



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 653 OF 2013

KENNEDY MURIITHI MUGO (Suing in his capacity

as the legal representative of the estate of

ANTHONY MUGO NDIGA).....1st PLAINTIFF

JOSEPH NG'ETHE KIHU.....2nd PLAINTIFF

VERSUS

PHIDESIUS NYAGA NJERU (Suing in his capacity as

the Legal Representative of the Estate of

NJERU NDIGA NJANJA).....DEFENDANT

JUDGMENT

Summary of Facts

Vide a Complaint dated 14th August 2013, amended on 10th May 2018 and further amended on 09th July 2019, the Plaintiffs prayed for judgement against the Defendants for:

a) A declaration that the Defendant was registered and held the original LR Ngariama/Lower/Ngariama 117, now subdivided into Ngariama/Lower/Ngariama/2127 and 2128 in trust for himself and the 1st Plaintiff in equal share and the said trust be determined with the Defendant retaining Ngariama/Lower/Ngariama/2127;

b) That a permanent injunction do issue restraining the Defendant, his servants, agents or anyone claiming through him from evicting, trespassing, charging, assigning, alienating or in any other unlawful way interfering with the 2nd Plaintiff's quiet possession and enjoyment of proprietary rights over Ngariama/Lower/Ngariama/2128, a subdivision of Ngariama/Lower/Ngariama 117 now registered in the names of the 2nd Plaintiff;

c) A declaration that the Defendant's father the late NjeruNdigaNjanja held Ngariama/Lower/Ngariama 117 in trust for himself and his brother Anthony MugoNdiga in equal share of 4.05 Ha and the said trust be determined in accordance with the law;

d) Entry No. 8 on the register for Ngariama/Lower/Ngariama 117 be restored and the subsequent subdivision into Ngariama/Lower/Ngariama/2127 and Ngariama/Lower/Ngariama/ 2128 be allowed to stand, their ownership status inclusive;

e) A declaration that the 2nd Plaintiff is a bona fide proprietor of Ngariama/Lower/Ngariama/2128 and a purchaser for value without notice or in the alternative, a declaration that the Plaintiff is entitled to 4.5 Ha out of Ngariama/Lower/Ngariama/117;

f) A declaration that entry No. 9 on the register for Ngariama/Lower/Ngariama/117 dated 26th February 2018 cancelling entry No. 8 of 15th September 1999 in respect of subdivisions of Ngariama/Lower/Ngariama/117 into Ngariama/Lower/Ngariama/2127 and Ngariama/Lower/Ngariama/2128 allegedly vide a decree dated 7th December 2010 issued vide Embu High Court Civil Appeal No. 35 of 2004 was fraudulent, illegal, misconceived and in breach of the Plaintiffs' proprietary rights, and an order cancelling entry No.9 on the register and reinstatement of entry No. 8 accordingly;

g) A declaration that the cancellation of entry No.8 of the register which effectively cancelled the resultant title deeds no. Ngariama/Lower/Ngariama/2127 and Ngariama/Lower/Ngariama/2128 was fraudulent, illegal and irregular and that the title deeds being resultant subdivisions of Ngariama/Lower/Ngariama/117 be restored in the names of Ngariama/Lower/Ngariama/2127 Njeru Ndiga Njanja and Ngariama/Lower/Ngariama/2128 in the name of Joseph Ng'ethe Kihuu;

h) Costs of the suit and interest thereon at court rates.

Originally, the Plaintiff was filed by Anthony Mugo Ndiga and Joseph Ng'ethe Kihuu against Njeru Ndiga Njanja. Anthony Mugo Ndiga, the original 1st Plaintiff was a brother to the original Defendant Njeru Ndiga Njanja. The original 1st Plaintiff's case was that land parcel no. Ngariama/Lower/Ngariama/117 was to be allocated to their father following completion of the land adjudication process. Unfortunately, their father passed away and the land was registered in the name of the original Defendant, being the eldest son. That the original Defendant was to hold this land in trust for his younger brother, the original 1st Plaintiff. That the original Defendant refused to transfer the 1st Plaintiff's portion on the said land. That vide a decree issued in Wanguru SRM Arbitration case No. 17 of 1997, the land was subdivided into two equal portions: Ngariama/Lower/Ngariama/2127 and Ngariama/Lower/Ngariama/2128, each measuring 4.05 Ha. That the original 1st Plaintiff was allocated Ngariama/Lower/Ngariama/2128 whereas the original Defendant was allocated Ngariama/Lower/Ngariama/2127 on 20th April 2000. That the original 1st Plaintiff transferred his interest on Ngariama/Lower/Ngariama/2128 to the 2nd Plaintiff on 19th September 2008. That the decision in Wanguru SRM Arbitration case No. 17 of 1997 was quashed for want of jurisdiction by an order of the High Court at Embu on 7th January 2010. That the original Plaintiffs thus sought a declaration that land parcel no. Ngariama/Lower/Ngariama/117 was registered in trust for the original 1st Plaintiff and was legally transferred to the 2nd Plaintiff.

