



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT CHUKA

CHUKA ELC CASE NO. 15 OF 2018

DIONECIA CIANDEKE.....PLAINTIFF

VERSUS

NDURURU NYAGA.....DEFENDANT

JUDGMENT

1. The Judgment in this matter was to be delivered on **24th March, 2020**. This could not be done because of complications brought about by the Corona Virus Crisis. Upon issuance of the apposite notice to the parties, the Judgment will be delivered in open court today. This is because this court lacks the necessary technological facilities to deliver the Judgment electronically. However, all precautions have been taken to ensure compliance with all measures necessary to obviate the spread of the Corona 2019 virus.

2. The plaintiff Dionecia Ciandeke prays for judgment against the defendant in this case in the following terms:

- a) A permanent injunction restraining the defendant by himself or by his servant agent or employees from registration alienating, transfer or in any other dealing whatsoever which may prejudice the plaintiff's interest over Karingani/Ndagani/294 & 1046 and or their subsequent subdivisions.
- b) A declaration that the plaintiff is entitled to one-half share of 5.4 Ha. Karingani/Ndagani/294, 1.0 Ha Karingani/Ndagani/1046 and or their subsequent subdivisions situated in Chuka held by the defendant and that the defendant is trustee thereof of the plaintiff.
- c) An order that the defendant do subdivide the said piece of land and transfer to the plaintiff one-half portion thereof.
- d) An order that the defendant execute the necessary transfer forms to effect transfer of one half share of the suit lands to the plaintiff.
- e) An order that should the defendant fail to sign the transfer forms Deputy Registrar of this court be authorized and directed to execute the same in favour of the plaintiff.
- f) An order revoking cancelling and or deleting the names of the defendant as registered proprietor of Karingani/Ndagani.294, replace the said defendant with the names of the plaintiff and declare the registration entered in 1994 as fraudulent.
- g) Costs of this suit and interest at court rates.

3. PW1, Dionecia Ciandeke, told the court that the defendant Ndururu Nyaga, was her brother's son. She said that her brother was called Njeru Nyaga Itugura and that she and him shared the same father. She was unequivocal that the suit lands parcel Nos. Karingani/Ndagani/294 and 1046 were ancestral lands for which she was entitled to half share as he represented her mother, Ciamwone's house, as his father had 2 wives.

4. During cross-examination PW1, denied knowledge that parcel No. Karingani/Ndagani/294 was no longer in existence as it had been subdivided and parts thereof sold. She also denied knowledge that subdivisions thereof were done in the year 2012. Even when shown her exhibit No. 2, the Green card, that showed that Parcel No. Karingani/Ndagani/294 was closed in 2012, PW1 remained silent.

5. Later on during cross-examination PW1 admitted that she knew that parcel No. Karingani/Ndagani/294 had been subdivided and sold to new owners. She, however, insisted that she was not aware that the land had been subdivided into parcel numbers 11821 and 11822 when she filed this case. Obviously, the exhibits she had filed showed otherwise. She went on to tell the court that she was not aware of the succession cause that led to the defendant being registered as owner of the suit lands. She also admitted that part of the suit lands had been sold by the

defendant's father to third parties before his demise. Later on, PW1 admitted that Parcel No. Karingani/Ndagani/294 had been subdivided to spawn members 4204 to 4208 before she filed this suit and that in particular parcel No. 4204 had been registered in the name of Micheni Jamleck Muthuri before this suit was filed.

6. In further cross-examination PW1 admitted that Parcel No. Karingani/Ndagani/9555 had been sold and registered in the name of Alfred Mugambi Njue.

7. PW1 denied that after filing this suit she had misled the court into granting her injunctive orders which affected persons who were not enjoined in this suit. She contradicted herself by saying that she did not know at that time that the suit lands had been sold to third parties contrary to her earlier evidence. Told that she did not know about this case because she was merely being used by other parties, she denied this suggestion. Asked if she recalled that after she obtained injunctive orders, she extracted and served upon the Land Registrar, Chuka a distorted and fraudulent order, her answer was: "***I never did that.***" PW1 was unequivocal that she was not aware of the forged injunctive orders.

8. To put matters into their proper perspective, I reproduce in full herebelow this court's ruling delivered on **17th December, 2019** which contained the apposite injunctive orders:

RULING

1. This application is dated 13th December, 2018 and seeks orders:

1. That this application be certified as urgent and its service be dispensed with in the first instance.
2. That the honourable court be pleased to grant temporary orders of injunction restraining the defendant/respondent his agents, employees and or servants from selling, transferring or however disposing off that parcel of land known as Karingani/Ndagani/294 or its subsequent sub divisions known as Karingani/Ndagani/4204, 4205, 4206, 4207, 4208, 9554, 9555, 9556, 9557, 9558, 9559, 9560, 9561, 9562, 9563, 9564 & 9565 and Karingani/Ndagani/1046 and any subsequent subdivisions (hereinafter referred to as the 'property' pending the hearing and determination of this application.
3. That the defendant/respondent his agents, employees and or servants be restrained by a permanent injunction from selling, transferring or however disposing off that parcel of land known as Karingani/Ndagani/294 or its subsequent subdivisions known as Karingani/Ndagani/4204, 4205, 4206, 4207, 4208, 9554, 9555, 9556, 9557, 9558, 9559, 9560, 9561, 9562, 9563, 9564, & 9565 and Karingani/Ndagani/1046 (hereinafter referred to as the 'property') pending the hearing and determination of the main suit.
4. That costs of this application be provided for.

