



**Nganga & 3 others v Maina; Maina & 2 others (The Chairman, Secretary and Treasurer of Cactus Self Help Group) (Interested Party) (Environment & Land Case 309 of 2012) [2023] KEELC 18463 (KLR) (3 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 18463 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT & LAND CASE 309 OF 2012**

**LA OMOLLO, J  
JULY 3, 2023**

**BETWEEN**

**MOSES MAINA NGANGA ..... 1<sup>ST</sup> PLAINTIFF  
LOISE WANJIRU MAINA ..... 2<sup>ND</sup> PLAINTIFF  
LUCY NJUHI MAINA ..... 3<sup>RD</sup> PLAINTIFF  
JANE MUKAMI NGUGI (SUING IN HER CAPACITY AS THE PERSONAL  
REPRESENTATIVE OF THE ESTATE OF JAMES BENSON NGUGI-  
DECEASED) ..... 4<sup>TH</sup> PLAINTIFF**

**AND**

**GEORGE NGANGA MAINA ..... DEFENDANT**

**AND**

**DANIEL KAMAU MAINA, SAMUEL MWARANO MBUTHIA AND ESTHER  
WAIRIMU (THE CHAIRMAN, SECRETARY AND TREASURER OF CACTUS  
SELF HELP GROUP) ..... INTERESTED PARTY**

**JUDGMENT**

**Introduction**

1. The Plaintiffs commenced this suit vide a plaint dated June 29, 2011.
2. They aver that the Defendant is the registered proprietor of Land Reference Number 1556/48 (Title Number IR 39720) and the certificate of title was issued on July 9, 1985.
3. They also aver that the 1<sup>st</sup> Plaintiff is the beneficial owner of the suit property as he was the one who had purchased it from Mararo Family Company Limited.



4. They further aver that the 1<sup>st</sup> Plaintiff made payments for the purchase price, survey fees and title processing charges between the years 1975 and 1985 and has in his custody, the original certificate of title and title documents adding that they were issued to him in the year 1985.
5. The Plaintiffs aver that at the time the 1<sup>st</sup> Plaintiff was paying the purchase price, the Defendant was a minor and did not therefore contribute towards its purchase.
6. The Plaintiffs also aver that the 1<sup>st</sup> Plaintiff registered the suit property in the name of the Defendant as a trustee to hold it on behalf of himself and the other siblings.
7. The Plaintiffs further aver that on November 1, 2003 the Defendant, the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs and the late James Benson Ngugi entered into a Memorandum of Understanding with the consent of the 1<sup>st</sup> Plaintiff where the Defendant acknowledged that he held the suit property in trust for all of them.
8. It is their averment that they agreed to subdivide the suit property into four equal portions to be transferred to each one of them.
9. They aver that they later met at the suit property with a surveyor and physically subdivided the land into four equal portions.
10. It is the Plaintiffs averment that a draft subdivision sketch plan was drawn on the understanding that the surveyor would rely on it and work with the Defendant to formalize and register the subdivisions and process new titles for each of the four beneficiaries.
11. They also aver that the Defendant breached the Memorandum of Understanding and refused to subdivide the land and process the titles for himself and the other plaintiffs and is instead in the process of subdividing the land and selling it to strangers.
12. They further aver that they have discovered that the Defendant had fraudulently obtained a provisional certificate of title for the land while aware that the original Certificate of Title is not lost as it is in the custody of the 1<sup>st</sup> Plaintiff.
13. The Plaintiffs seek orders to restrain the Defendant from selling, disposing off and alienating the suit property without the consent of the Plaintiffs.
14. They further seek an order to compel the Defendant to subdivide and transfer the suit land to the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Plaintiffs as agreed in the Memorandum of Understanding dated November 1, 2003.
15. The Plaintiffs have set out particulars of fraud and pray that judgment be entered against the Defendant for:
  - a. An injunction to be issued against the Defendant restraining the Defendant by himself and or through his agents and or employees from subdividing, selling, disposing off and or in any other manner whatsoever dealing or interfering with Land Reference Number 1556/48 (Title Number IR 39720) in Naivasha Town other than in accordance with the terms of the Memorandum of Understanding executed and dated November 1, 2003.
  - b. An order compelling the Defendant to immediately subdivide Land Reference Number 1556/48 (Title Number IR 39720) in Naivasha Town into four equal parcels and to transfer a parcel each to George Nganga Maina, Loise Wanjiru Maina, Lucy Njuhi Maina and Jane Mukami Ngugi in her capacity as the personal representative of the estate of the late James Benson Ngugi.
  - c. Any other order as the Honorable Court may deem fit and just to issue.



- d. Costs of the suit and interest.
16. The Defendant filed his Statement of Defence on October 13, 2011. He later filed an Amended Defence and Counterclaim on May 24, 2012 where he denies the Plaintiffs averments in the Plaint.
17. The Defendant states that on November 11, 2003 the Plaintiffs coerced him to sign a Memorandum of Understanding that acknowledged that he held the suit property in trust for himself, the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs and James Benson Ngigi.
18. The Defendant sets out the particulars of duress and coercion and prays for the following orders against the Plaintiffs:
- a. That the Plaintiffs suit against the Defendant be dismissed.
- b. That this honorable court be pleased to declare that a Memorandum of Understanding entered into between the Plaintiffs and the Defendant on 1/11/2003 in which the Defendant undertook that he holds land known as LR No 1556/48 (title No IR 39720) in trust for himself and the Plaintiffs void.
- c. That this honorable court be pleased to declare that the defendant is the absolute owner of land known as LR No 1556/48 (title No IR 39720) and by virtue of his registration as such, the same cannot be defeated by the plaintiffs.
- d. A perpetual order upon the plaintiffs requiring them from entering, claiming, occupying or otherwise dealing in other way with land known as LR No 1556/48 (Title No IR 39720).
- e. Costs of the suit.
19. The interested parties were joined to this suit on 3/10/2013 after an application dated 30/4/2013 for joinder was allowed by consent.

### **Plaintiff's Evidence**

20. During the hearing of the Plaintiffs case, Morris Maina Nganga testified as PW1. His witness statement dated June 29, 2011 was adopted as part of his evidence in this suit.
21. He clarified that he used two names, one being Moses and another is Morris. He produced an affidavit to explain that the two names refer to one and the same person. It was marked as Exhibit P1.
22. He testified that he knows George Maina Nganga the Defendant explaining that the defendant is his first-born son.
23. He went on to testify that he bought the suit property in the year 1975 from Mararo Society Family Company and was issued with receipts in the name of George Nganga Maina his son (The defendant).
24. It was further his evidence that he joined Mararo Society Family Company to buy a parcel of land. He stated that he had an initial twenty acres and subsequently bought another twenty acres. He went on to explain that he later on gave twenty acres to his children with each child getting five acres.
25. He testified that he paid the survey fees on 3<sup>rd</sup> November, 1979 and was issued with a receipt by Mararo Society Family Company. The said receipt was produced and marked as Exhibit 2(a).
26. He also testified that the receipt has two names which are Moris Maina and Nganga Maina who is his son (The defendant).



27. He further testified that he was given another receipt for survey dated 6<sup>th</sup> June 1992 in the name of Nganga Maina. He explained that Nganga Maina (the defendant) paid for the survey. This was produced and marked as Exhibit 2 (b).
28. It was his evidence that he is the one who paid the purchase price for the suit land as the defendant was still in school. It was his further evidence that he paid for the receipts for the title which are dated 26<sup>th</sup> February, 1985 and 11<sup>th</sup> October, 1984. The two were produced as Exhibit P3 (a) and (b).
29. It was also his evidence that was a member of Mararo Society Family Company and had paid for the survey but the title deed of the suit property was issued in the name of the defendant because he (the defendant) was his first child.
30. It was his further evidence that his intention was that the defendant would subdivide the land for purposes of sharing it with his other siblings and that he chose to register him as the proprietor of the suit property as he was his first child. He produced the Certificate of title which was marked as Exhibit P4.
31. He also produced his share certificate No 81 which was marked as Exhibit P5. This was intended to show that he was a member of Mararo Society Family Company.
32. PW1 reiterated that the defendant was in class three when he was making payments towards purchase of the suit land between the year 1978 and 1979. He made reference to receipts produced to show that the defendant was in school when the payment to conduct the survey was done.
33. It was PW1's testimony that they never took occupation of the suit land and that he only discovered that there was a problem when the defendant sold his share. He explained that this prompted him to call all the plaintiffs and asked them to subdivide the land.
34. He also testifies that they agreed to subdivide the land and that he had in court a transfer from Mararo Society Family Company to the defendant adding that he kept the original because the land to show that the land has never been subdivided.
35. He further testified that Cactus self-help group (the Interested Party) bought four acres from the defendant which they are now claiming and added that they bought the defendant's share. He went on to explain that he did not benefit from the Interested Party.
36. It is PW1's further evidence that he wants the court to make orders subdividing the land so that all the children who are Lois, Njuhi, Mary and the defendant can get their share.
37. It is also his evidence that each child should get five acres each because he is the one who bought the land for them.
38. In his witness statement, he states that between the years 1975 to 1978, he paid for two hundred shares at a total cost of Kshs 4,000/= to Mararo Family Company Limited in the name of his son and was issued with a share certificate on 31<sup>st</sup> March 1978.
39. He also states that the Defendant was born in the year 1961 and was therefore a minor when he purchased the shares and also when he paid the survey and title processing fees between the year 1979 to 1978.
40. He further states that he registered the suit property in the name of the Defendant to hold it in trust for his siblings.



