd Respondents

AG is absent for 3rd and 4th Respondents

Court Assistants – Kevin/Lilian

