



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU

ELC NO 29 OF 2019 (OS)

(FORMERLY NAKURU 126/2003)

JOSEPH MWANGI KANGETHE

(substituted as the legal representative

of LUCY NJERI NGANGA) (Deceased).....PLAINTIFF

VERSUS

ESTHER WANJIRU MWANGI.....DEFENDANT

JUDGEMENT

1. Before me for determination is an amended Originating Summons amended on the 28th February 2011, the original Originating Summons dated the 29th July 2003 having been filed in the Nakuru High Court as Civil Suit No 126 of 2003. Subsequently the matter had been transferred to this Court, upon its establishment, and registered by its current number.

2. In the said amended Originating Summons, the Plaintiff sought for determination of the following;

i. That there be a declaration that the Defendant is registered as proprietor of Title No. Nyandarua/Kiriita Mairo Inya Block 2 (Ngaindeithia) 653 as a trustee of the Plaintiff and members of his immediate family who are the sole beneficiaries or dependents of the estate of Mwangi Waithaka (deceased) in respect thereto.

ii. That arising for prayer (i) above there be a cancellation of the Defendant's registration as proprietor of Title No. Nyandarua/Kiriita Mairo Inya Block 2 (Ngaindeithia) 653 and substitution therefore the name of the Plaintiff in trust for himself and the members of his immediate family.

iii. Alternatively and without prejudice to prayer (i) above there be an order of cancellation of the Defendant's registration as proprietor of title No. Nyandarua/Kiriita Mairo Inya Block 2 (Ngaindeithia) 653 for being null and void having been procured in contravention of the Law of Succession Act Cap 160, Laws of Kenya.

iv. The costs of this suit be provided for.

3. The Originating Summons was supported on the grounds that were adduced at the hearing as well as by the supporting affidavit sworn on the 29th July 2003 by the Plaintiff.

4. The Defendant's replying affidavit sworn on the 18th August 2003 was to the effect that if indeed the suit land had belonged to the deceased Mwangi Waithaka then the right forum to claim the same was in a succession proceedings.

5. That further she had only been registered as the proprietor of the said suit land on 6th March 2003 and therefore the claim for adverse possession could not be brought against her.

6. The Defendant further deponed that the fraud allegations levelled against her by the Plaintiff were unfounded and baseless as no criminal charges had ever been pressed against her and neither had M/S Ngai Ndeithia Farmers Co. Limited who effected all the requisite transfers that vested the ownership of the land on her been enjoined as a party to the suit. The Defendant sought for the suit to be dismissed. It is of interest to note that even after amending their Originating Summons, the Defendants did not deem it fit to amend their response thereto.

