



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU**

**ELC NO.273 OF 2017**

**(FORMERLY NAKURU CC NO.354 OF 2008)**

**PETER KINYUA WAWERU.....1<sup>st</sup> PLAINTIFF**

**SIMON WARUTERE WAWERU.....2<sup>nd</sup> PLAINTIFF**

**MARY WAIRIMU KIBERA (Suing as the Legal Representative of the estate of the late**

**RAJAB KIBERA WAWERU.....3<sup>rd</sup> PLAINTIFF**

**VERSUS**

**NJERI MWENJE WAWERU AND**

**JANE NYAWIRA MWENJE (Sued as the joint**

**administratrix of the estate of the late MWENJE WAWERU.....DEFENDANTS**

**JUDGMENT**

1. This matter arose from a Complaint dated and filed on 24<sup>th</sup> November 2008 in the Nakuru Law Courts. However it was subsequently amended on 6<sup>th</sup> March 2019 and filed in Nyahururu Law Courts upon the establishment of the Court and transfer of the matter therein. In the amended Complaint the Plaintiffs sought the reliefs below;

- a) A permanent order of injunction restraining the Defendants either by themselves, their agents, servants or anybody claiming under or in their names from in any way interfering with L.R No. Nyandarua/Lesirko/456 or with the Plaintiffs' quiet occupation of their respective portions thereof.
- b) A declaration that the orders of Hon. J.N Kirembui of 29<sup>th</sup> November 1995 in Principal Magistrate's Succession Cause No. 83 of 1992 at Nyahururu adopting the elders award therein together with the award and all consequential orders thereto are null and void *ab initio* and of no effect whatsoever.
- c) A declaration that the late Mwenje Waweru then and the Defendants now the administratrix thereof hold Title No. Nyandarua/Lesirko 456 in trust for their own benefit and that of the Plaintiff and for the Court to ascertain the Plaintiffs' respective shares.
- d) Costs of the suit
- e) Any other or further relief this Honourable Court may deem fit and just to grant

2. Initially, the Plaintiffs filed a Notice of Motion application under certificate of urgency dated 24<sup>th</sup> November 2008 seeking injunctive orders restraining the Defendants, by themselves, their personal assigns, agents, and/or their servants from interfering in any way with the suit land or the Plaintiffs quiet occupation of their respective portions pending the hearing and determination of the application hereof.

3. The Application was heard ex-parte on 9<sup>th</sup> December 2008 before the Honourable Justice D.K Maraga (as he then was). Subsequently, he allowed the Application and the injunctive orders sought granted pending hearing and determination of the suit.

4. Thereafter, the Defendants filed a Notice of Motion Application dated 22<sup>nd</sup> September 2010. By the said application, the Defendants

sought to have suit dismissed for being res judicata in view of Nyahururu PMCC Succession Cause No. 83/1992 and Nyeri HCCA No. 5/1996 respectively.

5. On 11<sup>th</sup> March 2011 the Court delivered its ruling declining the Application by the Defendants to have the suit dismissed for being res judicata. It ordered that the matter proceeds on to full hearing.

6. The Plaintiffs sought leave to amend their Complaint after they had closed the Plaintiffs' case in 2017 wherein they filed their Application to that effect on 17<sup>th</sup> February 2019, which Application was allowed as prayed giving rise to the Amended Complaint dated 6<sup>th</sup> March 2019.

7. The matter went for full hearing wherein after the close of the Plaintiff's case and the calling of two Defence witnesses, Counsel for the Plaintiff relinquished his right to cross examine the last Defence witness-DW3 who had been stood down for further cross examination. The Defence closed its case wherein parties then filed their submissions

#### **The Plaintiffs' case**

8. On 26<sup>th</sup> July 2017, the 2<sup>nd</sup> Plaintiff PW 1 testified that the deceased Mwenje Waweru was his elder brother. He stated that he and his family lived on the suit land that was registered in the name of Mwenje Waweru by their father Waweru Mwenje, to hold it in trust for his siblings who were children at the time.

9. He testified that all the Plaintiffs who were siblings lived peacefully together with the deceased and brother Mwenje Waweru on the suit land.