2. The application has the following grounds:

- a) That the suit properties being parcel of lands known as Karingani/Ndagani/294 or its subsequent sub divisions known as Karingani/Ndagani/4204, 4205, 4206, 4207, 4208, 9554, 9555, 9556, 9557, 9558, 9559, 95560, 9561, 9562, 9563, 9564, 9565 and Karingani/Ndagani/1046 is (sic) at risk of being sold by defendant/respondent to the detriment of the plaintiff/applicant as they are Trust lands.
- b) That sometimes in 1994 the defendant/respondent, fraudulently, illegally, un-procedurally, through a corrupt scheme, caused Karingani/Ndagani/294 to be registered in his names.
- c) That the properties forms (sic) part and parcel of Trust properties and there is a real danger of her property being sold by the defendant/respondent herein pending the hearing and determination of this application and the main suit. Should the defendant not be restrained from selling, transferring or howsoever disposing the property.
- d) That the plaintiff/applicant has an arguable case with a high probability of success.
- e) That it is the wider interest of justice that the orders sought herein be granted.

3. The application is supported by the affidavit of Dionezia Ciandeke sworn on **13th December, 2018** which states:

I, DIONEZIA CIANDEKE a resident of Chuka and of Post Office Box 15-60400 Chuka in the Republic of Kenya do hereby make oath and states as follows:

1. That I am an adult female of sound mind and the plaintiff/applicant herein thus competent to swear this affidavit.
2. That I am the daughter of one Nkoroi M'Makanya born of his wife one joyce Ciamwonge. Nyaga Nkoroi alias Njeru Nyaga Itugura the step-father to the defendant is my elder half brother born of my father's 1st wife one Ciankuga Nyaga.
3. That my father married my mother after the death of his 1st wife, and it is her who gathered and walked the boundaries of the suit-lands in their original form to wit L.R.Karingani/Ndagani/294 & 1046. My mother was aided by father's clan Ibiga

Na Thona, since women did not own identity cards, my mother caused the said land to be registered in the names and aliases of my half brother who resided in Embu with his two wives in the year 1976.

4. That the suit land Karingani/Ndagani/294 was my father's matrimonial home, it is where my parents are buried, it is the place I was born and grew up calling home and my nieces and nephews claiming through me live on the aforesaid parcel of land.

5. That the defendant who never set foot in our land and being the step son to my brother, fraudulently caused his name to be registered as owner of L.R. Karingani/Ndagani/294 in the year 1994, claiming that the initial name of registration Njeru Nyaga was his common name which claim was fraudulent, unbelievable and intended to hoodwink as the name was his step father's moniker given to my half brother by my mother who bore no sons and who caused the said entry into the register (A copy of the green card is hereto attached and marked 'd c1').

6. That to further prove that the defendant is a fraudster in originating summons No. 127 of 1996 at the High Court in Meru, the defendant swore an affidavit clearly indicating that Njeru Nyaga was a stranger to him and correctly referred to himself as Ndururu Nyaga. (A copy of the green card is hereto attached and marked 'D C2').

7. That I will be disinherited and with no place to reside on by other dependants of the suit land if the orders sought herein are not granted as the defendant is hell bent on selling off the parcel herein.

8. That no prejudice will be occasioned to the defendants/respondents (sic) if the orders sought herein are granted.

9. That I have an arguable case with a high probability of success.

10. That I stand to suffer irreparable loss and damage if the suit lands are not inhibited and the suit will be rendered merely academic and overtaken by events should the defendants/respondents not be restrained from offering for sale or howsoever disposing off or transferring the said property to a third party.

11. That the intention of the registration by my mother was for customary trust with intergenerational Equity in mind.

12. That what is deponed herein is true to the best of my knowledge, information and belief.

4. Having perused the pleadings I find that the applicant has established an arguable basis for the granting of prayer 2 in the application. This court's recess will commence in a few days. Thereafter, the judge will be on leave until 20th March, 2018. It is important to preserve the suit property. Therefore, prayer 2 will be granted in the interest of justice, in accordance with section 63 (e) of the Civil Procedure Act. The matter will not be certified urgent BUT will be heard on priority basis.