7. Directions were subsequently issued on the 23rd July 2004 wherein the matter was stood over up to the 2nd October 2007 when the Plaintiff sought to amend their the pleadings and the matter was once again stood over generally.
8. No application was brought forth for the amendment until two years later when the Defendant's counsel sought that the suit be dismissed for want of prosecution, that the Plaintiff filed an application dated the 10th December 2008 to amend their Pleadings. Via a ruling delivered on the 17th February 2011, the Application to amend the Originating Summons was allowed wherein an amended Originating Summons was filed on the 28th February 2011.
9. The matter finally proceeded for hearing of the suit on the 17th February 2019 in the absence of both the Defendant and her Counsel who despite taking the hearing date by consent, chose to stay away from the proceedings. The Plaintiff testified as Pw1 to the effect that he was the son to the original Plaintiff Lucy Njeri Ng'ang'a who had passed away on 6th February 2005 as per the death certificated herein produced as Pf Exhibit 1.
10. That after her death, they had taken out letters of administration where he had been issued with a limited grant ad litem on 6th December 2005 in the Nyahururu PMCC Succession Cause No. 82 of 2005 which he produced as Pf Exhibit 2.
11. He testified that his mother used to live at a place known as Ngai Ndeithia Farm No. 653, (the subject suit of this case) land upon where he was born in 1976 and brought up. That as they used to talk with his mother over the suit land he came to know that she got onto the land, which measured 2 acres, in the year 1970 where she had lived since.
12. He produced a green card for title No. Nyandarua/Kiriita Maili Inya/Block 2(Ngai Ndeithia and Ndemi)/653 as PF Exhibit 3 and testified that the green card depicted the registered owner of the land was the Defendant Esther Wanjiru Mwangi who was also his aunty (mother's brother) and who had been registered as proprietor on the 6th March 2002.
13. He proceeded to testify that before her registration, the land belonged to the Government of Kenya and that the Defendant lived in Maina Village within Nyahururu Municipality and not on the suit land. That when growing up he had found their grandmother Mary Wangechi, grandfather Waithaka Kahu and their mother and her family living on the suit land whereupon the demise of his grandparents, mother and Waithaka Mwangi, they had all been buried thereon.
14. The Plaintiff testified that his grandfather used to live with a white man called John Reed in the village. That one time, the white man had asked people to contribute money so that they could ballot for land wherein since his grandfather was old, he had asked Mwangi Waithaka to register as a shareholder in Ngai Ndeithia Farmers Company Limited. Waithaka had registered and cast his ballot and after the land had been allotted, his grandparents and his mother who was unmarried then, took possession of the land wherein they had lived together with his 3 siblings. He confirmed that no Succession Cause had been filed after Waithaka Mwangi passed away.
15. His further testimony was that in the year 2003, they had received a letter dated 26th May 2003 which he produced as PF Exhibit 4, from an Advocate called Ndegwa Wahome which letter was addressed to his mother who was also known as Bahati Njeri Ng'ang'a, and which letter had sought that they vacate from the suit land. That they did not vacate but sought legal advice from their Advocate who responded via a letter dated 9th June 2003 herein produced as PF Exhibit 5.
16. That after two years, they received yet another letter dated the 24th February 2005 from M/S Wahome & Co. Advocate giving them notice to vacate from the land within 7 days. He produced the letter as PF Exhibit 6 and the response thereto dated 17th March 2005, as PF Exhibit 7.
17. He testified although Mwangi Waithaka had been registered as a shareholder member No. 58 in the Ngai Ndeithia Farmers Company register, the Defendant had gone caused a change in the registration so that she could obtain title. He produced the Ngai Ndeithia Register, the letters from the company and the Chief both dated the 21st February 2002 which were marked as PF MFI 8, PF MFI 9 (a) and PF MFI 9 (b) respectively.
18. He testified that it had been wrong for the land to have been registered in the Defendant's name because she did not inform the family members. At this juncture the Plaintiff sought to relay on his late mother's sworn affidavit of the 29th July 2003 as evidence, in relation to the events of the land.
19. He was categorical that they had lived on the suit land from 1970 to date but that the Defendant had now procured title to the suit land with which she was threatening to evict them from a land they had buried their kin, developed, ploughed, put up a fence and utilized the same as their own.
20. That being the first born to his grandfather, Mwangi Waithaka had been registered in trust of that property was alive and when he was alive, he had not tried to evict them from the land because he had his own land in Maina. He asked to be registered as a proprietor of the suit land in trust for his family.
21. The next Plaintiff witness, Peter Maina, testified to the effect that he had been the Chairman of Ngai Ndeithia Farmers Company Limited and having been a shareholder since 1969. That before he became a member of the Company, he used to live on Legetet Farm that belonged to Andrew Hamburg. That he knew the original Plaintiff's father Mzee Gatheca, his wife and their son Kimani Ng'ang'a, who all lived on the same farm.
22. That pursuant to the advice of one John Kimani Gatheru they had bought the white man's land using shares. That in order to buy a share, one had to register with Ksh. 20/- following which they could buy shares. That one share cost Ksh 1,500/- which was the equivalent of 2

acres of land. That subsequently the land had been subdivided in 1970 where people took possession of their respective parcels of land.