10. He further went ahead to narrate the history on how they came about living in the suit land. He stated that all the four brothers lived together with their deceased father Mwenje Ngure and grandfather Warutere Mwenje, on Land Parcel known as Othaya/Kihuguru/163 as per the Land Certificate marked as PMFI 1

11. PW1 stated that before their father died, he had not been registered in the register as land consolidation began in 1958 by which time he had already passed away and their elder brother, the deceased Mwenje Waweru took over the land and was listed in the register since they were still underage.

12. He informed court that their elder brother Mwenje Waweru secured employment in Nyandarua district in Oljororok where he worked for a white settler named Jacob. He stated that when the white settlers left the country, upon gaining its independence, the government allocated land to the employees of the settlers.

13. The witness proceeded to testify that it was in the year 1965 that their deceased brother was allocated the suit land. That he could not raise the requisite purchase price of a sum of Kshs. 141/=. He therefore sought assistance from the family members to raise the said purchase price.

14. According to PW – 1, Warutere Mwenje their grandfather sold the family cow and used the money to pay off the initial amount for the suit land within the Settlement Fund Trustee, herein referred to as SFT.

15. He informed court that the family further agreed to sell off their land being parcel No. Othaya/Kihuguru/163 so as to clear their loan with STF and thereafter relocate to a bigger land that would accommodate all of them, being the suit land herein.

They all moved to the suit land and began cultivating pyrethrum together in order to raise the necessary payments to offset the loan with STF. He further testified that even though money was contributed by each member of the family, the receipts were issued in the name of their elder brother, the deceased Mwenje Waweru as he was the one registered. That he had paid the last instalment for the loan being Ksh 5110/= in the year 2004 as per the documents, statements and receipts herein produced as exhibits 2(a-c).

16. He testified that the family had lived on the land since that time to date. It was his testimony further that their grandfather was buried on the suit land along with the 3<sup>rd</sup> Plaintiff (now deceased) without any objection or conflict.

17. PW1 informed that Court that Mwenje Waweru, their elder brother had died in the year 1984 wherein they had continued to live in harmony until the year 1992 when Mwenje Waweru's wives filed Succession proceedings in the Principal Magistrates Court in Nyahururu Succession Cause No. 83 of 1992 seeking to exclude the Plaintiffs from this estate.

18. The 1<sup>st</sup> Plaintiff Peter Kinyua then filed objection proceedings. The Court had subsequently referred the matter for arbitration which was done by the elders and an award issued and filed in Court. The 1<sup>st</sup> Plaintiff was dissatisfied and filed an application to set aside the award.

19. The Defendants were issued with the Grant of Letters Administration intestate on 19<sup>th</sup> January 2004 and subsequently it was confirmed on 22<sup>nd</sup> July 2004. The Plaintiffs then instituted the suit herein in order to have their rights to the suit land addressed and settled.