41. He states that in the year 2003, they held a family meeting where the Defendant was present and it was agreed that the Defendant would subdivide the suit property equally among the beneficiaries.
42. He also states that they went to the suit land with a surveyor one Mr. C.M Kamau and carried out the proposed subdivision of the land in four equal pieces and each beneficiary shown their respective parcel of land.
43. He further states that the surveyor drew a draft sketch plan of the proposed subdivision showing each beneficiaries portion and that they subsequently went to the office of P. K Njuguna Advocate and drew the Memorandum of Understanding.
44. He states that in the Memorandum of Understanding, the Defendant acknowledged that he was holding the suit property in trust for himself, the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs and James Benson Ngugi (now deceased).
45. He also states that they later discovered that the Defendant was subdividing the land contrary to the terms of the Memorandum of Understanding and was in the process of selling it to a group known as Cactus Self-Help Group (The Interested Party).
46. Finally, in his witness statement he states that later he also discovered that the Defendant had obtained a Provisional Certificate of Title without their knowledge while he (PW1) was still holding the original certificate of title.
47. On cross-examination by counsel for the Defendant, he confirmed that his name is Moses Maina Nganga and that his Identity Card reads Morris Maina Nganga.
48. He also confirmed that he has eight children; George, Wanjiru Lois, Lucy Njuhi, Mary, Kenneth Kamau, Peter Gitungu, Thiongo and Wamaitha.
49. He further confirmed that he swore an affidavit to explain his names and that he uses both a signature and fingerprint. He admitted that the signature on the affidavit was not his and that he did not sign it.
50. He also admitted that he is a member of Mararo Family Company and that he did not have documents to show that he was a member.
51. He further admitted that the receipts that he has produced in court together with the share certificate were in the name of the defendant.
52. He admitted that the title to the suit land is in the defendant's name and that the suit land has never been subdivided adding that the defendant was supposed to subdivide it and share with the rest of the plaintiffs.
53. He also confirmed that they had agreed that the defendant was to hold the suit property in trust for his siblings adding that none of his children lives on the suit land and that he too had never lived on it.
54. He further confirmed that the problem arose because the defendant's name was written on the title deed adding that the title deed was issued in the 1980's when he bought forty acres of land. Twenty acres were registered in his name while the other twenty acres were registered in the defendant's name to hold in trust for his siblings.
55. He also confirmed that he has been to the Land Control Board to aid the subdivision but did not have any document as evidence of attendance or evidence that consent had been obtained.
56. He further confirmed that the title deed in the name of the defendant was registered in the year 1985 adding that he did not have any documents to show that he had commenced subdivision.



57. PW1 further stated that he commenced the process of subdividing the suit land because he is the Defendant's father and because he is the one who bought the land.
58. PW1 confirmed that he has nothing to show that he had two parcels of land at Mararo Society Family Company and further stated that the defendant alleges that the suit property was given to him by his grandfather but his grandfather was dead and he (the defendant) could not remember when he died. He confirmed that his father (the defendant's grandfather) did not buy the land and reiterated that he was the one who bought it.
59. He further stated that that by the year 1985, the other children were already eighteen adding that none of them went to get the title adding that he is the one who went to get the title.
60. On cross-examination by counsel for the Interested Party, he confirms that the Defendant is his first-born son who was born in the year 1961.
61. He also confirms that he registered the suit property in his name because he is his first-born son adding that he was still in school at the time of the said registration.
62. He further confirmed that he told the Defendant that he was holding the suit property in trust and that his children were to get five acres each.
63. He stated that he did not know Cactus Self-help Group (The Interested Party) or that they bought a portion of the suit property from the Defendant adding that if they bought a portion of the suit property then they bought it secretly as the land is vacant and does not have any buildings on it.
64. He confirmed that he hadn't been to the suit property in a long time and admitted that he has never paid any rates.
65. He confirmed that after the property was registered in the defendant's name, he doesn't know what the defendant did with it.
66. He also confirmed that he knows the land buying process and that he did not raise any objections in respect to the Defendant's registration as the owner of the suit property.
67. PW1 reiterated that he did not know that the Defendant was selling the land.
68. On clarification sought by the court, he explained that the forty acres purchased by him share a common boundary.
69. On re-examination PW1 stated that the receipt produced as Exhibit 2(a) has two names which are Moris Maina-Kshs 1900 and Nganga Maina – Kshs 2000.
70. He reiterated that he bought forty acres and that he has a survey receipt that shows the two shares.
71. When referred to Exhibit P4 he stated that it was issued in the year 1985 when the Defendant was still in school and added that he has produced an affidavit that shows that Morris Maina Nganga and Moses Maina Nganga are one and the same person.
72. Lois Wanjiru Maina testified as PW2. She introduced herself and explained that Moses Maina (1<sup>st</sup> plaintiff) is her father while George Nganga (the defendant) is her elder brother.
73. Her witness statement was adopted as part of her evidence and she testified that the dispute arose in the year 2011 when the Defendant sold the suit property without telling their father.
74. She also testified that the papers in court with respect to the suit property show that they are in the name of the defendant.



75. She further testified that her father had informed her that the suit property was to be subdivided and so together with other family members they went to a lawyer's office to sign a Memorandum of Understanding. She gave the names of the family members who went to the lawyer's office as George, Lois, James and Lucy Njuhi Maina.
76. It was her further evidence that she had a copy of the Memorandum of Understanding that was drawn by P.K Njuguna Advocates adding that both their parents were present at the lawyer's office.
77. It was PW2's testimony that she is aware that there is a letter from an advocate saying that the defendant was forced to sign the Memorandum of Understanding. She went on to state that they were not coerced into going to the advocate adding that had it been so, they would not have signed it or gone together.
78. It is her evidence that the agreement was not finalized because after it was signed, they waited for the surveyor to visit the suit parcel, a sketch plan was drawn but they never got their share of the property.
79. She further testified that she knows S. N Kamau explaining that he was a surveyor. She stated that she is aware of a gazette notice that indicated that the title to the suit property was lost. She clarified that the original title was never lost and had always been in their father's (the 1<sup>st</sup> Plaintiff) custody.
80. It is her evidence that the title to the suit property was issued in the defendant's name in the year 1975 but the suit parcel was meant to be shared among her father's children.
81. It is also her evidence that her father could not have two names entered on the suit property and that Mararo Society Family Company decided to write the Defendant's name.
82. It is further her evidence that if the Defendant paid any land rates, then he must have paid them secretly.
83. She testified that she does not know the Interested Party and neither does she know any sale agreement between them and the Defendant.
84. She also testified that they have not benefited from the sale as the defendant acted alone. She further testified that she cannot comment on the said dealings between the Defendant and Interested Party because she was not involved.
85. It was her further testimony that the Defendant was not given/gifted with the suit property by his grandfather.
86. PW2 concluded her testimony by stating that in the year 1985, the Defendant had completed school but was not employed and was still dependent on his parents.
87. In her witness statement, she states that the 1<sup>st</sup> Plaintiff has always confided in her that he bought the suit property with his own funds and registered it in the name of the Defendant to hold it in trust for them.
88. She also states that the 1<sup>st</sup> Plaintiff showed them the original receipts, share certificate and certificate of title that he has kept since they were issued.
89. She further states that the Defendant refused to subdivide the land as agreed and instead fenced it contrary to their agreement and intends to sell it to third parties.
90. On cross-examination by counsel for the Defendant, PW2 confirmed that in the year 1985, she did not see her father make any payments to Mararo Housing Company Limited.