23. That he knew where the suit land was situated. He confirmed that Kimani Gatheca, the son of the old man Mzee Gatheca had balloted for the same which had been registered in his name. That after balloting, Mzee Gatheca, his wife and their daughter Bahati, who was the Plaintiff's mother took possession of the land and Kimani got another land in the neighborhood because he had shares in the company.

24. He confirmed that the Plaintiff was the person currently living on the land, his mother having passed away and having been buried on that same land. He also confirmed that he had lastly seen Mwangi in 1970 after the subdivision of the Ngai Ndeithia land which they had sub-divided in the company of one Johanna who was his friend and a brother Mwangi.

25. He also testified that from the year 2007, he had been a secretary in Ngai Ndeithia Farmers Company up to when the company was dissolved in 2012. That as a secretary, he kept all the Company's records. To this end, he confirmed that PMFI 8, was a copy of the register for Ngai Ndeithia Farmers and that at No. 58, the shareholder was Mwangi Waithaka. That the old number of the land, which measured 2 acres, was No. 46 whereas the new number was 653. He produced the register as PF Exhibit 8.

26. He also confirmed that PFMI 9 (a), a letter dated 21st February 2002, was a document seeking the transfer of shares from the late Mwangi Waithaka to Esther Wanjiru Mwangi and that the letter had been signed by Chief Muriuki Joseph Charles Mukua (deceased) and Charles Ndirangu (deceased) who was a director in the Company but that the transferor and transferee had not signed the transfer document. He produced the letter as PF Exhibit 9 (a).

27. He also identified the letter dated 21st February 2002 and testified that in the letter, the Chief had stated that the family of the deceased had no dispute on the transfer of the plot from the farmers company to the deceased Mwangi Waithaka's wife Esther Wanjiru Mwangi. He produced the letter as PF Exhibit 9 (b) and went on to state that that there had been no Letters of Administration or a Succession Cause to the late Mwangi who had died in 1987.

28. The witness in his testimony also confirmed that on the 3rd March 2002, the suit land had been registered to Esther Mwangi as per the green card herein produced as Pf exh 3 wherein he had heard the Plaintiff's mother lamenting that she ought to have been involved in the succession.

29. His closing remarks were that as a neighbor to the deceased Plaintiff, he knew that Bahati Njeri Ng'ang'a had developed the suit land since the issuance of the same in the 1970s. He also confirmed that he had not seen anybody else live on that land apart from the Plaintiff's mother.

30. The Plaintiff closed its case and in view of the fact that the date had been taken by consent, sought that the defence case be deemed as closed. The Court obliged and closed the defence case.

31. On the 29th April 2020, due to the Covid-19 pandemic, the Court had directed the Parties to file their written submissions electrically within 7 days wherein the same directions was issued again on 6th May 2020. Via an application dated the 18th May 2020 Counsel for the Defendant sought to cease acting for their client for lack of instructions wherein on the 8th June 2020, the Court directed that the said application be served upon the Defendant and the counsel for the Plaintiff who shall then file their responses electronically 7 days upon receipt.

32. Today as I sit to write this judgment, not only have parties not filed their responses to the application dated the 18th May 2020 but the Defendant has also not filed her written submission to the Originating Summons. To this end, I shall proceed to determine the matter on the evidence available and the submissions filed therein.

Plaintiff's submission.

33. The Plaintiff's submission after giving the background of the matter in issue was that the Defendant was married to the original Plaintiff's brother one Mwangi Waithaka (deceased). That sometimes in the late 1960's, the original Plaintiff's father one Waithaka Kahu (Deceased) bought shares in a land buying company known as Ngaindeithia Farmers Co. Ltd and caused the same to be registered in the name of Mwangi Waithaka (deceased). Pursuant thereto, the said company allocated the suit land measuring 0.8910 hectares whereupon the original Plaintiff and her parents settled thereon in the 1970's and proceeded to effect various developments on the suit land including construction of dwelling houses, and planting of trees uninterrupted. That upon their demise, they were both buried thereon.