#### **Defendants' case.**

20. The Defendants filed their Defence on 22<sup>nd</sup> November 2010 seeking dismissal of the suit and costs.

21. The Defendants called three witnesses to testify wherein DW1 testified that she was the second wife to the late Mwenje Waweru, herein referred to as the deceased, having got married to him on a date she could not recall but that after their marriage, she had started living with him.
22. She testified that her husband, who was the owner of the suit land died in the year 1984. That he used to work for a white settler known as Jacob which enabled him acquire the land after the settlers left.
23. She testified that her husband was supposed to pay Kshs. 141 to be given the land. She explained that in order to pay for the land, they used to take farm produce to the co-operative society wherein the money they were paid by the society would be utilized to repay the loan, a loan they had repaid for 30 years.
24. She further testified that when she came to live on the suit land, the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs and one Mugo Waweru were also living there. She informed Court that her husband had informed her that although he had allowed them to live on the land, they were to leave once they got their own land. It had been for this reason that they had lived peacefully throughout her husband's lifetime.
25. She testified that before her husband died, he had told Peter Kinyua that he had only been helping his brothers by allowing them to stay on the suit land.
26. DW1 proceeded to testify that the other land in Othaya was never sold and that it too belonged to her deceased husband but that she was not aware that the Plaintiffs had ever lived on the same. She also testified that she had not known how Warutere Mwenje was related to her husband. That she and the 2<sup>nd</sup> Defendant had filed succession proceedings over the estate of their husband. It was her testimony that although Peter Waweru objected to the proceedings several times, they still managed to obtain the Letters of Administration of their deceased husband.
27. During cross examination, DW1 confirmed that she had found the deceased's brothers already living on the suit land in houses they had built themselves. She further testified that she had never lived or been to the other land known as Othaya/Kihuguru/163 and neither did she know its location.
28. That she had not known her father in law Mwenje Ngure but she that she knew that two cows had been sold in the Othaya market for a sum of Kshs. 141/- and the money had then been given to two people, to avoid misappropriation by one person, to pay off the SFT loan.
29. She further stated that when she had started living on the suit land, she never found any pyrethrum crop grown on it. Instead, the brothers had farmed potatoes and also reared some cattle, the produce which was taken to the co-operative society. She also testified that Warutere Mwenje and Rajab Mwenje were buried on the suit land and their burial was never objected to.
30. The Next defence witness, DW2, Mr. Wellangai from the Land Adjudication and Settlement Fund Trustees who had been summoned to produce the file with regard to Plot No. 456 within Lersiko Settlement scheme, testified that on the 4<sup>th</sup> August 2008 Njeri Mwenje Waweru and Jane Nyawira Mwenje, had collected the discharge of charge. He produced a certified copy of the register to confirm his evidence.
31. He further testified that they did not have an accountability register for the scheme and therefore he could not tell who the original allottees of the scheme were.
32. When cross-examined, DW 2 testified that even though his office was charged with the responsibility of keeping and maintaining records, the necessary records pertaining to the suit land could not be traced from the file in his office.
33. The third defence witness, DW 3, who was the Executive Officer based at the Succession Registry in Nyahururu Law Courts produced the certified copies of the proceedings in Principal Magistrate's Succession Cause No. 83 of 1992 at Nyahururu wherein she had taken the Court through the entire Succession case. She expounded on the Applications made since the 24<sup>th</sup> August 1992, and the Award by the District Officer which was read in court and the subsequent applications to set it aside.
34. DW 3 was not cross examined as the Plaintiffs' counsel chose to relinquish that right. Upon the closure of the Defendant's case, parties filed their written submissions as herein under summarised.

### **Plaintiffs' Submissions**

35. The Plaintiffs framed three (3) issues for determination namely:-
  - i. Whether the Late Mweje Waweru held the suit land in trust for the Plaintiffs.
  - ii. Where the matter herein was res judicata vis a vis Nakuru High Court Succession Cause No. 66 of 2006.
  - iii. Should a declaration issue declaring the Orders of the Court of 29<sup>th</sup> November 2019 null and void.
36. On the 1<sup>st</sup> issue for determination, the Plaintiffs referred the Court to the Provisions of Sections 28 and 30(g) of the Registered Land Act, Cap 300 (Repealed) of the Laws of Kenya. This was the qualification on absolute proprietorship of land. Section 28 (b) was based on the exceptions upon which registration of a person as the owner of the land may be defeated even when such overriding interests are not mentioned in the register.