The original Defendant entered appearance and filed his defence on 4th September 2013. He denied the original Plaintiff's assertions that he was holding land parcel no. Ngariama/Lower/Ngariama/117 in trust for him. He averred that the decree to subdivide land parcel no. Ngariama/Lower/Ngariama/117 was nullified by High Court Appeal No. 286 of 2013. That therefore, the sale of land parcel no. Ngariama/Lower/Ngariama/2128 to the 2nd Plaintiff was illegal. That the suit was a veiled attempt at appealing against the orders in High Court Appeal No. 286 of 2013.

The original 1st Plaintiff passed away on 15th November 2013 and limited grant of letters of administration Ad litem were issued to one Faith Wawira Mugo on 23rd October 2014. The said Faith Wawira Mugo was substituted for the original deceased 1st Plaintiff and took conduct of the case. Faith Wawira Mugo would also pass away on 18th July 2019 and Kennedy Muriithi Mugo issued with a grant Ad litem on 29th January 2020. The said Kennedy Muriithi Mugo thus represents the estate of the original 1st Plaintiff, Anthony Mugo Ndiga. The original Defendant, Njeru Ndiga Njanja also passed away on 10th June 2014 and limited grant of letters of administration Ad litem were issued to Phidesius Nyaga Njanja on 8th March 2017. The said Phidesius Nyaga Njanja substituted the original Defendant as the personal representative of his estate.

On 9th May 2018, two Plaintiffs' witnesses filed their written statements. The first, James Gichobi stated that he was one of the elders who participated in the land demarcation exercise in 1960 and that parcel no. Ngariama/Lower/Ngariama/117 was to be transferred to the father of the original 1st Plaintiff and Defendant. That their father was deceased at

the time and so, in keeping with Kikuyu custom, the land was registered in the name of the Defendant as the eldest son, to hold in trust for his brother, the 1st Plaintiff. The 2nd Plaintiff witness, James Kamaru Mathenge stated that he is a retired chief of Baragwi Location and is familiar with Kikuyu customs in respect to land demarcation and consolidation. That the Defendant was registered as the proprietor of parcel No. Ngariama/Lower/Ngariama/117 as the eldest son, since his father had passed away and that the land was to be held in trust for his brother, the 1st Plaintiff.

The Plaintiffs vide their written statements dated 10th May 2018 aver that once Phidesius Nyaga Njanja substituted the original Defendant, he irregularly and unlawfully on 26th February 2018 caused an entry No. 9 to be entered on the register against parcel No. Ngariama/Lower/Ngariama/117 allegedly arising out of a decree issued by the Embu High Court Appeal No. 35 of 2004 on 7th December 2010. That the effect of the purported decree was to cancel entry 8 on the register which had ordered for the subdivision of parcel no. Ngariama/Lower/Ngariama/117 and to direct that the respective titles, parcel No. Ngariama/Lower/Ngariama/2127 and 2128 be cancelled and reverted to parcel no. Ngariama/Lower/Ngariama/117.

On 20th January 2021, the substituted Defendant, one Phidesius Nyaga Njanja filed his statement of defence. It was his contention that the 1st Plaintiff had erred in selling clan land. That the outcome of the effect of Embu HCCA No. 35 of 2004 was to cancel the titles emanating from the subdivision of parcel no. Ngariama/Lower/Ngariama/117, whose decision had not been vacated or set aside. That the Defendant was not holding parcel no. Ngariama/Lower/Ngariama/117 in trust for the 1st Plaintiff.