5. I issue the following orders

a) Matter is **NOT** certified urgent but will be heard on priority basis.

b) Prayer 2 is granted in terms of section 63(e) of the Civil Procedure Act pending hearing of this application and an order of inhibition is issued against all the parcels of land mentioned in prayer 2.

c) The application is to be properly served upon the defendant.

d) The application is to be **heard on 2nd April, 201**

6. It is so ordered.

Delivered in open Court at Chuka this **17th day of December, 2018** in the presence of:

CA: Ndegwa

Kirimi for the plaintiff

P.M. NJOROG

JUDGE

9. The contrived and shamelessly forged order PW1 served upon the Land Registrar, Chuka reads as follows:

IN COURT ON 17TH DECEMBER, 2018 BEFORE

HON. JUSTICE P.M. NJOROG

ORDER

APPLICATION FOR:

1. That this application be certified as urgent and its service be dispensed with in the first instance.
2. That the honourable court be pleased to issue an order revoking, cancelling and or deleting the names of the defendant from the register of the land registry Meru South as registered proprietor/owner of L.R.Karingani/Ndagani/294 and its subsequent subdivisions and substitute the same with the names Dionecea Ciandeke pending the hearing and determination of the main suit.
3. That the honourable court be pleased to grant temporary orders of injunction restraining the defendant/respondent his agents, employees and or servants from selling, transferring or however disposing off that parcel of land known as Karingani/Ndagani/294 or its subsequent sub divisions known as Karingani/Ndagani/4204, 4205, 4206, 4207, 4208, 9554, 9555, 9556, 9557, 9558, 9559, 9560, 9561, 9562, 9563, 9564 & 9565, and Karingani/Ndagani/1046 and any subsequent subdivisions (hereinafter referred to as the “property” pending the hearing and determination of this application).
4. That the defendant/respondent his agents, employees and or servants be restrained by a permanent injunction from selling, transferring or however disposing off that parcel of land known as Karingani/Ndagani/294 or its subsequent sub divisions known as Karingani/Ndagani/4204, 4205, 4206, 4207, 4208, 9554, 9555, 9556, 9557, 9558, 9559, 9560, 9561, 9562, 9563, 9564 & 9565 AND Karingani/Ndagani/1046 (hereinafter referred to as the “property”) pending the hearing and determination of the main suit.
5. That costs of this application be provided for.

UPON READING the application presented to this court on 17th December, 2018 AND **UPON READING** the supporting affidavit of Dionecea Ciandeke sworn on 13th December 2018 and upon hearing the counsel for the applicant;-

IT IS HEREBY ORDERS:

1. That the honourable court does not certify this matter as urgent but the same to be heard on a priority basis.
2. That the honourable court hereby issues in terms of section 63(e) of the Civil Procedure Act, an order revoking, cancelling and or deleting the names of the defendant from the register of the Land Registry Meru South as registered proprietor/owner of L.R.Karingani/Ndagani/294 and its subsequent subdivisions and substitute the same with the names Dionecea Ciandeke pending the hearing and determination of the main suit.
3. That the application to be properly served upon the defendant.
4. That the application to be heard on the 2nd April, 2019.

GIVEN under my hand and seal of this honourable court in open court this 17th day of December, 2018.

P. M. NJOROGE.

E. L. C. JUDGE

ISSUED at Chuka this 18th day of December, 2018

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DEPUTY REGISTRAR,

HIGH COURT OF KENYA – CHUKA.

10. The effect of the forged order No. 2 was to dispose of this case before it was even heard. Fortunately, this nefarious scheme was arrested before it was executed. Clearly, the plaintiff had mischievously and nefariously misled an officer of this court into signing the said order.

11. PW1 told the court that she knew Alexander Nyaga who was the son of her brother. She also told the court that she knew Martin Mugambi who was present in court and was the 1st plaintiff in Chuka ELC No. 115 of 2017 which was dismissed by this court on 14th November, 2018 on account of the finding that the plaintiff had not obtained the suit land through the doctrine of adverse possession. PW1 also told the court that Agnes Mwimbi who was the 2nd plaintiff in Chuka ELC No. 115 of 2017 was her daughter. She denied knowledge that Martin Mugambi and Agnes Mwimbi, her close relatives had sued the defendant in Chuka ELC No. 115 of 2017 and had lost. She denied knowledge of having been served with documents concerning Meru HCCC No. 60 of 2009(OS). She went on to say that this suit upon transfer to Chuka had become Chuka ELC No. 115 of 2017. She went on to say that she did not know what her grandson Martin Mugambi and her daughter Agnes Mwimbi were claiming in Chuka ELC No. 115 of 2009. PW1 also denied knowledge that her grandson

Albert Samuel Njue had filed OS No. 127 of 1996 before the High Court at Meru. PW1 also denied that her daughter Agnes Mwimbi had filed an application dated 13th May, 1997 to be enjoined in that suit. She denied the defendant's advocate's assertion that she was feigning not to have answers concerning various questions because she wanted to present herself as an independent claimant vis-a-vis the plaintiffs in Chuka ELC 115 of 2017 who were close relatives.