37. The Plaintiffs submitted that they all lived together with the deceased on the land known as L.R No. Othaya/Kihuguru/163 which belonged to their father but had been registered in the name of their deceased elder brother after death of their father.
38. That after their father's death, they had all moved to the suit land and lived together in harmony from the year 1966 wherein they had developed, cultivated and buried their relatives there.
39. They asserted that their rights and interests over the land as persons in actual occupation were recognized and safeguarded by the statute then and as it is now under the provisions of Sections 25 and 27 of the Land Act .
40. That under the provisions of Section 25 (2) of the Land Act, the deceased held the suit land in customary trust on their behalf. They relied on the holding of the Court in the cases of **Gathiba vs Gathiba Nairobi HCCC No. 1647/84** and the case of **Justus Maina Muruku vs Jane Waithira Mwangi** wherein the Hon Judge had held that even though Section 28 of the Registered Land Act did not spell out customary trust as an overriding interest, the general term trusts did not exclude trusts originating from customary law.
41. The Plaintiffs further relied on the holding in the case of **Juletabi African Adventure Limited & Another vs Christopher Micheal Lockley [2017] eKLR** where the Court held that a trust could never be presumed unless there was absolute necessity and the intention of the parties to create a trust which ought to be clear in evidence.
42. On the conditions necessary to show the intention of parties to create a customary trust, the Plaintiff placed reliance on the Supreme Court decision in the case of **Isaack Kieba M'P' nanga vs Isaaya Theuri M'Lintari & Another SCOK No.10 of 2015** that was quoted in the case of **Alice Wairimu Macharia vs Kirigo Phillip Macharia[2019] e KLR**. Some of the elements that would qualify a claimant as a trustee were as follows:
- i. The land in question was before registration, family, clan or group land.*
  - ii. The claimant belonged to such family, clan, or group*
  - iii. 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.*
  - iv. The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances.*
  - v. The claim was directed against the registered proprietor who is a member of the family, clan or group”.*
43. The Plaintiffs submitted that based on the history narrated at trial of how they came about to living on the suit land from the former land clearly satisfied the conditions necessary to claim that their deceased brother held the suit land in trust for them.
44. The Plaintiffs also submitted that it was undisputed that they had been in actual occupation of the suit land since the year 1965 and with the knowledge and authority of the deceased. That from the parties' conduct they all believed and understood that the suit parcel of land was family land and not belonging to any particular individual.
45. To emphasise on the issue of their actual occupation and the cultivation they had done on the suit land, the Plaintiffs relied on the case of **Alan Kiama vs Ndia Mathunya & Others C.A.42/1978** wherein it had cited the case of **Daniel K. Cheraisi & 2 Others vs Kipkoeach Kangongo & Another [2018] eKLR** where **Madan J** enunciating the provisions of Section 30 (g) of the Repealed Act stated that the overriding interests which arose in right only of possession or actual occupation without legal title were equitable rights which were binding on the land, therefore on the registered owner of it.
46. The court had gone on to state that cultivation of land was incidental and an appurtenance of an overriding interest in right only of possession or actual occupation. That there was nothing repugnant about the economic exploitation of land that was what land was for.
47. The Plaintiffs thus submitted that the customary trust created and established by the parties all these years could not be and was never extinguished by the registration of the deceased as the owner of the land as per the records at the Settlement Fund Trustees or the registration of the Defendants pursuant to the confirmed Grant.
48. On the 2<sup>nd</sup> issue for determination on whether the present suit was res judicata in light of the **Nakuru High Court Misc. Succession Cause No.66 of 2005 (520 of 2007)**, the Plaintiffs submitted that the suit herein was not res judicata.
49. They relied on the provisions of Section 7 of the Civil Procedure Act that sets out the conditions that must be met before a matter could be determined as res judicata.
50. The Plaintiffs have submitted that the issues in the present suit were totally different from the succession Cause. They opined that in the previous suit, the issue had been for revocation of grant, while the current issue was based on land being held in trust. They relied on the case of **Anne Njeri Mbugua(suing as the legal representatives of Peter Mbugua Mukora vs David Gathaiya (being sued as the legal representatives of Raphael Wairimu Mbugua[2017] eKLR)**.
51. The Plaintiffs also submitted that the previous case was never heard and determined but was withdrawn and that even if it had been determined the issues had been before a Probate court that had limited jurisdiction where issues of proprietary interest in land could not be

addressed there. Emphasis was laid on the decided case of **Monica Wangari Njiri & Others – Versus - Eunice Wanjiru Igamba & Another [2016] eKLR** wherein the Court had held that that objectors in succession proceedings ought to institute separate proceedings to articulate or vindicate their claims or rights to the title of the property.

52. On the 3<sup>rd</sup> issue for determination as to whether a declaration should be issued declaring the Orders of the Court of 29<sup>th</sup> November 1995 null and void, the Plaintiffs contented that the decision by Hon. J.N. Kirembui adopting the award of the elders and all other proceedings emanating from it thereof were a nullity in law.