By consent, parties agreed to file written submissions for consideration by the court. The Plaintiff filed his submissions on 13th April 2021. The submissions cited the Supreme Court decision in Isack M'inanga Kiebia Vs Isaya Theuri M'intari & Another [2018] e KLR; Section 25 of the Land Registration Act and the decision in Kareu Ndebu Vs Ndege Ndebu in support of the fact that the Defendant had held the suit land in trust for the 1st Plaintiff. Section 25 and 28 of the Land Registration Act are also cited in support. The 2nd Plaintiff was characterized as a bona fide purchaser for value. Reliance was placed on *Katende Vs Haridar & Company Limited [2008] 2 E.A 173*. The Defendant filed his submissions on 15th April 2021. He submitted that Njeru Ndiga and Antony Mugo were brothers and that both had been living on the 20-acre piece of land known as land parcel no. Ngariama/Lower/Ngariama/117. That although Antony Mugo was living on the land, the said land had been given to Njeru Ndiga by the clan elders on 13th January 1961. That after the award in the Mwea Tribunal sharing the land equally between the brothers, a boundary dividing the land into two acres each was put up. That Njeru Ndiga was aggrieved by the Mwea Tribunal decision and appealed against the same to the Nyeri Provincial Appeals Committee. That the Committee awarded 12 Acres to Njeru Ndiga and 8 Acres to Antony Mugo. That Njeru Ndiga was still unsatisfied with the Committee decision and filed an appeal in Embu High Court Civil Appeal 35/2004. That the High Court held that the Nyeri Provincial Appeals Committee did not have jurisdiction to hear or

determine matters touching on trust and that the award by the tribunal was therefore null and void ab initio. That after the award in the Mwea Disputes Tribunal, Antony had sold his 10 acre share to the 2nd Plaintiff and relocated to Mwea Settlement Scheme in 1974. That upon his demise, Antony Mugo was buried in his Mwea home. Relying on *Sections 23, 24 and 26 of the Land Registration Act, No. 3 of 2012* as well as *Alice Wairimu Macharia Vs Kirigo Philip Macharia [2019] e KLR*, it is the Defendant's case that the registration of the suit land in the Defendant's name is prima facie evidence that he was to hold the land absolutely. He noted that the decision in *Kareu Ndebu Vs Ndege Ndebu* cited by the Plaintiff is distinguishable in that the 1st Plaintiff had another parcel of land in Mwea which he relocated to. He further contends that since the decision in Embu High Court Civil Appeal 35/2004 was never appealed from, the Plaintiffs cannot seek a reinstatement of the titles awarded to them illegally. That although the Plaintiffs are aggrieved by the insertion of entry 9 into the register, whose effect is to cancel the subdivision, they have not sued the registrar. That they cannot say that the cancellation was fraudulent since it was consequent to the orders in Embu High Court Civil Appeal 35/2004. It is his prayer then that the court dismiss the Plaintiff's case.

Issues for Determination

- a) Whether the Defendant was registered and held the original LR Ngariama/Lower/Ngariama 117, now subdivided into Ngariama/Lower/Ngariama/2127 and 2128 in trust for himself and the 1st Plaintiff in equal share;
- b) Whether the 2nd Plaintiff is a *bona fide* proprietor of Ngariama/Lower/Ngariama/2128 and a purchaser for value without notice;
- c) Whether a permanent injunction ought to issue restraining the Defendant, his servants, agents or anyone claiming through him from evicting, trespassing, charging, assigning, alienating or in any other unlawful way interfering with the 2nd Plaintiff's quiet possession and enjoyment of proprietary rights over Ngariama/Lower/Ngariama/2128, a subdivision of Ngariama/Lower/Ngariama 117 now registered in the names of the 2nd Plaintiff;
- d) Whether Entry No. 8 on the register for Ngariama/Lower/Ngariama 117 ought to be restored and the subsequent subdivision into Ngariama/Lower/Ngariama/2127 and Ngariama/Lower/Ngariama/ 2128 be allowed to stand, their ownership status inclusive;
- e) Who ought to bear the costs of the suit.

Legal Analysis and Decision

The Court has anxiously considered the Parties' rival pleadings, affidavits and submissions.

The present case spans years and generations. Two of the original parties to the case are long deceased and have been substituted by new people, standing in their stead. It is important to summarize the transactions relating to the suit land in order to clarify the issues calling for determination. There is no dispute that the original 1st Plaintiff, Anthony Mugo Ndiga and the original Defendant Njeru Ndiga Njanja were brothers. It is also not contended that land parcel no. Ngariama/Lower/Ngariama/117 was following a completion of the adjudication process registered in the name of Njeru Ndiga Njanja on 13th January 1961. That by this time, Anthony and Njeru's father had passed away. It is further agreed that Anthony and Njeru lived together on land parcel no. Ngariama/Lower/Ngariama/117 until in 1974 when Anthony Mugo and his family moved to Mwea. That vide a decree issued in Wanguru SRM Arbitration case No. 17 of 1997, the land was subdivided into two equal portions: Ngariama/Lower/Ngariama/2127 and Ngariama/Lower/Ngariama/2128, each measuring 4.05 Ha. That Anthony Mugo was allocated Ngariama/Lower/Ngariama/2128 whereas the Njeru Ndiga was allocated Ngariama/Lower/Ngariama/2127 on 20th April 2000. On 19th September 2008, Anthony Mugo transferred his interest on Ngariama/Lower/Ngariama/2128 to the 2nd Plaintiff.