34. Further submission was that neither the Defendant nor her deceased husband ever lived or utilized any portion of the suit land wherein the original Plaintiff had been in possession of the land for more than 12 years uninterrupted though a beneficiary thereof and was entitled to claim registration by way of adverse possession.

35. That sometimes on the 6th March, 2002, the Defendant caused a title deed to be issued in her name without filing succession proceedings in respect of her deceased husband and without involving the original Plaintiff which transaction was fraudulent and intended to defeat the Plaintiff's interest as a beneficiary or dependent of the estate of Mwangi Waithaka (deceased). The Plaintiff contended that the said transfer was null and void and ought to be cancelled.

36. That the Defendant filed a Replying Affidavit to their Originating Summons on 19th August, 2003 stating that the Originating Summons was incompetent, bad in law, fatally defective and an abuse of Court process and further that the Plaintiff had no locus standi to claim the suit land other than through succession proceedings. That having been registered as proprietor of the suit land on 6th March 2002, the remedy of adverse possession could not be granted and that allegations of fraud against her were unfounded and baseless since no criminal charges had

been pressed against her. The Defendant had not explained the circumstances under which she became registered as proprietor of the suit land and neither had she denied the fact that the shares pursuant to which the suit land was allocated to her deceased husband were bought by the late Waithaka Kahu (Deceased).

37. The Plaintiff submitted that pursuant to the death of the original Plaintiff on the 6th February 2005, she had been substituted with her son, the current Plaintiff pursuant to an application dated 9th January, 2006. That through an application dated the 10th December 2008, the current Plaintiff sought for and was granted leave to amend the Originating Summons on 17th February, 2011 which amended Originating Summons was filed on 28th February, 2011 and despite being served with the amended pleadings, the Defendant did not file any further affidavit in response thereto and therefore it could be concluded that all matters of fact deposed to by the Plaintiff are not controverted.

38. That further, when the matter came up for hearing on 17th February, 2020, the Defendant and her Counsel did not appear although the date had been fixed by consent. As such the case proceeded ex-parte with the Plaintiff giving both oral and documentary evidence and also adopted depositions made in the supporting affidavit of his deceased mother. The Plaintiff also called an independent witness who confirmed that he was the immediate former Secretary of Ngaindeithia Public Co. Limited. The said witness had produced documents that facilitated the transfer of the suit land in the Company register from the name of Mwangi Waithaka (Deceased) into the Defendant's name. He also confirmed that although the balloting of the land had been made by the original Plaintiff's brother, yet it had been the Plaintiff's family who were in exclusive occupation of the suit land upon which they had even buried their kin including their grandparents.

39. The Plaintiff thus framed their issues for determination as follows;

- i. Whether the Defendant's registration as proprietor of the suit land was in trust for the Plaintiff and members of his immediate family to warrant granting the reliefs sought.
- ii. Alternatively, whether the Defendant's registration as proprietor of the suit land was procured against provisions of the Law of Succession Act.
- iii. Who is liable to meet costs of the suit?

40. On the first issue for determination, the Plaintiff submitted that the answer was in the affirmative. That it was clear from evidence adduced that the suit land was acquired pursuant to subscription of shares in Ngaindeithia Public Co. Limited which later subdivided the main farm and allocated the resultant sub divisions to its members. It was the Plaintiff's evidence that although the share capital had been paid by his deceased grandfather, yet it had been his uncle who had balloted for the same on behalf of the family. That thereafter, the Plaintiff's deceased mother had settled on the suit land in the 1970's together with her parents. No other family member settled thereon including the Defendant and her late husband. That the Plaintiff had therefore established a customary trust over the suit land.