91. She also admitted that she has seen the receipts and that she used to make payments at Mararo Housing Company Limited with Albert Njonjo and another person admitting that his name (Albert Njonjo) is not included in the witness statement.
92. She further admitted that they never attended the Land Control Board to set the process of subdivision in motion.
93. PW2 confirmed that the defendant is the registered owner of the suit property and also confirmed that the Defendant was not coerced into signing the Memorandum of Understanding adding that he knew that the suit property was bought by their father and that he would have to subdivide it among the siblings. She admitted that she first saw the letter from the Defendant's advocate alleging coercion in court while giving evidence.
94. She stated that if the Defendant did not want the suit land subdivided, he would have said so.
95. She also admitted that she did not know that the letter was denouncing the Memorandum of Understanding and that if the Defendant wanted to denounce it, he should have told them.
96. She further admitted that the Memorandum of Understanding is dated November 1, 2003 which was before the present suit was filed.
97. She confirmed that in the Memorandum of Understanding, the Defendant is both the registered owner of the suit property and a beneficiary.
98. She also confirmed that it was her father who gave the directions for the division of the land but his name is not in the Memorandum of Understanding.
99. She ended by stating that her claim against the defendant was in her capacity as his sister and a beneficiary of the suit parcel.
100. On cross-examination by the Interested Party's counsel, PW2 confirmed that they went to the surveyor and that the Defendant was supposed to get 4.77 acres as per the Memorandum of Understanding.
101. She also stated that she does not know the Interested Party and that if the Defendant sold 4.77 acres then that would mean that he was selling his share.
102. PW2 stated that the defendant made untrue statements at the Lands office in order to get the title deed. She further stated that the land was vacant though she did not know if there were any buildings on it as at the time of her testimony.
103. She confirmed that she does not know if rates were paid adding that she also was not conversant with the land buying process.
104. She admitted that the Defendant knew that he was holding the suit property in trust because when he was registered as the owner, he was fifteen years old.
105. The court sought clarification on the age of the defendant and in response PW2 stated that the Defendant was born in the year 1961.
106. On re-examination she states that there was no coercion when they signed the Memorandum of Understanding.
107. Philip Kamau Njuguna testified as PW3. It is his evidence that he is an Advocate and that his name is abbreviated as P.K Njuguna.



108. It is also his evidence that he practices in Naivasha town within Nakuru County and has done so since the year 2000.
109. He testified further that he was summoned on June 21, 2022 through the witness summons dated June 8, 2022 and the summons stated that was required to attend court to produce a Memorandum of Understanding dated November 1, 2003 on behalf of the Plaintiffs.
110. It was his testimony that that he drafted a Memorandum of Understanding dated November 1, 2003 on instructions from the four parties that appeared before him.
111. He further testified that once they signed the Memorandum of Understanding, he attested their signatures.
112. It was also his evidence that the Memorandum of Understanding consisted of matters he recorded and a sketch plan that the four people who attended his chambers had provided.
113. PW3 testified that the sketch plan showed the intended sharing of LR No 1556 /48 adding that it was signed by all the four people and that he also appended his signature.
114. It was his further evidence that he charged them Kshs 3,000/= which they paid and a receipt was issued. He produces the Memorandum of Understanding as Exhibit P7 (a), the receipt as Exhibit P7 (b) and the sketch as Exhibit P7(c).
115. He identified the four people who appeared in his office as George Nganga and Loise Wanjiru Maina whom he pointed out in court and James and Lucy whom he stated were not in court.
116. He further testified that the parties to the Memorandum of Understanding had gone to his office on a Saturday where they held mutual discussions which were reduced into writing.
117. He also testifies that they went over the agreement together and that the Memorandum was as a result of mutual discussion adding that there was no misunderstanding.
118. On cross examination by counsel for the Defendant, he confirmed that the agreement is dated November 1, 2003 and has four parties.
119. He also confirmed that Moses Maina Nganga (the 1<sup>st</sup> Plaintiff) was not a party to the Memorandum of Understanding and that the Defendant was a beneficiary of the suit property.
120. He admitted that he coined the word “beneficiary” for use in the memorandum of understanding because the parties told him they all wanted to benefit from the said parcel of land.
121. He also admitted that he did not conduct a search to confirm the owner and neither did he undertake an independent investigation of title.
122. He further admitted that the four parties told him that the Defendant, George Nganga Maina, was the registered owner of the property.
123. When referred to Exhibit P1, he confirmed that the owner of the suit property is the Defendant and that there is no indication that he is holding the suit property in trust for anyone.
124. He also confirmed that clause No 1 of the Memorandum of Understanding states that the Defendant holds the suit property in trust for himself and the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> beneficiaries adding that this was written on the basis of the instructions given to him by the four parties who visited his office.
125. PW3 also admitted that there are many different methods by which one becomes a trustee but that he did not ask how the trust arose and that they did not give him any documentation.



126. He also admitted that the sale agreements require consideration and in respect of the Memorandum of Understanding, there was no consideration passing between the parties.
127. He further confirmed that the four people who visited his office were escorted by a Mr. Kamau who is a surveyor adding that the said Mr. Kamau left the four parties in his office.
128. He confirmed that at the time he was drafting the Memorandum of Understanding, the Defendant told him that the property was registered in his name.
129. He further confirmed that he did not spell out the implications of the Memorandum of Understanding to the Defendant because he was the one who told him that he wanted to share the land with his siblings.
130. He admitted that he did not know the discussion that had taken place prior as the Defendant had told him that he had land that he wanted to share with his siblings.
131. PW3 stated that he has over the years drafted numerous agreements and that in drafting this particular memorandum of understanding, he confirms that there was no coercion.
132. When he is referred to Clause 5 of the Memorandum of Understanding, he confirmed that the Defendant undertook to pay the rates and rents due in respect of the property up to that day.
133. He also confirmed that he did not ask why because that is what the parties agreed on adding that since they were relatives, he had no reason to pry further.
134. He explained that interest in land can be acquired by purchase, gift, inheritance and in the present matter he did not know how to describe it adding that it akin to a gift.
135. He admits that he did not inquire much into the transaction because families have different ways of doing things adding that he hoped that eventually the property would be transferred to the other parties.
136. He also admitted that the Memorandum of Understanding was to guide what was to happen after that the Defendant was going to share his property. He explained that this meant that the defendant was surrendering his interest.
137. He stated that he was not aware that a portion of the suit land had been sold at the time of drafting the Memorandum of Understanding.
138. When referred to Exhibit D3, PW3 confirmed that it is a letter from an advocate addressed to C.M Kamau the surveyor and it has a highlighted paragraph that states that the Memorandum of Understanding is of no legal consequence for various reasons.
139. He confirmed that he was seeing the said letter for the first time and stated that a party should be bound by a document prepared on his instructions.
140. He further confirmed that the Memorandum of Understanding states that the parcel of land measures 7.716 Ha or thereabouts and that he was not aware that 12 acres of the said property had been sold.
141. On cross-examination by counsel for the Interested Party, he confirmed that he did not file any witness statement and that the Memorandum of Understanding is enforceable.
142. He stated that there could have been a subsequent agreement provided that this subsequent agreement adhered to what was in the original agreement. He explained that this means that all the parties had to participate in changing its terms.



143. He further confirmed that Exhibit D3 is from an Advocate and from the reading of it, one of the parties to the Memorandum of Understanding is recanting it.
144. He stated that from a reading of paragraph 1 of the Memorandum of Understanding, there was no document produced or explanation given on how he came to hold the property in trust for them.
145. He further stated that the four parties who came to his chambers only had a sketch and that he could not remember if they had a title. He further stated that he described them as the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> beneficiaries which term he came up with because they wanted to share the suit property.
146. PW3 confirmed that he did not ask if there were any other siblings but only knows that the four who came to his office are siblings.
147. He further confirmed that they were in full agreement and that the defendant was the one doing all the talking and that the parties had told him that the suit property was registered in the Defendant's name.
148. He further stated that he did not look at the pleadings and only learnt while in court that there was an Interested Party.
149. He further stated that one cannot register a caution on land that he intends to share adding that if that were to happen, it would impede the process of transfer.
150. The Plaintiffs case was then closed.

#### **Defendant's Case**

151. George Nganga Maina testified as DW1. His witness statements dated 10<sup>th</sup> October, 2011 and 24<sup>th</sup> May, 2012 were adopted as part of his evidence.
152. In his testimony in chief he stated that he is the owner of the suit property and has been since the year 1975 when his grandfather told him that he had bought him shares.
153. He also testified that his grandfather bought shares for him from Mararo Family Company Limited and was issued with a share certificate which share certificate had been produced by the Plaintiff.
154. He further testified that in the year 1982, he was given a letter saying that he had been allocated plot No 48 adding that the letter was given to him by the chairman of Mararo Family Company Limited.
155. It is his evidence that the title deed was issued in the year 1985 after the transfer was done.
156. He produced a copy of the title deed as Exhibit D1 and testified that when he was issued with the title deed, he picked it from the office of the secretary and later gave it to his mother to keep it for him.
157. It is also his evidence that the Plaintiffs pressured him to go to an Advocates office where he was coerced to sign the Memorandum of Understanding.
158. It is further his evidence that he went to his advocates office and told him what had happened at Mr. Njuguna's law firm where he signed the Memorandum of Understanding and his advocate wrote a letter dated 1<sup>st</sup> December, 2003 which was produced as Exhibit D3 adding that this letter was written one month after signing the Memorandum of Understanding.
159. He also testified that in the year 2008, he went to his mother to take the title deed but was informed that the title was lost. It is his further testimony that he subsequently went to the police station to report the loss of the said title deed, got an OB number and applied for a provisional title.