Now, Njeru Ndwiga was aggrieved by the Mwea Tribunal decision and appealed against the same to the Nyeri Provincial Appeals Committee. The Committee awarded 12 Acres to Njeru Ndwiga and 8 Acres to Antony Mugo. Njeru Ndwiga was still dissatisfied with the Committee decision and filed an appeal in Embu High Court Civil Appeal 35/2004. Vide a judgement delivered on 7th December 2010, the High Court held that the Nyeri Provincial Appeals Committee did not have jurisdiction to hear or determine matters touching on trust and that the award by the tribunal was therefore null and void ab initio.

From the foregoing analysis, the following issues come out clearly:

First that the decree ordering for the subdivision of Ngariama/Lower/Ngariama/117 into 2 equal portions was issued on 4th December 1997. That the subdivision was actually carried out and the respective title deeds: Ngariama/Lower/Ngariama/2127 and Ngariama/Lower/Ngariama/2128 issued almost three years later, on 20th April 2000. It is eight years after that on 19th September 2008, the 1st Plaintiff entered into a sale agreement for the sale of his portion to the 2nd Defendant. It was not until 7th December 2010, 13 years after the subdivision order was given that the Embu High Court Civil Appeal 35/2004 quashed the decision of the tribunal.

Secondly, in spite of the obvious dissatisfaction with the Tribunal decision adopted in Wanguru SRM Arbitration case No. 17 of 1997, and the two appeals lodged against the decision, it is clear that the Defendant did not at any time apply for nor was he granted a stay of execution pending appeal. The 1st Plaintiff cannot be faulted for having disposed his interest in the suit land as there was no order or legal impediment to the transfer. It is trite law that an appeal in and of itself does not operate as a stay of execution. See **Order 42 Rule 6 of the Civil Procedure Rules, 2010** reproduced below:

'[Order 42, rule 6.] Stay in case of appeal.

"6. (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the court appealed from may for sufficient cause order

stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.” (Underline, mine).

It is interesting that the Defendant admits in his submissions that the 2nd Plaintiff was a *bona fide* purchaser for value. He however faults him for not appealing against the Embu High Court decision. As already observed, the Embu High Court decision was delivered two years after the land was sold to the 2nd Plaintiff and title registered in his name. The governing law then was the **Registered Land Act which at Section 26** provides as follows regarding the rights of a registered proprietor:-

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

(a) To the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) Unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 not to require noting on the register: Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee”.

No evidence has been tendered to show that the title registered in the name of the 2nd Plaintiff on 2nd October 2008 was so done in contravention to the law. As such, the court agrees that the 2nd Plaintiff has demonstrated that he is a *bona fide* purchaser for value as described in **Katende Vs Haridar & Company Limited [2008] 2 E.A. 173** where the Court of Appeal in Uganda held that:-

“For the purposes of this appeal, it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine, ... (he) must prove that:

(a) He holds a certificate of title;

(b) he purchased the property in good faith;

(c) he had no knowledge of the fraud;

(d) he purchased for valuable consideration;

(e) the vendors had apparent valid title;

(f) he purchased without notice of any fraud;

(g) he was not party to any fraud.”

Thirdly, the orders issued in Embu High Court Civil Appeal 35/2004 were in the nature of judicial review orders and did not deal with the merits of the case. The Defendant (then, Appellant) sought the following orders:

a. That the Magistrate who entered judgement in the first instance did not have jurisdiction.

b. That the elders in the Provincial Land Disputes Appeals Tribunal erred in arbitrating on matters contrary to the provisions of the Land Disputes Tribunal Act.

It was the finding of the court that the first ground had no basis as the magistrate in the Wanguru SRM Arbitration Case No. 17 of 1997 had merely adopted the award of the Mwea Tribunal. The court thus addressed the second ground and declared thus:

a. The Tribunal (that is, the Provincial Land Disputes Appeals Tribunal) acted without jurisdiction and its award was therefore null and void ab initio; (emphasis, mine)

b. The Appellant has a good appeal. The same is hereby allowed;

c. Each party ordered to bear its costs of the Appeal.