41. That even though the Defendant had been issued with an absolute title for the suit land, under Section 27 of the now repealed Registered Land Act, the said registration was subject to the interest of the Plaintiff and that of members of his family who are/ were in occupation thereof. In this regard, the Plaintiff relied on the decision in the case of Isaac **M'inanga Kiebia vs Isaaya Theuri M'lintari & Another [2018] eKLR** where the Supreme Court of Kenya had cleared the confusion created by previous Court decisions on the issue of declaration of customary trust over registered land. That it was now clear beyond any peradventure that the rights of the Plaintiff and members of his family, being persons in possession and actual occupation of the suit land, had customary rights which were protected by law. The Plaintiff urged the honorable Court to infer a customary trust over the suit land and to proceed to grant the declaration sought herein.

42. On the second issue for determination as to whether the Defendant's registration as proprietor of the suit land contravened provisions of the Law of Succession Act, the answer was in the positive for reason that the suit land did not constitute free property of the deceased, by the time of his death. That the suit land was subject to the interest of the Plaintiff and members of his family as persons in possession and actual occupation of land. The deceased's inchoate interest in the suit land was subject to the said interest where he could not have freely disposed it during his lifetime without any regard to the rights of the Plaintiff and members of his family. In support of their submission the Plaintiff relied on the decision in **Re Estate of Inzei Musindai (Deceased) [2019] eKLR**.

43. They further submitted that although the suit land was still registered in the name of Government of Kenya, by the date of deceased's demise, the Court ought to take judicial notice that all land owned by public land buying Companies in Kenya were initially registered in the name of Government in trust for the shareholders, pending title documentation. Even if the Defendant filed succession proceedings in respect of the suit land, the issue as to whether the suit land was free property or held in trust would still have arisen before the probate Court and the question would still have been referred to this honorable Court for determination. In so submitting, the Plaintiff relied on the decision In **Re Estate of Muraguri Murathu (Deceased) [2019] eKLR**.

44. It was their submission that as had been observed earlier, the Defendant did not respond to issues of fact they had pleaded and neither had she testified in support of the allegations raised in her replying affidavit. It therefore meant that the Plaintiff's pleadings and evidence tendered in the case remained uncontroverted. That the consequence of a party failing to respond to allegations made on oath or evidence was aptly discussed in detail in **Re Estate of job Ndunda Muthike (Deceased) [2018] eKLR**.

45. The Plaintiff's final submissions was that they had established their case on a balance of probabilities and prayed for judgment to be entered in terms of prayers sought in their amended Originating Summons.

46. That on the issue of costs, the same was at the discretion of the Court although under Section 27 of the Civil Procedure Act, costs always followed the event unless otherwise ordered for good reasons. They urged the Court to award them costs of the suit.

Determination.

47. It must not be lost that the Defendant did not appear in Court to defend her case at the hearing day wherein the same proceeded ex-parte pursuant to the provisions of Order 12 Rule 2(a) of the Civil procedure Rules. I have carefully considered the Plaintiff's claim against Defendant, the evidence, submissions as well as the law applicable and the authorities herein cited. I find the matters arising for determination thereto as being;

- i. Whether the Defendant is registered as proprietor of Title No. Nyandarua/Kiriita Mairo Inya Block 2 (Ngaindeithia) 653 as a trustee of the Plaintiff and members of his immediate family.
- ii. Whether the Plaintiff is entitled to the possession and legal ownership of the suit land No. Nyandarua/Kiriita Mairo Inya Block 2 (Ngaindeithia) 653 vide the principle or claim of Land through Adverse Possession.
- iii. Whether there be a cancellation of the Defendant's registration as proprietor of Title No. Nyandarua/Kiriita Mairo Inya Block 2 (Ngaindeithia) 653 and substitution therefore the name of the Plaintiff in trust for himself and the members of his immediate family.
- iv. Who will bear the costs of the suit?