160. DW1 stated that before he was issued with a provisional title, a gazette notice dated 18<sup>th</sup> July, 2008 was issued. He produced it and it was marked as Exhibit D4.
161. It is his further evidence that he got the provisional certificate of title on 8<sup>th</sup> April, 2018. He produced it and it was marked as Exhibit D5.
162. It is also his evidence that he has been paying rates and rents. He produced the receipts dated 27<sup>th</sup> April, 1987 and 16<sup>th</sup> July, 2011 which were marked as Exhibit D6(a) and (b).
163. He produced demand notices dated 2<sup>nd</sup> June, 2011, 13<sup>th</sup> April, 1994, 6<sup>th</sup> August, 1987, 6<sup>th</sup> February, 1992, 6<sup>th</sup> December, 1988, 9<sup>th</sup> April, 1988, 14<sup>th</sup> November, 1987, 10<sup>th</sup> April, 1989, 30<sup>th</sup> June, 1988, 1<sup>st</sup> January, 1986 and 26<sup>th</sup> May 2011 which were marked as Exhibit D7 (a-k).
164. It was his testimony that the suit parcel was registered in his name because his father could not have more than one share at the company. He added that his grandfather sold a cow so that he could buy him (the defendant) some shares in the company.
165. He further testifies that he had 200 shares and seeks that the prayers sought in the counterclaim be allowed.
166. In his witness statement he states that he received his identity card in the year 1979 and has been paying land rates since then to date.
167. Upon cross-examination by counsel for the Plaintiffs, he confirmed that the 1<sup>st</sup> Plaintiff is his father while the 2<sup>nd</sup> to 4<sup>th</sup> Plaintiffs are his siblings.
168. When referred to the share certificate produced as Exhibit D5, he confirms that the share certificate is in the name of Nganga Maina and was issued on 31<sup>st</sup> March, 1978.
169. He also confirms that his grandfather's name is Stanley Nganga Kamau, his father's name is Moses Maina Nganga while his name is George Nganga Maina.
170. He admitted that he was born in the year 1961 and was seventeen years old when the share certificate was issued.
171. He also admitted that George Nganga Maina and Nganga Maina are one and the same person adding that his father did not know his English name.
172. He further admitted that his grandfather told him about the shares in the year 1975 when he was in class six and also confirmed that there were no witnesses to this discussion.
173. He confirmed that he lost the title deed but did not have an OB number.
174. He also confirmed that he swore an affidavit for loss of the title deed but did not have a copy in court. He stated that he followed the correct procedure to replace the lost title but did not have any documents in court.
175. He stated that he is the first born and that his name is George Stanley Nganga Maina though he does not use the name Stanley.
176. He further stated that it is not part of Kikuyu tradition that the first-born holds land in trust for others adding that he does not know if other people do it.
177. He went on to state that he was allocated plot No 48 and alleged that his lawyer has the evidence of this allocation but does not know why the evidence has not been produced in court.



178. He also stated that he has been paying rates and added that he sold the land in 2010 to some people and in 2011 he sold it to the Interested Party.
179. When referred to the list of documents dated 4<sup>th</sup> December 2013 filed by the Interested Party, DW1 admitted that document No 7 shows a payment on 3<sup>rd</sup> June, 2011.
180. He also admitted that he had to clear the rates before he transferred the property but denied that both the clearance and payments made in 2011 were for the purposes of transfer.
181. He further admitted that the payments of the year 2009 and 2010 are part of the 2011 payment. He also admitted that the rates due for payment in the year 2011 were Kshs 21,000/= which he confirmed were paid in the same year. He added that he got money in 2011 and that is when he was able to pay for the rates and that the said payment was necessary so as to ease the transfer process.
182. He further confirmed that he signed the Memorandum of Understanding but stated that the signature appearing thereon does not belong to him as he was coerced into signing it.
183. He stated that he was taken to the advocates office by force adding that the Plaintiffs threatened him, wanted to beat him but he did not report the incident to the police because they are his family.
184. He narrated that on the day he signed the memorandum of understanding, his sister sat next to him and issued threats to him.
185. DW1 stated that by the time he had signed the Memorandum of Understanding in the year 2003, he had sold two plots and reiterated that he did not sign the Memorandum of Understanding willingly.
186. On cross-examination by counsel for the Interested Party, he admitted that he did not inform the Interested Party that there was anything preventing him from the transaction.
187. He also admitted that he knows the Interested Party as he had sold five acres to them. He further admitted that he received money from them adding that he did not transfer the suit property to them because he had been informed that his title was lost.
188. He also stated that he had been paying land rates on his own and that the current status of the land is that his siblings have sold part of it and there are buildings on it.
189. He further confirmed that the Interested Party has not enjoyed the property and that when they bought it, he did not warn them because there was no problem.
190. He admitted that according to the Memorandum of Understanding, he was to get 5 acres while the Interested Party was to get five acres from the sale.
191. He also admitted that he sold to the Interested Party his share of the property.
192. On re-examination, he stated that his name is George Nganga Maina and reiterated that the name on the share certificate refers to him as his grandfather did not know his baptism name.
193. He also stated that he was not aware of a Kikuyu tradition that the first-born son holds land in trust for other children.
194. He further stated that he was allocated plot No 48 and that the Certificate of Title bears 1556/48 as the Land Reference Number.
195. He stated that it is not mandatory to clear rates before sale and added that he signed the Memorandum of Understanding unwillingly.



196. He further stated that he did not report to the police but went to the lawyer who wrote the letter for revocation. He went on to state that by the time they were signing the Memorandum of Understanding, he had sold part of the land.
197. He also stated that the Memorandum of Understanding did not reflect the true position because at the point of signing the Memorandum of Understanding, the Plaintiffs knew that the land had been sold.
198. DW1 also stated that as at the time of the sale agreement he had sold  $\frac{3}{4}$  of the suit parcel adding that it was not true that he was selling his share to the Interested Party.
199. The court sought clarification from DW1 and in response he stated that as at the time of signing the Memorandum of Understanding, he had sold  $12\frac{1}{2}$  acres of the suit property.
200. The Defendant's case was then closed.

### **Interested Party's Case**

201. Daniel Kamau Maina testifies as IP1. He adopted his witness statement dated 4<sup>th</sup> December, 2013 as part of his evidence and produces the documents on his list of documents dated 4<sup>th</sup> December, 2013. They were marked as follows:
  - a. Certificate of Registration dated April 29, 2009 as Exhibit IP1.
  - b. Sale agreement dated November 18, 2010 as Exhibit IP2.
  - c. Certificate of Title LR 1556/48 issued to George Nganga as Exhibit IP3.
  - d. Identity Card of George Nganga Maina as Exhibit IP4.
  - e. Bankers Cheque No 674374 issued on 18<sup>th</sup> November, 2010 for Kshs 900,000/= as Exhibit IP5.
  - f. Note of acknowledgement of payment of Kshs 400,000 dated 24<sup>th</sup> February, 2011 as Exhibit IP6.
  - g. Note of Payment of 3<sup>rd</sup> June 2011 for Kshs 200,000/= as Exhibit IP7.
  - h. Provincial Certificate of Title IR 39720 issued on 8<sup>th</sup> April, 2010 as Exhibit IP8.
202. He testified that Cactus Self Help Group is a group of friends who came together to contribute money for their general welfare and to buy property.
203. He also testified that he is the chairperson of the Interested Party and that he used to work at Kenya Power and Company Ltd with the Defendant.
204. He further testified that he mentioned to the Defendant that they wanted to buy land and so the Defendant informed him that he had property.
205. It is his evidence that they went to see the land and found a twenty-acre piece of land with nothing on it.
206. It is also his evidence that they were only interested in 4.77 acres and they agreed on the purchase price of Kshs 1,812, 600/=.
207. It is further his evidence that they entered into a sale agreement with the defendant and the first payment was of Kshs 900,000/= was made through a banker's cheque, the second payment was Kshs 300,000/= also made through a through a banker's cheque and a payment of Kshs 100,000/= cash and a third payment for Kshs 200,000/=.