Nothing in the judgement or in the prayers determined the issue of ownership of the suit land. Several decisions have already held that where title to land is in dispute, judicial review orders are not the most efficacious remedies. See **Republic Vs Registrar of Titles & Another ex-parte David Gachina Muriithi [2014] e KLR** where the court stated thus:

“.....Even if I were to grant the orders sought herein, the issue of validity of the applicant’s title would remain unresolved and since there is already in existence civil proceedings revolving around the suit property substantially between the parties herein, it is my

view that the issue ought to be determined before that forum in which viva voce evidence will be taken so that appropriate declaratory orders can be made and the matter brought to a finality. To grant the orders sought without determining the ownership of the suit land would in my view be an exercise in futility...Whether the allocation was illegal or not is, in my view, a matter beyond the scope of this determination. However, it is not an issue which can be wished away as inconsequential. There are in my view issues which ought to be properly investigated and evidence adduced. They are not matters which can simply be determined based on the grant possessed by the applicant which grant according to the Constitution is simply prima facie evidence of title which title can be challenged if found to have been unlawfully acquired.”

That said, the Embu High Court decision set aside the Nyeri Provincial Appeals Committee decision which had awarded 12 Acres to Njeru Ndwiga and 8 Acres to Antony Mugo. It did not interfere with the earlier decision adopted in Wanguru SRM Arbitration case No. 17 of 1997 dividing Ngariama/Lower/Ngariama/117 into Ngariama/Lower/Ngariama/2127 and Ngariama/Lower/Ngariama/2128. Nothing in the judgement can be interpreted to mean that the orders given were for the reunification of the two subdivisions under the name of the Defendant (then, Appellant). Entry No. 9 into the land register, effectively cancelling the subdivision under entry 8 and unifying the two parcels under the name of the Defendant is illegal. This is because, while the Registrar is given power to rectify the register, he has no power to cancel title deeds. See **Section 79 of the Land Registration Act, No. 3 of 2012**

“79. Rectification by Registrar

(1) The Registrar may rectify the register or any instrument presented for registration in the following cases —

- (a) In formal matters and in the case of errors, mistakes or omissions not materially affecting the interests of any proprietor;
- (b) In any case and at any time with the consent of all affected parties; or
- (c) If upon resurvey, a dimension or area shown in the register is found to be incorrect, in such case the Registrar shall first give notice in writing to all persons with an interest in the rectification of the parcel;
- (d) For purposes of updating the register;
- (e) For purposes of correcting the name, address or other particulars of the proprietor upon the written application by the proprietor in a prescribed form.

(2) No alteration affecting the title of the proprietor may be made pursuant to sub-section (1) without the proprietor's consent unless: -

- (a) The proprietor has by fraud or lack of proper care caused or substantially contributed to the error, mistake or omission; or
- (b) It would for any other reason be unjust for the alteration not to be made. Provided that a written notice of ninety days shall be given to the proprietor of such intention to make the alteration”.

The immediate observation from this provision is that the power of rectification does not include the power of cancellation of a proprietor's title. The power of cancellation is a preserve of the court by dint of **Section 80 of the Land Registration Act (No. 3 of 2012):**

“80. Rectification by order of Court -

(1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.

(2) The register shall not be rectified to affect the title of a proprietor, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.”.

See also the decision in **Republic Vs Registrar of Titles Mombasa & 4 others Ex-Parte A.K. Abdulgani Limited [2018] e KLR**, where the Court held that;

“..... What was the right procedure to follow in asserting the respondent's and interested parties' interest in the suit land? Surely, not by ultra vires action of revocation of grant of title but by suitable judicial proceedings in that behalf. In a recent decision, *Franns Investments Limited v. The Registrar of Titles, Mombasa & 2 Ors.*, Mombasa Petition No. 63 of 2012 this Court has ruled on the issue as follows: “It is clear that it is now settled that Registrar of Tiles or the Land Registrar as the case may be does not have power to revoke title to land.”

Again in **Republic Vs The Registrar of titles Mombasa & 2 others Ex parte Emfill Ltd (2012) e KLR**, the Court of Appeal held that;

“For these reasons, I find that the government cannot revoke title to land even for public need or interest or for alleged illegality. The government is obliged to move the court for appropriate orders to revoke, cancel or rectify title in such circumstances. A

unilateral decision published in the Gazette will not do. The considerations of public interest such as presented by the Respondent in this proceedings may only be used by the Court in appropriate case in making an order for cancellation of title or in authorizing, subject to due compensation, the compulsory acquisition or takeover of the private property.’

It is also clear that where a rectification of title is to be done, whether by the Registrar or by Court, the proprietor of land has to be duly notified beforehand. It is the finding of the Court that entry No. 9 in the register of Ngariama/Lower/Ngariama/117 was illegal and unprocedural.

Lastly on the question of the existence of a trust in relation to the suit land, the 1st Plaintiff has demonstrated extensively how the land came to be registered in the name of his elder brother. He also called witnesses who were present during the adjudication exercise and who averred that the land was clan land belonging to the ‘*Umbui mbari ya ngiria clan*’ transferred to the Defendant as the eldest brother to hold the same in trust for his brothers. The Defendant opposes this position for two reasons: First because the 1st Plaintiff holds a parcel of land in Mwea and second because nothing in the title deed indicated that the suit land was to be held in trust. No evidence has been led to show how the land in Mwea was acquired, whether it was transferred to the 1st Plaintiff by the clan or whether the 1st Plaintiff bought it. Going by Kikuyu custom, the land in Mwea, if it was clan land ought to have been registered in the eldest son’s name, seeing as their father was deceased. The acreage of that land is also not known, and it is not until in the submissions that its identity is disclosed as Karaba/Section K7/4288. On the second question, as already noted, **Section 26 of the repealed Registered Land Act** recognized trusts as overriding interests on land:-

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

(a) To the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) Unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 not to require noting on the register:

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

The court is satisfied that the 1st Plaintiff has satisfied the conditions necessary to establish the presence of a customary trust as set out by the Supreme Court in ***Isack M’inanga Kiebia Vs Isaaya Theuri M’lintari & another [2018] e KLR:***

“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 Vs Kinuthia, that what is essential is the nature of the holding of the land and intention of the parties. If the said holding is for the benefit of other members of the family, then a customary trust would be presumed to have been created in favour of such other members, whether or not they are in possession or actual occupation of the land. Some of the elements that would qualify a claimant as a trustee are:

- 1. The land in question was before registration, family, clan or group land;*
- 2. The claimant belongs to such family, clan, or group;*
- 3. The relationship of the claimant to such family, clan or group is not so remote or tenuous as to make his/her claim idle or adventurous;*
- 4. The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances;*
- 5. The claim is directed against the registered proprietor who is a member of the family, clan or group.”*

The upshot of the foregoing analysis is as follows:-

a) The Defendant was registered and held the original L.R Ngariama/Lower/Ngariama/117, now subdivided into Ngariama/Lower/Ngariama/2127 and 2128 in trust for himself and the 1st Plaintiff in equal share;

b) The 2nd Plaintiff is a bona fide proprietor of Ngariama/Lower/Ngariama/2128 and a purchaser for value without notice;

c) A permanent injunction issues restraining the Defendant, his servants, agents or anyone claiming through him from evicting, trespassing, charging, assigning, alienating or in any other unlawful way interfering with the 2nd Plaintiff’s quiet possession and enjoyment of proprietary rights over Ngariama/Lower/Ngariama/2128, a subdivision of Ngariama/Lower/Ngariama/117 now registered in the names of the 2nd Plaintiff;

d) A declaration that entry No. 9 on the register for Ngariama/Lower/Ngariama/117 dated 26th February 2018 cancelling entry No. 8 of 15th September 1999 in respect of subdivisions of Ngariama/Lower/Ngariama/117 into Ngariama/Lower/Ngariama/2127 and Ngariama/Lower/Ngariama/2128 allegedly vide a decree dated 7th December 2010 issued vide Embu High Court Civil

Appeal No. 35 of 2004 was fraudulent, illegal, misconceived and in breach of the Plaintiffs' proprietary rights, and an order cancelling entry No.9 on the register and reinstatement of entry No. 8 is issued accordingly;

e) Costs are awarded to the Plaintiffs.

JUDGMENT READ, DELIVERED PHYSICALLY AND SIGNED IN OPEN COURT AT KERUGOYA THIS 16TH DAY OF JULY, 2021.

.....

E.C. CHERONO

ELC JUDGE

In the presence of:-

1. Ms Wanjiru Waweru for the Defendant
2. Ms Ndungu holding brief for Ann Thungu for Plaintiff
3. Mr. Kabuta – Court Assistant.