12. PW1 could not explain if she lived on both the suit lands. During re-examination by Mr. I. C. Mugo, her advocate PW1 told the court that she was aware that Martin Mugambi, Agnes Mwimbi and Albert Samuel Njue had filed various suits at Meru. This was contrary to her earlier evidence when she had said that she had no knowledge of such cases.

13. PW2 Albert Njoka Mutera testified she was a child of Nkoroi M'Makanya who had 2 wives: Ciankombo and Joyce Ciamwonge who was the mother of Dionezia Ciandeke, the plaintiff. He went on to tell the court that the suit land was gathered by Joyce Ciamwonge but she could not be registered as proprietor as in those days women had no identification cards and therefore were not being registered as land owners.

14. PW2, told the court that she supported the plaintiff's claim because she was the daughter of Nkoroi M'Makanya who was the ancestral owner of the suit land. He told the court that he did not know when the plaintiff got married and made it clear that the plaintiff was older than him by many years. When asked how he could testify that the plaintiff was born on the suit land when he was many years younger than her, PW2 could not give a satisfactory answer. PW2 admitted that ancestral land belonged to clans and admitted that he belonged to another clan and that the plaintiff was his mother's sister. He admitted that every clan had its list of members.

15. The court noted that PW2 was being evasive on several occasions. Shown records concerning Meru HCCC 127 OF 1996, PW2 denied knowledge that Agnes Mwimbi and Samuel Njue had sought orders concerning the same suit land. He gave rather garbled evidence concerning if or if not the plaintiff occupied the suit land. He admitted that some portions of the suit land had been subdivided and been sold to new owners. He was unequivocal that the new owners were in occupation and cultivated the suit land.

16. DW1, Ndururu Nyaga, the defendant told the court that he did not know the plaintiff, adding that he had only seen her in court. It was his evidence that Land Parcel No. Karingani/Ndagani/1046 belonged to his father and that it was sold to 3 individuals. He denied the claim that when Parcel No. 294 was registered in his name he had cheated the Land Control Board. He told the court that it devolved to him through a succession cause. DW1 was unequivocal that the suit lands were not ancestral land but went on to say that they were gathered by his father. He told the court that he could not agree with the assertion that women could not be registered as land owners during the adjudication process but added that the plaintiff's mother could not be registered as owner of the suit lands because they did not belong to her. He was unequivocal that the plaintiff had not cultivated any part of the suit land. He was also unequivocal that land parcel No. Karingani/Ndagani was sold by his father and that he only transferred it to the purchasers after it had devolved to him through a succession cause. He also told the court that he had subdivided land parcel No. Karingani/Ndagani/294 to parcel numbers 4202 to 4208 and had subsequently disposed of parcel numbers 4202 to 4207. He then had subdivided Parcel No. 4208 to 11 parcels out of which he had sold 4 parcels.

17. DW2, Mbaka Ntutua told the court that he was a neighbour to the defendant's land parcel No. Karingani/Ndagani/294 since the land demarcation process. He told the court that he had never seen the plaintiff Dionezia Ciandeke cultivating parcel No. 294. He further testified that when land adjudication took place in the late 1960's he was in his thirties.

18. DW2 told the court that the defendant Ndururu Nyaga got the suit lands because that was the wish of his father. He testified that he never saw the plaintiff's grandfather and could not say how many wives he had. He went on to say that the plaintiff's mother Ciamwonge was the 1st wife of Nkoroi, the claimed putative father of the defendant. He was unequivocal that Land Parcel Numbers Karingani/Ndagani/294 and 1046 devolved to the defendant through his father Nkoroi who had got the land from the clan. He was insistent that the plaintiff, Ndururu Nyaga, was never given the suit lands to hold them in trust for anybody else.

19. Upon closure of their respective cases, the parties filed written submissions.

20. The plaintiff's written submissions are reproduced in full herbelow without any alterations whatsoever, including correction of spelling or any other mistakes.

PLAINTIFFS FINAL SUBMISSIONS

1. Your lordship these are the plaintiffs' final submissions. With these submissions we will be out to show that land parcels LR:KARINGANI NDAGANI/294 and 1046 were ancestral and or family land and whoever held the land at any time held the same in trust for the family tree. We will demonstrate that the plaintiff is a cousin to the defendant with origins from Nyaga Nkoroi the original owner of LR:Karingani/Ndagani/294 and LR:Karingani/Ndagani /1046. We admit the two parcels of land have been subdivided and some disposed but we submit that through the doctrine of tracing the defendant can still discharge the trust in which he held the two parcels of land and give the plaintiff a place to cultivate and reside.

2. From the pleadings statements and oral evidence by the plaintiff her claim to the defendant is that of trust. She pleaded and testified that land parcels LR:Karingani/Ndagani /294 and LR:Karingani/Ndagani /1046 can be traced back to Nyaga Nkoroi. Nyaga Nkoroi died before adjudication. Nyaga Nkoroi had two wives namely Ciankombo and Ciamwonge. Ciankombo died before adjudication during the adjudication process of the suitland it was Ciamwonge who was alive, She walked the boundaries of LR:Karingani/Ndagani 294 and LR:Karingani/Ndagani /1046 but due to cultural taboos that as of then women could not be registered with land she caused parcel no LR:Karingani/Ndagani /294 and LR:Karingani/Ndagani /1046 to be registered under the name of njeru nyaga nkoroi. nyaga nkoroi was the father of ndururu nyaga the defendant herein.

3. Fraudulently and dishonestly the defendant changed the registered owner of parcel LR:Karingani/Ndagani /294 of Njeru Nyaga Nkoroi to Ndururu Nyaga. In the pleadings the defendant says that ndururu nyaga is one and the same person with Nyaga Nkoroi. On

cross examination he told the court that he was known by on name ndururu nyaga.The defendant's witness DW2 contradicted the defendant who testified that Ndururu Nyaga was also called njeru nyaga.We submit that the manner in which Ndururu Nyaga became registered with parcel LR:Karingani/Ndagani /294 was fraudulent and did not get a good title.Consequently he did not pass a good title to those he transferred the resultant parcels of LR:Karingani/Ndagani /294.

4. The plaintiff claims land from the defendant under customary trust. We submit that the days of eshiroyo and versus eshiroyo are over.A customary law trust is now recognized by law see section 28(b) of the registration of land act 2012 but of course a customary law trust is a question of fact which must be proved as with evidence .in this case having established the family tree of the plaintiff it is clear that the defendant (though he obtained registration of parcel LR:Karingani/Ndagani /294 fraudulently and dishonestly the said land formed part of nkoroi's land the grandfather of the defendant.Although the defendant denied knowing ciamwonge as the second wife of Nkoroi his denial was a mere denial or the same is explained by the fact that he was born in Nguvu in Embu County and stayed there for 100 years to date.DW2 the defendant witness contradicted the defendant when he told the court that he knew Joyce Ciamwonge as a wife of Nkoroi when on the other hand the defendant was categorical that he never knew the said Joyce Ciamwonge the second wife of Nkoroi.We submit further your lordship that customary law trust is an overriding interest which need not be noted in the register.A case with almost similar facts as the instant one is that of civil appeal no 43 of 2013 sitting at Nyeri of Erika Gathoni Kariithi and Tersei Mumbi Kariithi versus Charles Ngatia Nguyo at paragraph 9 and 10 of the judgement the court of appeal pronounced itself that the registered proprietor of the suitland held the same in trust for the benefit of the family.There was nothing on the register showing the existence of a customary law trust.

5. We have pointed out supra that the defendant did not acquire LR: KARINGANI/NDAGANI/294 and LR:Karingani/Ndagani /1046 by purchase or gift.the defendant got registered with the 2 parcels and from his father nyaga nkoroi who in turn had gotten the said lands from nkoroi the grandfather of the defendant.In such circumstances it is clear that he did not own the land absolutely.The fact that members of the family and in particular Joyce Ciamwonge second wife to the defendant's grandfather requested to be enjoined in civil suit no 127 of 1996(OS) AND chuka ELC CASE NO 115 of 2017(OS) formerly ELC CASE NO 100 of 2009 although dismissed) is a clear indication that there was a customary law trust existing between the defendant and the extended family.The two high court cases,(although dismissed) confirms that there were members of the family that had interest over LR:Karingani/Ndagani /294 and LR:Karingani/Ndagani /1046.we submit that this was the finding and holding of the judges in civil appeal NO 43 of 2013 quoted supra.We urge the court to make a finding and hold that the defendant held parcel no 294 and 1046 in trust for the benefit of the entire lineage of nkoroi the grandfather of the defendant.We are minded that parcel number 1046 was subdivided into 2 parcels and the two parcels transferred to third parties by the defendant .the defendant told the court that the 2 parcels of land were sold by his father.Admittedly there are consents on the defendant's list of documents(no 1 and 2) from the land control board whereby the defendant's father nyaga nkoroi was allowed to transfer 1046 to mbaka njagi and chiankoroi njagi.What is interesting regarding this consent is that nyaga nkoroi was not transferring subdivisions of 1046.He was transferring land to 2 persons but each getting his own land.we submit that it was the defendant who subdivided LR:Karingani/Ndagani /1046 and sold it to the current registered proprietors.The defendant has acted in bad faith in all transactions dealing with land parcels LR:Karingani/Ndagani 294 and LR:Karingani/Ndagani /1046.Probably he did so because he knew the land was not his absolutely.After subdividing LR:Karingani/Ndagani /294 into LR:Karingani/Ndagani /4208 the defendant sold and transferred LR:Karingani/Ndagani /4208 to LR:Karingani/Ndagani /4207.The defendant then embarked on subdividing LR:Karingani/Ndagani /4208 into 11 resultant parcels to wit LR:Karingani/Ndagani /9554,9555,9556,9557,9558,9559,9560,9561,9562,9563,9564 and 9565.The defendant then sold and transferred LR:Karingani/Ndagani /9554,9555,9556 and 9565 to the current registered proprietors.The defendant is now the registered proprietor of all other subdivisions of karingani/ndagani/208 which are LR:Karingani/Ndagani /9556,9557,9559,9560,9561,9562,9563,9564.These parcels of land are ancestral and or family land and subject to the customary law trust.The defendant cannot be said to be the absolute owner of these parcels of land.The extended family of Nyaga Nkoroi have a right to benefit from these parcels of land.The defendant on the other hand is selfish and he wants to own on the purposes of disposing all the parts of the family land.AS pointed out supra we urge the court to apply the doctrine of tracing and make a finding and hold that the parcels of the land aforesaid in the name of the defendant(subdivisions of karingani/ndagani/4208 are held by the defendant in trust for the benefit of the entire lineage (family tree of Nkoroi Nyaga the grandfather of the defendant.

6. Does the plaintiff have the locus standi to claim under the doctrine of trust from the defendant.We submit that she has the same.It is not in dispute that the plaintiff is a daughter of Joyce Ciamwonge who was on the other hand the second wife of Nyaga Nkoroi from whom the suitlands herein can be traced.The other wife of Nyaga Nkoroi was Ciankombo.It means therefore that the plaintiff falls squarely on the family tree of Nyaga Nkoroi from whom the suitlands can be traced.The supreme court had an occasion to interrogate the issue of what amounts to a customary law trust.This was in petition no 10 of 2015 between Isaack M'inanga Kiebia-Appellant And Isaiya Theuri M'lintari And Isaack Ntongai M'lintari-respondent.At paragraph 52 the judges of the supreme court pronounced themselves as follows:"flowing from this analysis ,we now declare that a customary trust,as long as the same can be proved to subsist,upon a first registration, is one of the trusts to which a registered proprietor,is subject under the proviso to section 28 of the registered land cat.Under this legal regime (now appealed),the content of such a trust can take several forms.For example ,it may emerge through evidence ,that part of the land ,now registered,was always reserved for family or clan uses,such as burials,and other traditional rites.It could also be that other parts of the land ,depending on the specific group or family setting,were reserved for various future uses,such as construction of houses and other amenities by youths graduating into manhood.The categories of a customary trust are therefore of such a trust subsists as to bind the registered proprietor.

7. Each case has to be determined on its own merits and quality of evidence.It is not every claim of a right to land that will qualify as a customary trust.In this regard,we agree with the high court in *Kiarie v Kinuthia* ,that what is essential is the nature of the holding of the land and intention of the parties.If the said holding is for the benefit of other members of the family,then a customary trust would be presumed to have been created in favour of such other members whether or not they are in possession or actual occupation of the land.Some of the elements that would qualify a claimant as a trustee are:

- I) The land in question was before registration,family,clan or group land.
- II) The claimant belongs to such family,clan ,or group.

III) The relationship of the claimant to such family, clan or group is not so remote or tenuous as to make his/her claim idle or adventurous.

IV) The claimant could have entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances.

V) The claim is directed against the registered proprietor who is a member of the family, clan, group.

8. In light of the foregoing your lordship we submit that the plaintiff has the locus standi to bring this suit based on customary law trust. We have established in these submissions that the defendant was registered with karingani/ndagani/294 and 1046 for his benefit and that of the family tree of Nyaga Nkoroi from where these two land parcels can be traced. We urge the court to make such a finding and hold that the 2 parcels of land are trustlands.

9. We rest our submissions and pray.

DATED AT CHUKA THIS15THDAY OFNOVEMBER,.....2019

DRAWN AND FILED BY:

I.C MUGO & CO

ADVOCATES FOR THE PLAINTIFF

21. The defendant's written submissions are reproduced in full herebelow without any alterations whatsoever including correction of spelling or any other mistakes.

DEFENDANT'S SUBMISSIONS

Your Lordship,

We submit that the plaintiff has not proved her case on a balance of probabilities and it ought to be dismissed with costs.

In her plaint the Plaintiff is praying for two main prayers. These are prayers (b) where she is praying for a declaration that she is entitled to one half share of 5.4 Ha KARINGANI/NDAGANI/294, 1.0 Ha KARINGANI/NDAGANI/1046 and or their subsequent subdivisions situated in Chuka held by the Defendant and that the Defendant is trustee thereof of the Plaintiff.

In prayer (f) in her plaint she prays for an order revoking cancelling and or deleting the names of the Defendant as registered proprietor of KARINGANI/NDAGANI/294, replace he said defendant with the names of the Plaintiff and declare the registration entered in 1994 as fraudulent.

Looking at these two prayers one is not able to discern what exactly it is that the Plaintiff wants from the defendant. Is it half of the suit property or is it the whole as the two prayers are not said to be alternatives.

This was also apparent during the cross examination of the Plaintiff. She did not seem to understand the contents of her pleadings before the Honourable court.

It is also clear that at the time of filing the suit herein the plaintiff knew that parcels of land numbers KARINGANI/NDAGANI/294 and 1046 were not in existence. This is clear

from the copies of the Green cards that she produced as her exhibits 2 and 3 as per her list of documents dated 13th December 2018.

From those documents it is clear that parcel Number KARINGANI/NDAGANI/294 was subdivided on 17th December 2012 and the resultant parcels were numbers KARINGANI/NDAGANI/4204 – 4208.

It also came out during the cross-examination of the defendant that parcel of land Number 4208 was later sub divided into eleven other parcels.

From her exhibit 3, it is clear that parcel Number KARINGANI/NDAGANI/1046 was subdivided on 25th May 2017 and the resultant parcels were KARINGANI/NDAGANI/11821 and 11822.

It is further clear from the documents filed by the Plaintiff that some of the resultant parcels of land from the original parcels are in the names of third parties who are known by names yet she did not include them as parties in this suit.

It is our submissions that she cannot get the orders that she is praying for as the Honourable Court cannot give orders against individuals who are not parties in this suit. In any case the subject matter of the suit does not exist as those titles were closed upon subdivisions way before the filing of the instant suit.

In her plaint at paragraph fifteen the Plaintiff avers that the Defendant was in 1976 and 1994 irregularly, unprocedurally and corruptly registered with parcel of land No. KARINGANI/NDAGANI/294. This would therefore mean that the cause of action arose for the first time in 1976 which is more than 40 years to last year when the Plaintiff filed the suit herein. She has not explained why she decided to sit on her right to claim the suitland for that long.

We submit that to that extent her suit is bad in law as it is time barred under Section 7 of Limitation of Actions Act. Under that Section a claim for land ought to be filed within 12 years from the date on which the right of action accrued to the Plaintiff.

We submit that during cross-examination, the Plaintiff admitted that Joyce Ciamwonge Nkoroi was her mother and that Agnes Mwimbi was her daughter. She further admitted that Albert Samuel Njue and Martin Mugambi were her grandsons.

In his pleadings, statement and the list of documents, the defendant has proved to the court that these very close relatives of the Plaintiff have sued him in the past before the High Court Meru. This is between pages three to 56 of his bundle of documents.

Those relatives of the Plaintiff had sued him each claiming a portion of parcel of land No. KARINGANI/NDAGANI/294. Those cases were eventually dismissed by the Honourable Court.

The last case that had been filed by the Plaintiff's daughter Agnes Mwimbi and grandson Martin Mugambi as Civil Case No. 100 of 2009 Meru High Court was transferred to this Honourable Court and was registered as Chuka ELC No. 115 of 2017. This case was heard on merit and dismissed on 14th November 2018. A copy of the judgment is in the defendant's list of documents.

That suit had been filed after the suit by Albert Njue in High Court civil No. 127 of 1996 Meru in which the Plaintiff's mother in this case and her daughter applied to be joined as Plaintiffs. Their application at page 5 of Defendant's bundle of documents was allowed and they were praying for 3 and 2 acres respectively from parcel No. KARINGANI/NDAGANI/294.

The Honourable Court will note that the plaintiff filed the instant suit on 14th December 2018 which is exactly 30 days after the said suit by her daughter Agnes Mwimbi and grandson Martin Mugambi was dismissed by this Honourable Court on 14th November 2018.

We submit that this suit was filed as an afterthought and as an Appeal through the backdoor against the dismissal of the Plaintiffs close relatives suit. This is particularly so taking into consideration that the Plaintiff who was married before 1958, has all along been living and cultivating in her husband's land and had never thought of suing for any land from the Defendant since her marriage.

This leads us to submit that his matter ought to be dismissed under Section 7 of the Civil Procedure Act.

That section provides that ".....No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."

We submit this section applies here as the Plaintiff's mother, daughter and two grandsons have had suits filed against the Defendant over the same suitland. This matter is res judicata.

The court will note that in the previous suits the Plaintiff's mother Ciamwonge and daughter Agnes Mwimbi never claimed that the defendant herein was registered with the suitland either fraudulently or to hold it in trust for any family member or that Ciamwonge caused the same to be registered in the name of the Defendant or his father because women could not be registered with land. That we submit is a creation by the fertile imagination of the plaintiff.

On the issue of parcel of land No. KARINGANI/NDAGANI/1046, the Defendant attached his exhibits one and two which are copies of letters of consent from Nithi Land Control Board proving that his father Nyaga Nkoroi had subdivided and sold the same to 3rd parties prior to his death.

In his testimony, the defendant testified to the effect that his father died before the transfer and that is why he filed a succession cause over the same and after the land was

granted to him he transferred the same to the people who had bought the same from his late father.

We urge the Honourable Court to believe the evidence of the defendant and that of his witness Mbaka Ntatua who hails from the same clan as the defendant and was conversant

with how the defendant came to acquire the Suitland as they were given neighbouring parcels by the clan.

The court ought to disbelieve the evidence of the Plaintiff and that of her witness Albert Njoka Muruera who was said to be a cousin from her mother's side and from a different

clan and therefore could not be conversant about how Ibiga na Thona clan was distributing its land.

He admitted on cross examination that he was from Itari na Muroko clan. We submit that nothing would have been easier than for the

Plaintiff to call an elder from her father's clan to come and confirm to the court that the clan gave the Defendant the suitland to hold in trust for her or anybody else for that matter. Indeed she is being used by 3rd parties to prosecute this suit.

The Plaintiff's claim is bad in law, has no merit and ought to be dismissed with costs.

We wish to rely on the authorities of:-

(i) COURT OF APPEAL AT NYERI IN CIVIL APPEAL NO: 6 OF 2013 –SALESIO M'ITONGA VS M'ARITHI M'ATHARA AND 3 OTHERS.

In that Appeal, the Court stated that a plaintiff must prove the creation and existence of the alleged trust. In the instant case the Plaintiff was unable to discharge that burden of prove.

(ii) ELC SUIT NO. 878 OF 2013 AT NAIROBI – HON GIDION MIKE MBUVI VS REGISTERED TRUSTEES OF NATIONAL CHRISTIAN COUNCIL OF KENYA AND THREE OTHERS- This authority supports our contention that the matter herein is res judicata. This is because the issue of the claim for a portion of the suitland has been litigated upon in the past by the mother, daughter and two grandsons of the Plaintiff herein.

We urge this Honourable Court to dismiss the Plaintiff's suit with costs and let the Defendant who is over 100 years old continue enjoying the rights of his parcel of land in his sunset years.

That is all.

DATED AT EMBU THIS ...19th... DAY OFNOVEMBER,.... 2019

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JOE KATHUNGU & CO.

ADVOCATES FOR THE DEFENDANT

22. At the outset, I wish to point out that parties cannot use written submissions to introduce new evidence. Courts of law rely on the pleadings and the oral evidence proffered by the parties in support of their assertions.

23. I have considered the pleadings, the oral evidence, the submissions and the authorities proffered by the parties to buttress their diametrically divergent assertions. I opine that the authorities proffered by the parties are good authorities in their facts and circumstances and I have taken them into account when determining this matter. However, no two cases are congruent to a degree of mathematical exactitude in their facts and circumstances.

24. When a litigant comes to court, which is also a court of equity, he or she must do so with clean hands. I do note that the plaintiff had presented before the Land Registrar Chuka a distorted and, therefore, forged order purporting that it had been issued by this court. This is reprehensible conduct that is frowned upon and deprecated by this court.

25. The above referred to nefarious conduct on the part of the plaintiff notwithstanding, I find that the plaintiff in her oral evidence was serially evasive when she was being cross examined by the defendant's advocate. The evidence of PW2, her witness, did not evince much probative value in favour of her case.

26. I agree that this court in Chuka ELC 115 of 2017, which case had been filed by the plaintiff's daughter Ages Mwimbi and grandson Martin Mugambi, had definitively found that the suit lands properly belonged to the defendant. In her evidence and that of her witness PW2, her cousin, the plaintiff did not on a balance of probability, prove trust and breach thereof as itemized in her plaint.

27. The plaintiff admitted that portions of the land she was claiming had been sold to third parties and she was well aware of this fact before she filed this suit. Of course, this court cannot issue orders against parties who had not been enjoined in this suit. I also find the defendant's evidence truthful when he asserted that parcel No. Karingani/Ndagani/1046 had been sold to the present owners by his father before he died.

2 I make a finding that the plaintiff, although she vehemently denied it, filed this case with the knowledge that her daughter Agnes Mwimbi and her grandson Martin Mugambi, had lost Chuka ELC 115 of 2017 where they sought to be declared owners of the portions of the suit lands by way of the doctrine of adverse possession. I also note that the plaintiff had been one of the parties in Meru HCCC No. 127 of 1996 (OS) which had been dismissed for want of prosecution. This shows that the plaintiff and her close relatives had litigated this matter with the defendant in other suits, although she attempted to deny this fact in her oral evidence.

Consequently, I find that the plaintiff has not proved her case on a balance of probability. I, therefore, enter judgment in favour of the defendant and against the plaintiff in the following terms:

- a) This suit is hereby dismissed.
- b) Costs shall follow the event and are awarded to the defendant.

Delivered in open Court at Chuka this 5th day of May, 2020 in the presence of:

CA: Ndegwa

Kirimi Muturi h/b I.C Mugo for the plaintiff

Joe Kathungu present for the defendant

P. M. NJORGE,

JUDGE.