53. While placing reliance on the case of **Macfoy – Versus - United Africa Co. Limited [1961] All ER 1169**, the Plaintiffs submitted that the Certificate of Confirmation of Grant issued on the 22<sup>nd</sup> of July 2004 purporting to distribute the state of the deceased, to wit, L.R No. Nyandarua/Lersiko/456 was null and void.

54. It was further their submission that this Court had jurisdiction to issue declaratory orders on the nullity of another court's decision. They relied on the provisions of Order 11 Rule 7 of the Civil Procedure Rules and Article 23(3) of the Constitution. In conclusion, the Plaintiffs prayed that the prayers sought in their Amended Plaint dated 6<sup>th</sup> March 2019 be granted.

### **Analysis and Determination**

55. As at the time I am writing this Judgement, the Defendants although having applied for and were granted an extension of time to file and serve their written submissions by the 17<sup>th</sup> December 2019 as prayed, have not filed their submissions. As such, I will rely on the evidence adduced, and the applicable laws. The following are the salient issues to be determined:-

- i. Whether this suit is res judicata.
- ii. Whether the Plaintiffs are entitled to proprietorship to the L.R No. Nyandarua/Lesirko/456 by trust;
- iii. Whether this Court can issue declaratory orders as prayed in relation to Nakuru High Court Misc. Succession Cause No.66 of 2005 (520 Of 2007), formally **Nyahururu** Succession Cause 83 of 1992.
- iv. Who should bear cost of this suit.

56. On the *first* issue as to whether this suit is res judicata, the substantive law on *res judicata* is found in Section 7 of the Civil Procedure Act Cap 21 which 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”***

57. The test in determining whether a matter is *res judicata* as stated was summarized in **Bernard Mugo Ndegwa -vs- James Nderitu Githae and 2 Others (2010) eKLR**, as follows that:

58. The matter in issue is identical in both suits;

- i. The parties in the suit are the same;
- ii. Sameness of the title/claim;
- iii. Concurrence of jurisdiction; and
- iv. Finality of the previous decision.

59. In order to arrive at a decision on whether this suit is res judicata the statutory thresholds and conditions herein above have to be met.

60. The Defendants have stated that in the Succession Cause No. 66 of 2005 the Plaintiffs were parties wherein the matter had been concluded thus rendering the present suit a nullity since the matters in issue in the present suit were similar to those in the Succession Cause.

61. The Succession Cause of the estate of the late Mwenje Waweru began in 1992 vide Succession Cause No.83 of 1992 in the Principal Magistrates Court at Nyahururu. The parties in this suit were **Njeri Mwenje Waweru and Jane Nyawira Mwenje vs Peter Kinyua Waweru** who was the objector.

62. The 1<sup>st</sup> Plaintiff herein then lodged an objection in that Succession Cause claiming that the land comprising the deceased's estate was family land and was held in trust by the deceased. This was the file that was presented in evidence by DW 3 as an exhibit.

63. The Court had subsequently referred the matter for arbitration which was done by the elders and an award issued and filed in Court. The 1<sup>st</sup> Plaintiff was dissatisfied and filed an application to set aside the award.

64. The application was dismissed, wherein the 1<sup>st</sup> Plaintiff appealed in Nyeri HCA No. 5/96 where the appeal was also dismissed under Order 42 Rule 35(1) for want of prosecution.

65. The Defendant then moved to the High Court vide High Court Succession Cause No. 66/2005 wherein they had applied for grant of letters of administration. The matter was later registered as High Court Succession Cause No. 520/2007. The Plaintiffs again unsuccessfully applied for revocation of the grant based on the issue that the suit land could not be part of the deceased's estate.

66. Now having analysed the evidence presented by the parties in the Succession Cause and the production of the exhibit by DW 3, I am inclined to state that the issues addressed in the Succession Cause and the suit herein are completely different and hence fail to satisfy the first condition on the doctrine of res judicata

67. Secondly I have also perused through the evidence presented in the application lodged by the Defendants herein while seeking to have the suit herein filed in the high Court dismissed for being res judicata, which Application had been dismissed by the Hon. Justice Wendoh. This issue had therefore been clearly and exhaustively addressed.

68. The jurisdiction of the Environment and the Land Court flows from both the Constitution as well as the Environment and Land Court Act. Article 162 (2) (b) provides that the court is established to hear and determine disputes relating to the environment and the use and occupation of, and title to land.

69. The issues for determination in this suit touch on an aspect of beneficial interest where the Plaintiffs' claim is on the estate of the late Mwenje Waweru. This Court, under Sections 12 and 13 of the Environment and Land Act has jurisdiction to address such issues and the same cannot be addressed or deemed to have been addressed in a Probate and Administration Court.

70. I therefore find that the Plaintiffs rightly brought the issue on the title of the suit land before this Court as the same was never addressed in the Probate court which had no jurisdiction.

71. It was held in the decided case of **Monica Wangari Njiri & 4 Others vs Eunice Wanjiru Igamba & Another**[2016] eKLR as follows:

*'The mandate of the Probate court is limited. A distinction ought to be made between a claim against the Estate of a deceased and a claim on inheritance in respect of the estate of the deceased. In our instant suit the objectors are not claiming any interest as dependents or direct beneficiaries of the deceased. Their claim is that the title to the parcels of land is held in trust for them. Indeed this is a claim for a proprietary right.*

*As held in H.C. Succession Cause No.864 of 1996 (2015) eKLR, even if there was material establishing that there was such a trust, I doubt that the resolution of this issue would be a matter of the Probate court. The mandate of the Probate court under the Law of Succession Act is limited. It does not extend to determining issues of ownership of property and declaration of trusts. It is not a matter of the Probate court being incompetent to deal with such issues but rather that the provisions of the Law of Succession Act and the relevant subsidiary legislation do not provide a convenient mechanism for determination of such issues. A party who wishes to have such matters resolved ought to file a substantive suit to be determined by the Environment and Land Court.'*

72. Similarly, in the case at hand the Plaintiffs sought inter alia a declaration that the disputed land was held in trust for them by the deceased. They are thereby challenging the title and claiming proprietary rights and therefore the court with the requisite jurisdiction is the Environment and Land Court. Hence for these very reasons adduced hereof, I hold that this suit cannot be dismissed on ground for being res judicata.

73. The second issue for determination is whether the Plaintiffs are entitled to be proprietors of the suit land by way of trust.

The Plaintiffs have stated that the deceased Mwenje Waweru held the suit land in trust for himself and his brothers despite the property being registered in the name of the deceased.

74. The Plaintiffs took this Court back to the history and genesis of the issue at hand where PW1 testified that they had at one time all lived on the family land that is Othaya/Kihugiru/163 and that once their father died their elder brother was left in charge as the head of the family.

75. That they were later to move to the suit land when their brother secured employment in a white Settler's farm and was allotted the suit land after the white settler left. The suit land had to be however paid for and the testimony of the Plaintiffs is that the deceased was never able to pay the initial purchase price of Kshs.141/= and so it had been then resolved that they sell their land in Othaya being Othaya/Kihugiru/163.

76. It was PW1's testimony that the family helped raise the money to purchase the present suit land wherein apart from selling the family land their grandfather Warutere Mwenje had sold his own cow and the proceedings had been used to repay the Settlement Fund Trustee loan.

77. That they had then moved to the suit land in 1968 where they had engaged in farming, cultivating pyrethrum on the suit land to raise funds to make some of the payments to the Settlement Fund Trustee. That they have lived on the suit land with their families and some of their relatives had even been buried on the suit land.

78. In challenging this particular history of the family land DW1 had testified that she had never lived on the said family land at the time she got married to the deceased. That she never knew Warutere Mwenje or whether the family ever lived on it.

79. She also stated that the suit land was not bought by the proceeds from the family land which was not sold and still belonged to the deceased.

80. She also testified that the deceased had always wanted the Plaintiffs to move out and was only accommodating them until they were stable to move.

81. It is not in dispute that there existed a land known as Othaya/Kihugiru/163 and that the family moved and lived all together on the suit land since 1968.

82. It is further not disputed that the suit land is registered in the name of the deceased Mwenje Waweru who is the elder brother to the Plaintiffs.

83. The issue that arises hereof is whether the deceased in lieu of the above, held the suit land in trust for the Plaintiffs. In this case the Plaintiffs have pleaded customary trust in the suit land. Customary trust is one of the overriding interests hinged on the land that is currently recognized under Section 28 (1) (b) of the Land Registration Act. The suit property was registered under Registered Land Act. The provisions of Sections 27 & 28 of Registered Land Act states that the rights of a registered proprietor of registered land under the Act are absolute and indefeasible and only subject to rights and encumbrances noted on the register or overriding interests which were set out under Section 30 of the Act. The provisions of 27 & 28 are similar to the provisions set out in Sections 24, 25, 26 & 28 of the Land Registration Act, 2012.

84. Section 107 of the Registered Land Act (now repealed) provided for transitional clauses and is quoted for specifics as follows;

*(1) "Unless the contrary is specifically provided for in this Act, any right, interest, title, power, or obligation acquired, accrued, established, coming into force or exercisable before the commencement of this Act shall continue to be governed by the law applicable to it immediately prior to the commencement of this Act."*

*(2) "Unless the contrary is specifically provided for in this Act or the circumstances are such that the contrary must be presumed to be the case, where any step has been taken to create, acquire, assign, transfer, or otherwise execute a disposition, any such transaction shall be continued in accordance with the law applicable to it immediately prior to the commencement of this Act."*

85. From recent jurisprudence Section 30 (g) of Registered Land Act provided for customary trust while Section 28 (b) of "the Land Registration Act specifically provides for overriding interests as may subsist on the land and affect it without it being noted on the register such as customary trusts.

86. These provisions are to the effect that the overriding interest such as customary trust need not be noted on the Register of the suit land. It therefore follows that registration of a person as a proprietor of land does not preclude him from holding an interest in trust for another. Customary trust is an encumbrance on land. These are non registrable rights which run with the land. They are overriding. They subsist on the land.

87. The rebuttal by the 1<sup>st</sup> Defendant is that the deceased was the registered owner and that he paid for the entire purchase price and only helped his brothers with somewhere to stay. This evidence alone is insufficient to challenge the existence of a customary trust. The Plaintiffs have demonstrated existence of Kikuyu customary law whereby their elder brother after the death of their father was in charge of the homestead and lived together with his siblings on their ancestral property being Othaya/Kihugiru/163.

88. This concept of the Kikuyu Customary law is demonstrated in the Court of Appeal decision in **Henry Mwangi vs Charles Mwangi CA 245 of 2004** where it was held that under Kikuyu Customary Law, to which both parties are subject to, the eldest son inherits land as a Muramati or trustee. to hold in trust for himself and other heirs. It would follow that even when the suit land was under the name of the Plaintiff's father it was subject to customary trust. The registration of the Plaintiff pursuant to the grant of administration did not extinguish the trust on behalf of the lineage of their father. The land was already subject to customary trust.

89. In this case, at the time the Plaintiffs and the deceased's father died, the registration had not been done since land consolidation began around the year 1955 onwards after the implementation of the Swynnerton Plan of 1951.

90. The sale of the ancestral property was for the benefit of the family to acquire a bigger land that would become their ancestral land. The 1<sup>st</sup> Defendant admitted not to be aware of this history that however the former land was still registered in the deceased name. She however did not produce sufficient evidence to rule out the Plaintiffs interest in the suit land arising from the original ancestral land. In the case of **Kanyi vs Muthiora (1984) KLR 712** the Court stated that;

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

91. Further, the Plaintiff testified that not only was the land registered in the name of the deceased in trust for them but they also lived there hence they were in occupation and had developed and maintained a livelihood since 1968.

92. It is important to establish the root of this suit land. In the case of **Mbui Mukangu v Gerald Mutwiri Mbui C.A No. 281 of 2000** the Court of Appeal stated that customary trust is a concept of intergenerational equity where the land is held by one generation for the benefit of succeeding generations. The Court also held that possession and occupation are key elements (emphasis mine) in determining the existence

of a customary trust.

93. The Plaintiff's testimony was accompanied with evidence of the burials of family members who had lived and were buried on the suit land without any objection by the 1<sup>st</sup> Defendant or the deceased. The 1<sup>st</sup> Defendant also testified that indeed the Plaintiffs' have built homesteads and that when she got married to the deceased she found his siblings already living on the suit land.

94. The deceased died in 1984 and it was until then that the 1<sup>st</sup> Defendant started to disrupt the occupation by the Plaintiffs. I find this to be very suspicious as it only goes to support the Plaintiffs' claim. The 1<sup>st</sup> Defendant's conduct after the death of the deceased was inconsistent with her testimony that the land belonged to the deceased exclusively.

95. Customary trust must be proved by way of evidence, in this case, the Plaintiffs have proved occupation and cultivation on the suit land. They have proved that the proceeds from the sale of their family land in Othaya, a cow and produce got from the suit land as well where the family worked as well as his own money were all used to offset the Settlement Fund Trustee loan so that they could purchase the suit land. This evidence has not been controverted by the 1<sup>st</sup> Defendant.

96. Arising from the above analysis and based on the evidence adduced and weighing it on a balance of probabilities, the Court finds and holds that a customary trust subsists on the suit land in favour of the Plaintiffs.

97. On the third issue for determination as to whether this Court can issue declaratory orders as prayed, in relation to Nakuru High Court Misc. Succession Cause No.66 of 2005(520 Of 2007) formally **Nyahururu** Succession Cause 83 of 1992, it is important to note that the jurisdiction of this Court is specific under Section 13 of the Environment and Land Court Act which provides as follows;

*(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.*

*(2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes—*

*(a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;*

*(b) relating to compulsory acquisition of land;*

*(c) relating to land administration and management;*

*(d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and*

*(e) any other dispute relating to environment and land. (Emphasis supplied)*

**98. From the above captioned provisions of the law, the Court has determined its decision purely in its jurisdiction and finds that indeed the deceased Mwenje Waweru held the suit Land Parcel L.R No. Nyandarua/Lesirko/456 in trust for the Plaintiffs herein and hence the said parcel of land cannot form part of the estate of Mwenje Waweru the deceased**

**99. The Plaintiffs have without bearing any fruit, sought to nullify the award in Nyahururu Succession 83 of 1992 in the Nakuru High Court Misc. Succession Cause No.66 of 2005(520 Of 2007). In my opinion the Plaintiffs prayer to have this Court nullify the decision of another Court in which they had attempted to Appeal is pushing their luck by trying to squeeze water from a rock.**

**100. In light of the evidence adduced by the parties, this Court has no jurisdiction to nullify a decision of another Court based on its finding. However the Plaintiffs if aggrieved on the mode in which the succession proceedings were conducted on the grant, distribution of the estate or any other order, can only have those issues addressed in the Probate Court or the Court of Appeal.**

**101. In a nutshell and in light of the foregoing it is my finding that the Plaintiffs have proved their case on a balance of probabilities. I therefore enter judgment for the Plaintiffs and make the following orders:**

**i. An order that land parcel L.R No. Nyandarua/Lesirko/456 was purchased by the deceased Mwenje Waweru with aid of the Plaintiffs but registered in the name of deceased thereby the Plaintiffs are entitled to their occupied shares.**

**ii. An order that the said Mwenje Waweru deceased and now the administratrix held the suit land parcel known as L.R No. Nyandarua/Lesirko/456 in trust for the Plaintiffs herein and hence the said parcel of land cannot form part of the estate of Mwenje Waweru the deceased.**

**iii. A declaration is hereby issued that the Plaintiffs herein are entitled to share of Land known as parcel L.R No. Nyandarua/Lesirko/456 currently registered in the deceased Mwenje Waweru's name and held in trust by the administratrix of the deceased.**

**iv. The costs of this suit is awarded to the Plaintiffs.**

It is so ordered

**Dated and delivered at Nyahururu this 10<sup>th</sup> day of March 2020.**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**