48. To begin with, the doctrine of Adverse Possession in Kenya is embodied in Section 7 of the Limitation of Actions Act, (Cap 22) in these terms:

'An action may not be brought by any person to recover land after the end of 12 years from the dated on which the right of action accrued to him, or if it first accrued to some person through whom he claims, to that person'.

49. Section 13 of the Limitation of Actions Act aforesaid further provides that:

*A right of action to recover land does not accrue unless the land is in the possession of some person in whose favor the period of limitation can run (which possession is in this Act referred to as Adverse Possession) and, where under **sections 9, 10, 11 and 12 (of the Act)** a right of action to recover land accrues on a certain date and no person is in Adverse Possession on that date, a right of action does not accrue unless and until some person takes Adverse Possession of the land.*

50. Sections 37 and 38 of the Limitation of Actions Act stipulate that if the land is registered under one of the registration Acts, then the title is not extinguished but held in trust for the person in Adverse Possession until he shall have obtained and registered a High Court Order vesting the land in him.

51. The Plaintiff has instituted the present suit seeking for a declaration that the Defendant is registered as proprietor of the suit land as his trustee and that of members of his immediate family who were the sole beneficiaries or dependents of the estate of Mwangi Waitthaka (Deceased) in respect thereto. The Plaintiff contends that the transfer of shares held by the Defendant's deceased husband at Ngaindeithia Farmers Co. Limited and registration thereafter in favour of the Defendant was done at the time when the original Plaintiff and members of her family had been occupying the suit land for over 30 years without any interruption by the Defendant or persons through whom she claims.

52. The Plaintiff has instituted the present Originating Summons in which he has asked the Court to declare him as the proprietor of Title No. Nyandarua/Kiriita Mairo Inya Block 2 (Ngaindeithia) 653 in trust for himself and the members of his immediate family having taken possession of the same since the year 1970.

53. The law in respect to Adverse Possession is now settled. For one to succeed in a claim of Adverse Possession (s)he must satisfy the following criteria stated in the case of **Maweu vs. Liu Ranching and Farming Cooperative Society 1985 KLR 430** where the Court held;

"Thus, to prove title by Adverse Possession, it was not sufficient to show that some acts of Adverse Possession had been committed. It was also to prove that possession claimed was adequate, in continuity, in publicity and in extent and that it was adverse to the registered owner. In law, possession is a matter of fact depending on all circumstances".

54. As was stated by the Court of Appeal in the case of **Benjamin Kamau Murma & Others vs Gladys Njeri, C A No. 213 of 1996:**

"The combined effect of the relevant provisions of sections 7, 13 and 17 of the Limitation of Actions Act, Chapter 22 of the Laws of Kenya is to extinguish the title of the proprietor of land in favour of an adverse possessor of the same at the expiry of 12 years of Adverse Possession of that land."

55. The onus is on the person or persons claiming Adverse Possession:

".. to prove that they have used this land which they claim as of right: Nec vi, nec clam, nec precario (No force, no secrecy, no evasion). So the Plaintiffs must show that the company had knowledge (or the means of knowing, actual or constructive) of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purpose or by any endeavors to interrupt it or by any recurrent consideration"

56. The main the elements of Adverse Possession that a claimant has to prove include :

- i. actual,

ii. open,

iii. exclusive

iv. and hostile possession of the land claimed.

57. Has the Plaintiff herein demonstrated the said elements?

58. The facts upon which the claim for Adverse Possession is made is that the From the evidence adduced herein, it was clear that in the 1960's, the original Plaintiff's father one Waithaka Kahu (Deceased) who was a shareholder in a land buying company known as Ngaindeithia Farmers Co. Ltd bought shares and caused the same to be registered in the name of his son Mwangi Waithaka (deceased) who was the Defendant's husband. Thereafter the Company had given him the suit land measuring 0.8910 hectares whereupon the original Plaintiff and her parents settled thereon in the 1970's and proceeded to effect various developments on the suit land including construction of dwelling houses, and planting trees uninterrupted. That upon their demise, they were both buried thereon.