208. He went on to testify that that the court issued an order to stop development and they obeyed the said order adding that subsequently, they saw some buildings on another part of the land. He went on to state that they later gave the Defendant Kshs 20,000/= and have an unpaid balance for Kshs 192,000/=.
209. He further testified that they thought that they should be joined in the suit because before they purchased the suit property, they did a search with showed that the owner of the suit land was George Nganga Maina.
210. It was his evidence that they were not able to get the property transferred to them and that they did not know about the Memorandum of Understanding.
211. It is his further evidence that when they bought 4.77 acres of the suit property, there was no caution registered on the suit land.
212. He testified that paragraph 3 of the Memorandum of Understanding states that each beneficiary was to get 5 acres and that it showed 1.93 Ha was to go to the Defendant. In his view, the Defendant sold his share to them.
213. He also testified that as at the time of his testimony, there are three permanent houses and an ongoing construction on the suit parcel despite there being an order of injunction.
214. He further testified that they have never enjoyed the property and the group has since disintegrated. He prayed that they be granted orders in the counterclaim.
215. It is his evidence that he does not know the Plaintiffs adding that he met them in court for the first time.
216. On cross-examination by counsel for the Plaintiffs, he confirmed that from the search he produced, the property is registered in the name of the Defendant.
217. He also confirmed that he had no proof that there was no caution registered on the suit land adding that after fencing the portion purchased by them, they were served with an order of injunction.
218. He admitted that they are yet to pay Kshs 192,000/= and that they were able to get a Rates Clearance Certificate after entering into the land sale agreement.
219. He also admitted that the transfer was to be done upon payment of the last installment and also admitted that the agreement does not list the completion documents.
220. He further admitted that he has not approached the developer to ask who sold the land to them but only knows that Defendant confirmed having sold the land to other people.
221. On cross-examination by counsel for the Defendant, he reiterated that they have not completed payment explaining that a sum of is Kshs 192,000/= is yet to be paid.
222. He admitted that according to paragraph 4 of his witness statement, he stated that he paid Kshs 1,600,000/= and there was a balance of Kshs 212,600/=.
223. He further admitted that the sale agreement was entered into on 18<sup>th</sup> November, 2011 and for the past eleven years they have not completed paying the purchase price.
224. He confirmed that according to Clause 4 of the agreement, possession was on full payment of the purchase price and further confirmed that according to Clause 2, the balance of Kshs 812,600 was to be paid within six months.
225. He also confirmed that he was not aware that consent of the Land Control Board was to be obtained within six months and that none has been obtained.



226. He further confirmed that he had no evidence of the payment of Kshs 20,000/= as advocate fees and admitted that he did not produce a search certificate.
227. He reiterated that they are not in possession and that there are three permanent houses and one house under construction on the suit land.
228. He also reiterated that he is seeking compensation from the court and added that they also paid Kshs 1,600,000/= as part of the purchase price.
229. He admitted that clause 7 of the agreement provides for breach and further agreed that both parties are in breach of the said agreement.
230. On re-examination, IPI stated that the balance of the purchase price is Kshs 212, 600/= and explained that it was agreed that they would pay the balance upon getting the consent of the Land Control Board.
231. He also stated that according to Clause 7 which is on default, the vendor defaulted first adding that their default is that they did not pay the balance of Kshs 212, 600/= and this was because the defendant did not furnish them with documents necessary to effect transfer.
232. IPI went on to state that when they were buying the property, it was vacant and that the portion they bought is still vacant.
233. He reiterated that his prayer is for compensation from both the Plaintiffs and the Defendant and that the Defendant did not transfer the land because he was served with an injunction.

#### **Issues For Determination**

234. The Plaintiffs filed their submissions on October 27, 2022, the Defendant filed his submissions on January 20, 2023 while the Interested Party filed its submissions on February 1, 2023.
235. The Plaintiffs in their submissions identify the following issues for determination:
  - a. Whether the plaintiffs have proved that the defendant was holding the suit property and Land Reference Number 1556/38 (Title Number LR 39720) in trust for them.
  - b. Whether the plaintiffs are entitled to the reliefs sought.
  - c. Who should bear the costs of this suit.
236. On the first issue, the Plaintiffs submit that their claim is within the provisions of Section 28 of the [Land Registration Act](#) and that customary trusts are overriding interests that subsist on the land and therefore the registration of the Defendant as a proprietor of the land did not preclude the Defendant from holding an interest as trustee of another.
237. The Plaintiffs also submit that PW1 registered the suit property in the name of the Defendant as it is within the Kikuyu customs. They further submit that the Defendant was to hold the suit property in trust for his siblings and that it is only the Defendant who disputed this and started claiming that it was his grandfather who had bought the property for him.
238. The Plaintiffs rely on the case of [Isack Kieba M'inangu Vs Isaaya Theuri M'Lintari & another](#) SCoK No 10 of 2015 in support of their arguments.
239. The Plaintiffs also submit that the Defendant did not produce any evidence to show that his grandfather was a member of Mararo Family Company Ltd.



240. The Plaintiffs further submit that the Defendant's claim that he signed the Memorandum of Understanding under duress does not hold especially in light of the testimony of PW3 who drafted the said Memorandum of understanding.
241. On the second issue, the Plaintiffs rely on the cases of *Sally Jepchumba Samoei & 3 others vs Kimwei Arap Samoei* [2020] eKLR, *Kareu Ndebu vs Ndege Ndebu* [2020] eKLR and submit that they are entitled to the orders sought in their Plaint.
242. The Defendant in his submissions identifies the following issues for determination:
- a. Whether the Defendant is the registered and the legal owner of the suit property and has he demonstrated the process leading to him being the registered owner of the suit property.
  - b. Whether the Plaintiffs have proved the allegation of fraud and/or illegality as against the Defendant.
  - c. Whether there is any trust created as been the Defendant and the Plaintiffs herein.
  - d. Whether the Plaintiffs have demonstrated that they have any legal interest on the suit property.
  - e. Whether the Interested Parties and other innocent third parties who have purchased 12.5 acres of the suit property have any legal interest on the suit property?
  - f. Whether the Plaintiffs are entitled to the reliefs sought?
  - g. Who should bear the costs of this suit?
243. On the first issue, the Defendant submits that during the hearing he demonstrated how he acquired the suit property and that he has always been in possession of it.
244. The Defendant also submits that the Plaintiffs admit that they have never been in possession of the suit property and that there is no evidence that he was holding the suit property in trust for them.
245. On the second issue, the Defendant relies on Sections 24 and 26 of the *Land Registration Act*, the case of *Gichinga Kibutha v Caroline Nduku* [2018] eKLR and submits that the Plaintiffs failed to demonstrate that he has engaged in any fraudulent behavior and that as the registered owner of the suit property, he has the right to sell it to whoever he wishes.
246. The Defendant also relies on the cases of *Kinyanjui Kamau v George Kamau Njoroge* [2015] eKLR, *Kuria Kiarie & 2 Others vs Sammy Magera* [2018] eKLR in support of his argument.
247. On the third issue, the Defendant submits that he had already sold 12 ½ acres of the suit property before the institution of this case and that the purchasers have already taken possession.
248. The Defendant also submits that as the court determines the issues between the Plaintiffs and the Defendant, it should take cognizance of the Interested Parties who had purchased portions of the suit property.
249. The Defendant relies on the cases of *Shimoni Resort v Registrar of Titles & 5 Others* [2016] eKLR, *Samwel D. Omwenga Angwenyi v National Land Commission & 2 Others* [2019] eKLR and submits that the purchasers are innocent purchasers for value without notice and that the interest they hold over the suit property is protected.
250. On the fourth issue, the Defendant submits that no evidence was called to show that the payments made by the Defendant were not made by himself and further that the claim that he was young and



- was not able to pay for the same does not demonstrate that it was the 1<sup>st</sup> Plaintiff that made the said payments.
251. The Defendant also submits that the Plaintiffs ought to have called a witness from the land buying company to give evidence that it was the 1<sup>st</sup> Plaintiff who was making the said payments.
  252. The Defendant relies on the cases of *Susan Nyambura Mwatih v Duncan Kiria Kabete* [2020] eKLR, *Njiru Micheni Nthiga v Governor, Tharaka Nithi County Government & 5 others* [2021] eKLR, *Isack M'inanga Kiebia v Isaaya Theuri M'lintari & another* [2018] eKLR and submits that there was no trust or customary trust created over the suit property as the suit property has never been owned by the 1<sup>st</sup> Plaintiff and neither is it family land.
  253. On the fifth issue, the Defendant submits that the 1<sup>st</sup> Plaintiff claims that he bought the suit property and registered it in his name which claims he has not substantiated.
  254. The Defendant also submits that the 2<sup>nd</sup> to 4<sup>th</sup> Plaintiffs are claiming the suit property on the basis of a Memorandum of Understanding which was revoked a month later.
  255. The Defendant relies on Section 6 of the *Land Control Act* and submits that the Memorandum of Understanding is void because the parties failed to obtain the Land Control Board consent.
  256. The Defendant relies on the cases of *Isaac Ngatia Kihagi v Paul Kaiga Githui* [2017] eKLR and *David Sirona Ole Tukai vs Francis Arap Mugo & 2 Others* [2014] eKLR in support of this argument.
  257. On the sixth issue, the Defendant submits that the Plaintiffs are not entitled to the reliefs sought and their case should be dismissed with costs.
  258. The Interested Party in its submissions identifies only one issue for determination which is whether it is a bonafide purchaser for value without notice flowing from the sale transaction in property measuring 4.77 acres out of LR No 1556/48(Title Number IR 39720).
  259. The Interested Party relies on the Ugandan case of *Katende v Haridar & Company Limited* [2008] 2 E.A 173, the American case of *Fletcher vs Peck* 10 US 87 [1810], Section 26 of the *Land Registration Act* and submits that it carried due diligence and established that the Defendant was the owner of the suit property and it therefore qualifies to be an innocent purchaser for value.
  260. The Interested Party also relies on the cases of *Mary Wagici Kiarie v Samson Muiruri Gaitbingu & another* [2021] eKLR, *Samuel Kamere v Land Registrar Kajiado, Nairobi Court of Appeal, Civil Appeal No 28 of 2005* and submits that the court should make a finding in its favor and dismiss the Plaintiffs case.

### **Analysis And Determination**

261. After considering the pleadings, the evidence and the submissions, the following issues arise for determination:
  - a. Whether the suit parcel was purchased by the 1<sup>st</sup> Plaintiff or by the Defendant's grandfather.
  - b. Whether or not the memorandum of understanding continued to be in force and whether or not parties are bound by it.
  - c. Whether the Defendant is holding land reference number 1556/48 (Title number IR 39720) in trust for the Plaintiffs.
  - d. Whether the Defendant is deserving of the prayers sought in the counterclaim.



- e. Whether this court can and should declare that the Interested Party is bonafide purchasers for value without notice.
- f. Who should bear costs of this suit.

**A. Whether the suit parcel was purchased by the 1<sup>st</sup> Plaintiff or by the Defendant's grandfather.**

262. In civil matters the required standard of proof is proof on a balance of probabilities. Lord Denning in *Miller v Minister of Pensions* [1942] 2 All ER 372 as follows:

“The ..... (standard of proof) ....is well settled. It must carry a reasonable degree of probability..... If the evidence is such that the tribunal can say ‘we think it more probable than not’ the burden is discharged, but if the probabilities are equal, it is not.”

263. Taking all the documentary evidence and testimony into consideration, the question for this court is whether it is more probable than not that the 1<sup>st</sup> plaintiff purchased the suit parcel in the name of the defendant to hold in trust for himself and the other plaintiffs or whether it is more probable than not that the suit parcel was purchased by the defendant's grandfather who in turn gifted it to the defendant, thereby making him a sole owner.

264. As I grapple with this question, I am reminded of the provisions of Section 28 of *Land Registration Act* which provides that overriding interests within the provisions of this Section include trusts. These overriding interests are not ordinarily noted in the register. I am further also reminded that a proprietor's title is defeasible on grounds of trust.

265. It is the Plaintiffs case that the 1<sup>st</sup> Plaintiff purchased the suit property from Mararo Company Family Limited and registered it in the name of the Defendant so that he could hold it in trust for himself, the 2<sup>nd</sup>, 3<sup>rd</sup> Plaintiffs and James Benson Ngugi(deceased).

266. It is also the Plaintiffs case that on 1<sup>st</sup> November 2003, the Plaintiffs and the Defendant entered into a Memorandum of Understanding where they agreed that they would subdivide the suit property into four equal portions.

267. The Plaintiffs allege that the Defendant did not honor the terms of the Memorandum of Understanding but instead sold portions of the suit property to other persons.

268. In support of their case, the Plaintiffs produced the certificate of title for LR No 1556/48(Title Number IR 39720) (Exhibit P1) which shows that the suit property was registered in the name of George Nganga Maina the Defendant on July 9, 1985 and measures 7.716 Hectares.

269. The Plaintiffs also produced an affidavit sworn by the Plaintiff on March 1, 2019 (Exhibit P2) which indicates that his name is Morris Maina Nganga and that he is also known as Moses Maina Nganga.

270. The Plaintiffs further produced a bundle of receipts (Exhibit P3) issued by Mararo Family Co. Ltd to Nganga Maina dated 26<sup>th</sup> February 1985 for Kshs 200, receipt dated October 11, 1984 also issued to Nganga Maina for Kshs 600. Both receipts are issued as payment of a title deed.

271. A receipt dated 3<sup>rd</sup> November 1979 was also produced which is issued to Morris Maina for Kshs 3,900/= for payment of survey. On the face of it there is a breakdown of Kshs 3,900/= as follows:

- a. Morris Maina -Kshs 1900/=
- b. Nganga Maina – Kshs 2000.



272. PW1 produced the original share certificate No 081 (Exhibit P5) issued by Mararo Family Company Limited to Nganga Maina on 31<sup>st</sup> March 1978.
273. A bundle of original receipts (issued on various dates) from Kabete Harambee Secondary School (Exhibit P6) were produced. There is a receipt issued on January 16, 1978 issued to George Nganga Maina for Kshs 200 being payment for school fees, a receipt issued on 16<sup>th</sup> May, 1979 to George Nganga Maina for Kshs 100 being payment for school fees and a receipt issued on 3<sup>rd</sup> May, 1978 issued to George Nganga Maina for Kshs 200/= also for payment of school fees. These were intended to show that the defendant was still in school as at 1979 and had no means of acquiring the suit land. The 1<sup>st</sup> plaintiff has custody of the said school fees receipts.
274. The Plaintiffs also produced the original Memorandum of Understanding (Exhibit P7a) dated 1<sup>st</sup> November 2003 entered into by George Nganga Maina, Loise Wanjiru Maina, James Benson Ngungi and Lucy Njuhi Maina.
275. The terms of the Memorandum of Understanding were that the Defendant, George Nganga Maina was holding land LR No 1556/48 comprised in Title No IR 39720 situated in the South East of Naivasha Town measuring 7.716 Hectares in trust for himself and the second, third and fourth beneficiaries.
276. The other term of the agreement was that the beneficiaries had agreed to subdivide the parcel of land into four equal portions each measuring 1.93 Ha and for each beneficiary to get a portion.
277. The parties to the Memorandum of Understanding agreed that the 1<sup>st</sup> beneficiary who is George Nganga Maina was to pay for all the rates and/or rents payable to the local authority and that the costs of subdivision were to be shared among all the parties to the Memorandum of Understanding.
278. All the parties to the Memorandum of Understanding signed it and their signatures were attested to by P. K Njuguna Advocate (PW3) who also testified and negated the defendants claim that he was coerced into signing the memorandum of Understanding.
279. The Plaintiffs also produced a sketch of the proposed subdivision of the suit property (Exhibit P7(C)) indicating which portion each of the beneficiaries was to get.
280. The Defendant's case on the other hand is that his grandfather bought the suit property for him while he was in school and that he (his grandfather) registered it in his name. It is also the Defendant's case that he took occupation of the suit property and has even sold portions of it to third parties which parties include the Interested Party.
281. The Defendant denies that he is holding the suit property in trust for the 2<sup>nd</sup>, 3<sup>rd</sup> Plaintiffs and James Benson Ngugi (deceased) and states that the suit property has always belonged to him.
282. The Defendant alleges that he was coerced to sign the Memorandum of Understanding and produced the letter dated 1<sup>st</sup> December 2003 written by Mburu F.I & Company Advocates to CM Kamau of Landmark Rift Agencies (Exhibit D3) which states that the Memorandum of Understanding is of no legal consequence for the reason that the document does not indicate how the said beneficiaries arose and further that a registered owner cannot be a beneficiary to his own parcel of land. The letter further denounces the memorandum of understanding and asks the addressee (one C.M Kamau) to desist, stop or cease any proposed sub-divisions of the suit parcel.
283. The Defendant also produced original receipts for payment of rates (Exhibit D6) issued on various dates in 2011 and demands notices for land rent for the suit parcel dated 14/11/87, 9/4/88 and 36/5/11 (Exhibit D7).



284. The Defendant also alleges that after he was issued with a Certificate of title, he gave it to his mother for safe keeping and that when he went to collect it, he was informed that it had been misplaced.
285. The Defendant's evidence is that he reported the fact of loss of the title deed to the police station, he did not have an OB number but gave evidence that the loss was published in Gazette Notice of 18<sup>th</sup> July, 2008 (Exhibit D4) and was subsequently issued with a Provisional Certificate of Title IR 39720 (Exhibit D5).
286. The 1<sup>st</sup> Plaintiff is the father to the 2<sup>nd</sup> & 3<sup>rd</sup> Plaintiffs, the Defendant and James Benson Ngugi(deceased). It is not disputed that the Defendant is the registered owner of Land Reference Number 1556/48 (Title Number IR 39720).
287. From the foregoing, it is evident that the plaintiffs and the defendant have given different accounts on how suit land was acquired and how it came to be registered in the name of the Defendant. The 1<sup>st</sup> Plaintiff claims that he bought the suit property from Mararo Family Company Limited and registered it in the name of the Defendant as his first-born son to hold it in trust for himself and his other children who include the 2<sup>nd</sup> plaintiff, the 3<sup>rd</sup> plaintiff, and James Benson Ngugi(deceased). The Defendant, however, claims that his grandfather bought the suit property for him and registered it in his name.
288. The Plaintiffs in an attempt to explain the circumstances surrounding the registration of the suit parcel in the Defendant's name has produced the following original documents:
- a. The original certificate of title in the name of the defendant. The same was issue on 9/7/1985
  - b. A receipt dated 3<sup>rd</sup> November 1979 issued to Morris Maina for Kshs 3,900/= for payment of survey. On the face of the receipt, the amount is apportioned as follows:
    - i. Morris Maina -Kshs 1900/=
    - ii. Nganga Maina – Kshs 2000.
  - c. Original receipts all in the name of Nganga Maina which bear dates and explanations as follows:
    - i. 8/8/75---- for purchase of land
    - ii. 31/8/75---- for purchase of land
    - iii. 5/10/75----- for purchase of land
    - iv. 7/12/75 ----- for purchase of land
    - v. 1/2/76----- for purchase of land
    - vi. 4/1/76----- for purchase of land
    - vii. 4/4/76..... for purchase of land
    - viii. 6/6/82----- for survey
    - ix. 26/7/83---- for survey
    - x. 11/10/84 ---- for title deed
    - xi. 26/2/85 ---- for title deed
  - d. Original share certificate in the name of the Nganga Maina issued on 31/3/78



- e. Bundle of Receipts issued between 1978 and 1979 from Kabete Harambee Secondary school to show that the defendant was in school when the 1st plaintiff was paying for survey {see (b) above}.
289. The Defendant has not adduced any evidence to show that his grandfather was a member of Mararo Family Company Limited, that his grandfather had shares in the said company, that his grandfather transferred the said shares to the defendant and/or that he caused the suit parcel to be registered in the name of the defendant.
290. The 1<sup>st</sup> and 2<sup>nd</sup> Plaintiff have given evidence that the defendant (George Nganga Maina) was born in the year 1961 and was still in school when he (the 1<sup>st</sup> plaintiff) was making payments to Mararo Family Company Limited in the year 1978 and 1979. He has produced school fees receipts as evidence of this fact (Exhibit P6). This evidence by the plaintiffs remains uncontroverted.
291. The fact that remains undisputed is that the Defendant did not purchase the suit property from Mararo Family Company Limited. From the totality of evidence that has been adduced before this court, it is more probable than not that the 1<sup>st</sup> Plaintiff, Moses Maina Nganga, bought the suit property and registered it in the name of the Defendant.

**B. Whether or not the memorandum of understanding continued to be in force and whether or not parties are bound by it.**

292. The Plaintiffs produced a Memorandum of Understanding dated November 1, 2003 whose contents I have elaborately set out in the preceding paragraphs.
293. Briefly, the memorandum of understanding is dated 01/11/2003 and is between 4 persons including the defendant and PW2. It is drafted in terms that:
- a. The Defendant is the registered owner of the suit parcel.
  - b. The beneficiaries are each entitled to a share in the suit parcel (in equal shares).
  - c. The defendant holds the suit land in trust for himself and the other 3 parties.
  - d. All the parties have agreed to subdivide the suit parcel into 4 equal shares.
  - e. All the parties have identified the portions which each one of them shall take in accordance to the sketch attached and countersigned by all the 4 parties
  - f. The defendant shall pay all rents and rated due on the suit parcel
  - g. The costs of sub-division shall be borne by the four parties equally.
  - h. The process of sub-division shall commence immediately and they have instructed Mr. C.M Kamau to undertake the said work.
294. One month after the drafting and execution of the memorandum of understanding, the Defendant through his Advocate wrote a letter dated 1<sup>st</sup> December 2003 denouncing the contents of the Memorandum of Understanding and asks the addressee (C.M Kamau) to desist, stop or cease any proposed sub-divisions of the suit parcel.
295. The Defendant's testimony in court is that he was coerced into signing the memorandum of understanding. I note, however, that the issue of coercion is not raised in the letter written by his advocate.



296. It is important to point out that the memorandum of understanding for all intent and purpose is an agreement. First, for an agreement to be legally binding it must comprise of certain essential elements pertaining to capacity of the parties, consideration, consensus ad idem, consent, legality of object among others.
297. Secondly, the law acknowledges that there are certain factors that vitiate the binding force of agreements. One of such factors is coercion. The presence of these vitiating factors causes an agreement to be voidable but not void. Such an agreement is voidable at the option of the party whose consent, for example, was not free. Such a party must take certain specific steps to revoke the agreement. This may be by approaching a court of law to make an order declaring the agreement as void.
298. How then does revocation of an agreement occur? The defendant hoped that the letter written by his Advocate on 1/12/2003 and addressed to one C.M Kamau would have the effect of revoking the memorandum of understanding. Revocation of an agreement occurs by performance, by agreement of the parties, by operation of law, by impossibility, by breach of contract or by impossibility. I am unable to bring the reasons offered by the defendant in the letter by his advocate within any of these categories. A court of law would have to pronounce itself on whether such revocation is merited and make an order revoking such agreement unless, of course, the revocation is by consent of the parties.
299. After that slight digression, allow me to go back to the issue of coercion. No evidence was tendered in support of the assertions of coercion. Importantly, PW3, the Advocate who drafted the Memorandum of Understanding, gave evidence that the memorandum was as a result of mutual understanding between the parties. He particularly stated that the Defendant stated clearly that he wanted to share the suit parcel with his siblings. PW3 also expressly stated that in drafting this particular memorandum of understanding, he confirms that there was no coercion.
300. In my view the allegations of coercion are an afterthought. If they were indeed true, then they would have been specifically mentioned in the letter dated 1<sup>st</sup> December, 2003 written by the defendant's advocate.
301. The letter dated 1<sup>st</sup> December, 2003 purporting to denounce and/or revoke the Memorandum of Understanding was not served upon the other parties to the Memorandum of Understanding but was instead addressed to a C.M Kamau of Landmark Rift Agencies. For instance, PW2 stated that she was seeing the said letter for the first time in court, while on the witness stand.
302. Taking into consideration the circumstances surrounding the drafting and the memorandum of understanding and the drafting of the letter dated 1<sup>st</sup> December, 2003, I find that the purported denunciation was improper. It was not communicated to the parties to it, the parties did not consent to such revocation and no court made an order revoking the said Memorandum of Understanding. In my view, the act of revocation cannot be left to the whims of a party to an agreement but must be subjected to a legal process. If left to the whims of the party, it would go against the cardinal principle of the Law of Contract which is to see to it that, that which parties have promised each other under a contract shall come to pass.
303. Consequently, I find that the memorandum of understating continued to be in force and continued to be binding upon all the parties.



**C. Whether the Defendant is holding land reference number 1556/48 (Title number IR 39720) in trust for the Plaintiffs.**

304. Based on my finding that the 1<sup>st</sup> Plaintiff who bought the suit parcel and registered it in the name of the Defendant, the next question is whether Defendant is holding the suit parcel in trust for himself, the 2<sup>nd</sup>, 3<sup>rd</sup> Plaintiffs and James Benson Ngugi(deceased).

305. Section 28 of the [Land Registration Act](#) provides as follows:

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

- (a) spousal rights over matrimonial property;
- (b) trusts including customary trusts;
- (c) rights of way, rights of water and profits subsisting at the time of first registration under this Act;
- (d) natural rights of light, air, water and support;
- (e) rights of compulsory acquisition, resumption, entry, search and user conferred by any other written law; ...

306. In [Dominic Otieno Ogunyo & 2 others v Helida Akoth Walori](#) [2022] eKLR it was held as follows:

17. On the 1<sup>st</sup> issue, it is evident that trusts including customary trusts are recognized as overriding rights within the provisions of Section 28 of the [Land Registration Act](#) and these trusts being overriding rights are ordinarily not noted in the register and therefore a proprietor’s title is defeasible on grounds of trust...

19. It is settled law that to prove a trust in land; one need not be in actual physical possession and occupation of the land. This was the position upheld by the Supreme Court of Kenya in the case of [Isack M’inanga Kiebia v Isaaya Theuri M’Lintari & another](#) [2018] eKLR. The question that then arises is whether the plaintiff discharged the burden that the appellant held a portion of the suit property in trust for the him.

20. It is trite law that a party who alleges customary trust must prove that it was the intent of the parties or family members that the parcel of land would be registered in trust for other family members and once this onus is discharged, then the court would render its decision on the intent. It is never the duty of the court to infer trust. A determination on the existence of trust is on a case by case basis and the Supreme Court settled the guiding principles of customary trust in the case of [Isack Kieba M’Inanga Vs Isaaya Theuri M’Lintari & Another](#) SCoK No 10 of 2015 where it held thus;

“Each case had to be determined on its own merits and quality of evidence...Some of the elements that would qualify a claimant as a trustee were:(a) The land in question was before registration, family, clan or group land, (b) The claimant belonged to such family, clan,



or group, (c)The relationship of the claimant to such family, clan or group was not so remote or tenuous as to make his/her claim idle or adventurous. (d)The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances. (e)The claim was directed against the registered proprietor who was a member of the family, clan or group”

21. 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.

307. The court in the case of *Peter Gitonga v Francis Maingi M'ikiara* [2007] eKLR also held as follows:

14. 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.” See HCCC 1400 of 1973 as quoted in *Mwangi vs Mwangi* [1986] KLR 328 at 332, by Shah J.A.

15. In *Mwangi* (supra), the situation was similar to the one obtaining here because the Defendant was eight (8) years old when his father registered the land in his name and it was held that there was a trust intended and he held the trust for his brother in equal shares. It was held as specifically as follows:

“1. In accordance with the provisions of the Registered *Land Act* sections 28 and 30, the defendants registered interest in the suit land was subject to the overriding interests of the Plaintiffs as persons in possession and occupation of the land without legal title. The plaintiff’s equitable rights were binding on the land and the land was subject to those rights when it was registered in the defendant’s name.”

16. The holding in the *Mwangi* case holds true in this case and there was no need for the words “trustee” to have been inscribed on the Defendant’s title for the trust to be recognizable...”

308. As was held in the case of *Peter Gitonga v Francis Maingi M'ikiara* (supra) a “trust” can be created under customary law and the circumstances surrounding registration must be looked at and taken into account by a court in determining the purpose of the registration.

309. In the present matter, it is evident and I have found that the 1<sup>st</sup> Plaintiff bought the suit property and registered it in the name of the Defendant. The 1<sup>st</sup> plaintiff has produced a bundle of documents which I have set out in paragraph 288 above.

310. On scrutinizing these documents and particularly the receipt issued on 3/11/79 - Exhibit P2(a), it is evident that as at the time the 1<sup>st</sup> Plaintiff was making payments for the purchase and survey of the suit land, the defendant was in school - Exhibit P6 (a)(b)(c). The 1<sup>st</sup> Plaintiff in re-examination explained



that he bought 40 acres of land and Exhibit P2(a) is indicative of his 2 shares. It is logical to deduce that the said payments were made by the 1<sup>st</sup> Plaintiff for land intended to be registered in his name and in the name of the Defendant

311. Subsequently, the 1<sup>st</sup> Plaintiff made payments for processing of title deeds vide receipts dated 11/10/84 and 26/2/85. A certificate of title was issued in the name of the 1<sup>st</sup> Defendant on 9/7/1985.
312. Several years after this registration, the 1<sup>st</sup> Plaintiff continued to hold the original certificate of title and in the year 2003 chaperoned the signing of a memorandum of understanding to set in motion the process of sub division to make good his intention to have his other children get shares of the suit parcel.
313. I have no doubt, flowing from documents produced and testimony of witnesses setting out the circumstances surrounding the registration of the suit parcel in the name of the 1<sup>st</sup> defendant that indeed the 1<sup>st</sup> Plaintiff had every intention that the Defendant, in whose name the suit property is registered, would hold it in trust for himself and the 2<sup>nd</sup>, 3<sup>rd</sup> Plaintiffs and James Benson Ngugi(deceased).

#### **D. Whether the Defendant is deserving of the prayers sought in the Counterclaim.**

314. The defendant in his Amended Defence and Counterclaim prays for judgment in the following terms:
  - a. That the Plaintiffs suit against the Defendant be dismissed.
  - b. That this honorable court be pleased to declare that a Memorandum of Understanding entered into between the Plaintiffs and the Defendant on 1/11/2003 in which the Defendant undertook that he holds land known as LR No 1556/48 (title No IR 39720) in trust for himself and the Plaintiffs void.
  - c. That this honorable court be pleased to declare that the defendant is the absolute owner of land known as LR No 1556/48 (title No IR 39720) and by virtue of his registration as such, the same cannot be defeated by the plaintiffs.
  - d. A perpetual order upon the plaintiffs requiring them from entering, claiming, occupying or otherwise dealing in other way with land known as LR No 1556/48 (Title No IR 39720).
  - e. Costs of the suit.
315. Having found that the registration of the Defendant as the proprietor of the suit land was intended that he holds it in trust for himself, the 2<sup>nd</sup>, 3<sup>rd</sup> Plaintiffs and James Benson Ngugi(deceased) and also having also found that the Memorandum of Understanding is valid and legally binding, I find, invariably, that the Defendant's Counterclaim dated 24<sup>th</sup> May 2012 lacks merit and is hereby dismissed.

#### **E. Whether this court can and should declare that the Interested Party is bonafide purchaser for value without notice.**

316. The Interested Party claims that it is a bonafide purchaser for value without notice. It urges this court to find that the defendant is the absolute proprietor of the suit parcel and by virtue of that proprietorship he had capacity to enter into any dealings in respect of the suit parcel.
317. In my introductory paragraphs, I noted that the Interested Party joined this suit vide an application dated 30/4/13 which was allowed on 3/10/13 by consent.
318. I have also noted, from the court record, that my brother Justice Sila Munyao delivered a ruling on 22/6/17 in which ruling he dismissed an application by Kamwonjo Self-help Group to be joined to



these proceedings. In doing so, the Learned Judge stated that this suit is meant to determine whether or not the defendant holds the suit parcel in trust for the plaintiffs or whether he is an absolute owner. He goes on to state that he does not see how the joinder of the said group would help in determining this question.

319. The Learned Judge goes on to state that if the intention of the applicant is to enforce the agreement, then it can file a separate suit.
320. The Learned Judge further observes that the Interested Party herein joined the suit by consent and that if it were left for him, he would not have allowed them as they are incapable of aiding the court in determining the question of existence or otherwise of a trust as between the plaintiffs and defendant.
321. The Supreme Court in the case of *Francis Kariuki Muruatetu & another v Republic & 5 others* [2016] eKLR held as follows:

...any party seeking to join proceedings in any capacity, must come to terms with the fact that the overriding interest or stake in any matter is that of the primary/principal parties before the Court. The determination of any matter will always have a direct effect on the primary/principal parties. Third parties admitted as interested parties may only be remotely or indirectly affected, but the primary impact is on the parties that first moved the Court. This is true, more so, in proceedings that were not commenced as Public Interest Litigation (PIL), like the proceedings now before us.

(42) Therefore, in every case, whether some parties are enjoined as interested parties or not, the issues to be determined by the Court will always remain the issues as presented by the principal parties, or as framed by the Court from the pleadings and submissions of the principal parties. An Interested Party may not frame its own fresh issues, or introduce new issues for determination by the Court. One of the principles for admission of an Interested Party is that such a party must demonstrate that he/she has a stake in the matter before the Court. That stake cannot take the form of an altogether a new issue to be introduced before the Court. (Emphasis is mine)

322. In the same breath, I am of the view that the dispute herein pertains to the existence or otherwise of a trust. The Interested Party hoped for a determination on the question of innocent purchaser for value without notice. This is a new issue. As was observed by My brother Hon. Justice Munyao, had it not have been for the consent allowing the Interested Party herein to be part of these proceedings, he would have declined to join them in this suit. I hold a similar view.
323. Nevertheless, the Interested Party is here and without pleadings seeking specific prayers or disclosing any claim against the plaintiffs or defendant. This Court cannot and shall not issue any orders in its favour. Needless to say, submissions are not pleadings. The only thing that the Interested Party has filed in this suit are submissions. Consequently, I decline to make any finding on this question.

#### **F. Who shall bear the costs of this suit?**

324. On the issue of costs, *Halsbury's Laws of England*, 4<sup>th</sup> Edition (Re-issue), [2010], Vol10 para 16, notes that:

“The court has discretion as to whether costs are payable by one party to another, the amount of those costs, and when they are to be paid. Where costs are in the discretion of the court, a party has no right to costs unless and until the court awards them to him, and the court has



an absolute and unfettered discretion to award or not to award them. This discretion must be exercised judicially; it must not be exercised arbitrarily but in accordance with reason and justice”

325. Further Section 27 (1) of the Civil Procedure Act stipulates as follows:

“

“(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that that court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers.

Provided that the costs of any action, cause or other matter shall follow the event unless the court or judge shall for good reasons otherwise order.”

326. I noted in the preceding paragraphs that the 1<sup>st</sup> Plaintiff is the father of the Defendant and the other Plaintiffs and Defendant are siblings. Based on these relationships and in order that parties forge better relations, I will make no order as to costs.

### **Determination**

327. In the result, I find that the Plaintiffs have proved their case on a balance of probabilities and I hereby enter judgement in their favour in the following terms:

- a. A permanent injunction is hereby issued against the Defendant restraining him by himself and/or through his agents and/or employees from subdividing, selling, disposing off and/or in any other manner whatsoever dealing or interfering with Land Reference Number 1556/48 (Title Number IR 39720) in Naivasha Town other than in accordance with the terms of the Memorandum of Understanding executed and dated November 1, 2003.
- b. An order is hereby issued compelling the Defendant to immediately subdivide Land Reference Number 1556/48 (Title Number IR 39720) in Naivasha Town into four equal parcels (as set out in the sketch attached to the Memorandum of Understanding) and to transfer a parcel each to George Nganga Maina, Loise Wanjiru Maina, Lucy Njuhi Maina and Jane Mukami Ngugi in her capacity as the personal representative of the estate of the late James Benson Ngugi and keep one for himself.
- c. Each party shall bear own costs.

328. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 3<sup>RD</sup> DAY OF JULY 2023.**

**L. A. OMOLLO**

**JUDGE**

In the presence of: -

Miss Chepngetich for the Plaintiffs.

Miss Karanja for the Defendant.



Mr. Kariuki for Karanja Mbugua for the Interested Party.

Court Assistant: Ms. Monica Wanjohi.