59. It was also in evidence that neither the Defendant nor her deceased husband ever lived or utilized any portion of the suit land although on the 6th March, 2002, the Defendant caused a title deed to the said land to be issued in her name without filing succession proceedings in respect of her deceased husband and without involving the original Plaintiff. That thereafter, she had issued notices to the original Plaintiff to vacate the land.

60. It is the Plaintiff's case that having lived on the suit land for more than 12 years that he and his family were entitled to it by the operation of the law on the doctrine of adverse possession. Secondly, that the rights of the Plaintiff and members of his family being persons in possession and actual occupation of the suit land were customary rights which were protected by law. The Plaintiff urged the honorable Court to infer a customary trust over the suit land and to proceed to grant the declaration sought herein.

61. I have looked at the green card produced as Pf Exhibit 3 and one thing is clear, that the suit land had been registered in the name of the Government on 11th August 1993 and thereafter to the Defendant on the 6th March 2003. The original Plaintiff herein instituted this suit on the 29th July 2003 by which time the Original Plaintiff had been living on the suit land for about 33 years from 1970.

62. It is trite law that the mere change of ownership of land which is occupied by another person under adverse possession does not stop time from running or interrupt such person's adverse possession. **See Githu v Ndeete [1984] KLR 776.** The Court took judicial notice that all land owned by public land buying Companies in Kenya were initially registered in the name of Government in trust for the shareholders, pending title documentation. to this effect therefore time began to run against the Defendant in favour of the Original Plaintiff from the time the latter occupied the suit property and was engaged in acts that were inconsistent with the Defendant's title, for instance putting up a fence on the suit property, planting trees and cultivating thereon. There is nothing to suggest that that occupation was secret or that it was not known to the Defendant.

63. Going by the above case law, time started to run from the year 1970 as when the original Plaintiff got into 1970 when the original plaintiff's family took possession of the suit land and did not stop even after the Defendant got registered as its proprietor. By the 29th July 2003 when the Plaintiff subsequently commenced legal proceedings that effectively stopped time from running, the Plaintiff had been on the suit land for more than 33 years and within the ambit of the provisions of Section 7 of the Limitation of Actions Act.

64. If I am wrong in the above finding however, then I find that having regard to the evidence on the history of the suit land herein even before the same had been registered to the Government in 1993 under the Registered Land Act, that the Plaintiffs family herein had been living on the same for about 23 years. It is also not in dispute that in the late 1960's, the original Plaintiff's father one Waithaka Kahu (Deceased) bought shares in a land buying company known as Ngaindeithia Farmers Co. Ltd and caused the same to be registered in the name of Mwangi Waithaka (deceased), pursuant to which the said company allocated them the suit land measuring 0.8910 hectares whereupon the original Plaintiff and her parents settled thereon in the 1970's and proceeded to effect various developments on the suit land including construction of dwelling houses, and planting trees uninterrupted. That upon their demise, they were both buried thereon.

65. The parties herein being of Kikuyu decent, I find that prior to the registration of the Defendant under the Registered Land Act as a first registration, there existed a kind of trust which was customary one and which bound the subsequent registered proprietor to this effect the suit land herein had been held by Mwangi Waithaka (deceased), in trust on behalf of the entire household of the descendants of his father Waithaka Kahu (Deceased) who were in possession and occupation therein and therefore the subsequent registration of land in the name of the Defendant herein under the Registered Land Act did not extinguish the original Plaintiff's rights under the Kikuyu customary law, the Defendants was not relieved from her duty or obligation to which she was as a trustee to the land:

66. Indeed it follows that that pursuant to the provisions of Section 30(g) of the Registered Land Act now Section 28 of the Land Registration Act, the rights of a person in possession or actual occupation are overriding interests.

67. Section 28 (b) of the Land Registration Act 2012 provides as follows:

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

(b) trusts including customary trusts;

68. The Supreme Court of Kenya, while faulting the decisions in **Obiero v. Opiyo**, and **Esiroyo v. Esiroyo**; held as following the case in **Isaac M'inanga Kiebia** (Supra)

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 Act. Under this legal regime, (now repealed), 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 not closed. It is for the Court to make a determination, on the basis of evidence, as to which category of such a trust subsists as to bind the registered proprietor.

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:.....

.....We also declare that, rights of a person in possession or actual occupation under Section 30(g) of the Registered Land Act, are customary rights. This statement of legal principle, therefore reverses the age old pronouncements to the contrary in **Obiero v. Opiyo and Esiroyo v. Esiroyo**. Once it is concluded, that such rights subsist, a Court need not fall back upon a customary trust to accord them legal sanctity, since they are already recognized by statute as overriding interests.

In the foregoing premises, it follows that we agree with the Court of Appeal's assertion that "to prove a trust in land; one need not be in actual physical possession and occupation of the land." A customary trust falls within the ambit of the proviso to Section 28 of the Registered Land Act, while the rights of a person in possession or actual occupation, are overriding interests and fall within the ambit of Section 30(g) of the Registered Land Act.

.....It is now clear that customary trusts, as well as all other trusts, are overriding interests. These trusts, being overriding interests, are not required to be noted in the register. However, by retaining the proviso to Section 28 of the Registered Land Act (now repealed), in Section 25 of the Land Registration Act, it can be logically assumed that certain trusts can still be noted in the register. Once so noted, such trusts, not being overriding interests, would bind the registered proprietor in terms noted on the register. The rights of a person in possession or actual occupation of land, as previously envisaged under Section 30 (g) of the Registered Land Act, have now been subsumed in the "customary trusts" under Section 25 (b) of the Land Registration Act. Thus under the latter Section, a person can prove the existence of a specific category of a customary trust, one of which can arise, although not exclusively, from the fact of rightful possession or actual occupation of the land

69. I find that the Plaintiff herein has established a valid claim to the suit property based on customary trust subsisted at the time of first registration as evidenced by his being in possession or actual occupation, which trust was rooted in customary law and which trust is binding upon the Defendant herein being the registered proprietor of the said suit land. I further find that the land in question was family land before registration, and that the original Plaintiff belonged to the said family and therefore she had been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances and that the claim is against the registered proprietor.(see **James N. Kiarie v. Geoffrey Kinuthia & Another [2012] eKLR**)

70. There was no evidence tendered as to how the Defendant had acquired the suit land and subsequently registered it in her name and the Plaintiff's claim remained unchallenged.

71. The right of the Plaintiff was therefore not subject to interference or disturbance such as by eviction save where inquiry is made and they are not disclosed see Madan J.A in **Alan Kiama v Ndia Mathunya & Others, CA 42/1978**, unreported.

72. In the circumstance herein the Plaintiff's Originating Summons Originating Summons amended on the 28th February 2011 succeeds in its entirety to the effect that:

i. It is herein declared that the Defendant is registered as proprietor of Title No. Nyandarua/Kiriita Mairo Inya Block 2 (Ngaindeithia) 653 as a trustee of the Plaintiff and members of his immediate family who are the sole beneficiaries or dependents of the estate of Mwangi Waithaka (deceased) in respect thereto.

ii. It is further ordered that there be cancellation of the Defendant's registration as proprietor of Title No. Nyandarua/Kiriita Mairo Inya Block 2 (Ngaindeithia) 653 and substitution therefore with the name of the Plaintiff in trust for himself and the members of his immediate family.

iii. Costs are granted on a lower scale since the suit was undefended.

It is ordered.

Dated and delivered at Nyahuru this 25th day of June 2020.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE