



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC SUIT NO. 71 OF 2011**

**JOSEPH MWANGI RECHO.....1<sup>ST</sup> PLAINTIFF**

**ELIZABETH WAMBUI.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**FRANCIS GICHIRI NDUA.....1<sup>ST</sup> DEFENDANT**

**THE LAND REGISTRAR THIKA DISTRICT.....2<sup>ND</sup> DEFENDANT**

**SUSAN NJERI MWANGI.....3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. The plaintiffs and the 3<sup>rd</sup> defendant are siblings. Their mother was called Wairimu Mwambia. The plaintiffs and the 3<sup>rd</sup> defendant had other siblings namely, David Karanja, John Kimani and Hannah Wanjiku. The plaintiffs and the 3<sup>rd</sup> defendant's mother, Wairimu Mwambia was the daughter of Joseph Mwambia and Njeri Mwambia both deceased. The parcel of land known as Ngenda/Kimunya/584(hereinafter referred to as "Plot No. 584") was registered in the name of Joseph Mwambia on first registration on 3<sup>rd</sup> January, 1958. Plot No. 584 measured 12.40 acres (approximately 5.018hectares). After the death of Joseph Mwambia, Plot No. 584 was registered in the name of his wife, Njeri Mwambia who was the grand-mother of the plaintiffs and the 3<sup>rd</sup> defendant on 21<sup>st</sup> October, 1960. A part from the plaintiffs' and the 3<sup>rd</sup> defendant's mother, Njeri Mwambia and Joseph Mwambia had other children namely, Karanja Mwambia, Daniel Kihui Mwambia, George Mburu Mwambia, Kuria Mwambia and Wachu Mwambia.

2. On 19<sup>th</sup> February, 1976, Njeri Mwambia transferred Plot No. 584 to her name and the names of her three sons, Daniel Kihui Mwambia, George Mburu Mwambia and Solomon Kuria Mwambia as tenants in common in different shares. In this distribution of ancestral land, Njeri Mwambia left out her daughters, Wairimu Mwambia (the plaintiffs and the 3<sup>rd</sup> defendant's mother) and Wachu Mwambia. Also left out was the wife of one of her sons, Karanja Mwambia by the name Margaret Wanjiku Karanja. Wachu Mwambia and Margaret Wanjiku Karanja objected to the distribution of Plot No. 584 and registered cautions against the title of the property. Njeri Mwambia together with her sons and daughters who included Wacu Mwambia and the plaintiffs' and the 3<sup>rd</sup> defendant's mother, Wairimu Mwambia subsequently agreed on the distribution of Plot No. 584 which agreement led to the withdrawal of the cautions aforesaid.

3. Following that agreement, Plot No. 584 was distributed a fresh on 8<sup>th</sup> March, 1983 when all the children of Njeri Mwambia and Joseph Mwambia were given portions of the said plot. As at this date, the plaintiffs' and the 3<sup>rd</sup> defendant's mother, Wairimu Mwambia was deceased. The portion of Plot No. 584 that belonged to Wairimu Mwambia was registered in the name of Elizabeth Wachu Mwambia as a trustee of Wairimu Mwambia's eldest daughter, Susan Njeri, the 3<sup>rd</sup> defendant herein. On 28<sup>th</sup> March, 1983, Plot No. 584 was partitioned so that each of Njeri Mwambia's and Joseph Mwambia's children could have separate titles for their portions of the said parcel of land. The partitioning of Plot No. 584 gave rise to Ngenda/Kimunya/1192 to 1197. The portion of land that was held by Elizabeth Wachu Mwambia as a trustee of Wairimu Mwambia's eldest daughter, Susan Njeri, the 3<sup>rd</sup> defendant herein was given title number Ngenda/Kimunya/1195 and the same was registered in the name of Susan Njeri Mwangi, the 3<sup>rd</sup> defendant herein. Ngenda/Kimunya/1195 (hereinafter referred to as "the suit property") measured 0.53 acres.

4. Sometimes in January, 2000, the 3<sup>rd</sup> defendant sold the suit property to the 1<sup>st</sup> defendant at a price of Kshs. 750,000/-. The suit property was subsequently registered in the name of the 1<sup>st</sup> defendant on 24<sup>th</sup> January, 2001 on which date the 1<sup>st</sup> defendant was also issued with a title deed under the Registered Land Act, Chapter 300 Laws of Kenya (now repealed).

5. The plaintiffs brought this suit against the 1<sup>st</sup> and 2<sup>nd</sup> defendants on 22<sup>nd</sup> February, 2011 through a plaint dated 21<sup>st</sup> February, 2011. The

plaint was amended on 25<sup>th</sup> September, 2014 to join the 3<sup>rd</sup> defendant as a party to the suit. In the amended plaint dated 25<sup>th</sup> September, 2014, the plaintiffs averred that the parcel of land known as Ngenda/Kimunyu/1195(the suit property) was registered in the name of the 3<sup>rd</sup> defendant to hold as a trustee for the children of Wairimu Mwambia who included the plaintiffs and their siblings namely, David Karanja (a person of unsound mind), John Kimani(deceased) and Hannah Wanjiku(deceased). The plaintiffs averred that when the 2<sup>nd</sup> defendant registered the suit property in the name of the 3<sup>rd</sup> defendant absolutely, the 2<sup>nd</sup> defendant failed to take into consideration the interest of the plaintiffs and their siblings aforesaid.

6. The plaintiffs averred that the registration of the 3<sup>rd</sup> defendant as the absolute owner of the suit property was without the consent of the plaintiffs and as such null and void. The plaintiffs averred that in 2001, the 3<sup>rd</sup> defendant fraudulently represented that she was the absolute proprietor of the suit property and proceeded to illegally sell the property to the 1<sup>st</sup> defendant before she left the country to unknown destination. The plaintiffs averred that the sale of the suit property by the 3<sup>rd</sup> defendant to the 1<sup>st</sup> defendant was unlawful, null and void since the 3<sup>rd</sup> defendant had no capacity in law to sell and transfer the property. The plaintiffs averred that the registration of the 3<sup>rd</sup> defendant as the absolute owner of the suit property and the subsequent transfer of the property by the 3<sup>rd</sup> defendant to the 1<sup>st</sup> defendant was fraudulent and made recklessly in bad faith.

7. The plaintiffs averred that the 1<sup>st</sup> defendant purchased the suit property from the 3<sup>rd</sup> defendant with the full knowledge that the 3<sup>rd</sup> defendant was holding the suit property in trust for her siblings and that she was not the absolute owner of the property. The plaintiffs averred that by reason of the matters aforesaid, the plaintiffs and their siblings had been wrongfully deprived of the ownership and quiet enjoyment of the suit property.

8. The plaintiffs sought judgment against the defendants jointly and severally for;

(a) A declaration that the 3<sup>rd</sup> defendant held the parcel of land known as Ngenda/Kimunyu/ 1195(the suit property) in trust for the plaintiffs.

(b) A permanent injunction restraining the 1<sup>st</sup> defendant from selling, disposing of, transferring, charging, pledging, leasing, wasting or in any manner whatsoever or howsoever interfering with or dealing with the suit property.

(c) An order directing the Land Registrar to rectify the register of the suit property by cancelling the title held by the 1<sup>st</sup> defendant and all the entries in the register relating to the transfer of the property to the 1<sup>st</sup> defendant.

(d) An order directing the Land Registrar to re-issue a fresh title deed for the suit property in the names of the plaintiffs.

(e) Damages for trespass.

(f) Mesne profits.

(g) Costs of the suit.

(h) In the alternative, General damages against the 1<sup>st</sup> and 3<sup>rd</sup> defendants for wanton, unlawful and blatant disregard of the plaintiffs' interest and rights under the law.

8. The 1<sup>st</sup> defendant filed a statement of defence dated 10<sup>th</sup> March, 2011 on 11<sup>th</sup> March, 2011 which was amended on 23<sup>rd</sup> October, 2014. In his amended statement of defence, the 1<sup>st</sup> defendant averred that he was registered as the absolute proprietor of the suit property which he acquired from the 3<sup>rd</sup> defendant free from any encumbrance. The 1<sup>st</sup> defendant averred that the 3<sup>rd</sup> defendant presented herself as the proprietor of the suit property and that at no time prior to and during the transaction did the 3<sup>rd</sup> defendant indicate that she was a trustee of the plaintiffs or any other person in respect of the suit property. The 1<sup>st</sup> defendant averred further that there was no record of the alleged trust. The 1<sup>st</sup> defendant denied that the sale of the suit property by the 3<sup>rd</sup> defendant to the 1<sup>st</sup> defendant was unlawful and fraudulent. The 1<sup>st</sup> defendant averred that the plaintiffs had approached the 1<sup>st</sup> defendant to sell the suit property to them and as such the plaintiffs were estopped from claiming that the property was held in trust for them by the 3<sup>rd</sup> defendant. The 1<sup>st</sup> defendant averred further that the plaintiffs were not entitled to the reliefs sought in the plaint for the following reasons; first, the plaintiffs had approached the court with unclean hands; secondly, the 1<sup>st</sup> defendant acquired the suit property lawfully; thirdly, the 3<sup>rd</sup> defendant was not registered in the register of the suit property as holding the suit property as a trustee and finally, the plaintiffs' remedy if any lied against the 3<sup>rd</sup> defendant.

9. The 2<sup>nd</sup> defendant filed its statement of defence on 24<sup>th</sup> August, 2011 in which he denied the plaintiffs' claim in its entirety. The 2<sup>nd</sup> defendant averred that as the registered proprietor of the suit property, the 3<sup>rd</sup> defendant had the capacity to transfer the suit property to the 1<sup>st</sup> defendant. The 2<sup>nd</sup> defendant averred that the plaintiffs had no valid claim to the suit property. The 2<sup>nd</sup> defendant averred without prejudice that all the entries that were made on the register of the suit property were made in good faith pursuant to the statutory duties and obligations bestowed upon the 2<sup>nd</sup> defendant. The 2<sup>nd</sup> defendant denied that he was involved in any wrong doing in relation to the suit property and contended that the plaintiffs had failed to establish the existence of trust on which their case was based.

10. At the trial, the plaintiffs called three witnesses while the 1<sup>st</sup> and 2<sup>nd</sup> defendants called one witness each. The 3<sup>rd</sup> defendant who did not enter appearance did not call any witness. The plaintiffs' first witness was the 1<sup>st</sup> plaintiff, Joseph Mwangi Recho (PW1). The 1<sup>st</sup> plaintiff adopted his witness statement dated 18<sup>th</sup> March, 2015 as his evidence in chief. The 1<sup>st</sup> plaintiff also gave oral testimony and produced a number of documents as exhibits. In his statement and oral testimony, the 1<sup>st</sup> plaintiff narrated the genesis of the dispute between the parties

that I have captured at length at the beginning of this judgment. It is not necessary to repeat the same here.

11. In his oral testimony, the 1<sup>st</sup> plaintiff stated as follows: The suit property was sold and transferred by the 3<sup>rd</sup> defendant to the 1<sup>st</sup> defendant without the knowledge of the plaintiffs. The 3<sup>rd</sup> defendant had no right to sell the suit property since the suit property was family property that belonged to the plaintiffs and the 3<sup>rd</sup> defendant's mother, Wairimu Mwambia. The suit property was given to their mother by their maternal grandmother, Njeri Mwambia. When the original parcel of land namely, Plot No. 584 from which the suit property originated was being distributed by Njeri Mwambia, the plaintiffs were young and it was feared that they could dispose of their mother's share of the property. The share of Plot No. 584 that belonged to the plaintiffs and the 3<sup>rd</sup> defendant's mother, Wairimu Mwambia was registered in the name of their aunt, Elizabeth Wachu to hold in trust for the 3<sup>rd</sup> defendant who was the plaintiffs' eldest sister. Since the plaintiffs were young and immature, it was felt that the suit property was safe with the 3<sup>rd</sup> defendant. The 3<sup>rd</sup> defendant was to hold the suit property in trust for the plaintiffs and their other siblings. He had put up a house on the suit property that was demolished on 6<sup>th</sup> February, 2001 by the 1<sup>st</sup> defendant after the 3<sup>rd</sup> defendant sold the suit property to the 1<sup>st</sup> defendant.

12. He stated further that, their elder brother was buried on the suit property and that they were not aware that the title deed for the suit property had been issued to the 3<sup>rd</sup> defendant. It was after his (PW1) house was demolished that they learnt that the suit property had been sold to the 1<sup>st</sup> defendant. When the 1<sup>st</sup> defendant was purchasing the suit property he was aware that the property belonged to their mother, Wairimu Mwambia and that the same did not belong to the 3<sup>rd</sup> defendant. As at the time the 1<sup>st</sup> defendant was purchasing the suit property, his (PW1) house was standing thereon. There was also their elder brother's grave on the property which the 1<sup>st</sup> defendant must have seen. PW1 urged the court to grant to the plaintiffs the reliefs sought in the plaint.

13. The plaintiffs' second witness was Margaret Wanjiru Karanja (PW2). PW2 was the wife of Peter Karanja Mwambia. Njeri Mwambia was her mother-in-law. PW2 told the court that during the distribution of the family land by Njeri Mwambia, her husband was given a portion of that land. She stated that Elizabeth Wacu was given a portion of that land to hold in trust for the 3<sup>rd</sup> defendant. She stated that the portion of land that was given to Elizabeth Wacu to hold in trust for the 3<sup>rd</sup> defendant (the suit property) belonged to all the children of Wairimu Mwambia who was deceased by then. PW2 told the court that the 3<sup>rd</sup> defendant had no right to sell the suit property. PW2 corroborated PW1's evidence that the suit property had a house belonging to PW1 standing on it and a grave when it was sold by the 3<sup>rd</sup> defendant to the 1<sup>st</sup> defendant.

14. The last to give evidence for the plaintiffs was the 2<sup>nd</sup> plaintiff, Margaret Wambui Macharia (PW3). PW3 adopted her witness statement dated 18<sup>th</sup> March, 2015 as her evidence in chief. In her witness statement, PW3 stated that she was a daughter of Wairimu Mwambia and that a part from the 1<sup>st</sup> plaintiff and the 3<sup>rd</sup> defendant, her other siblings were; David Karanja, John Kimani and Hannah Wanjiku. She stated that their mother, Wairimu Mwambia died before their grandmother, Njeri Mwambia could distribute the land that their mother and her siblings had inherited from their father. She stated that since their mother was deceased, the portion of family land that she was entitled to (the suit property) was given to her children which included herself, the 1<sup>st</sup> plaintiff, the 3<sup>rd</sup> defendant and their other siblings. PW3 stated that an agreement was reached that the 3<sup>rd</sup> defendant who was their eldest sister was to hold the suit property in trust for PW3 and her siblings mentioned above. PW3 stated that the 3<sup>rd</sup> defendant did not own the suit property absolutely and as such she had no capacity to sell the same.

15. The 2<sup>nd</sup> defendant called Joseph Wangombe Kamuyu (DW1) as his witness. DW1 was a former land registrar at Gatundu Land Registry. He gave the court the history of the suit property more particularly how it was created from Plot No. 584. DW1 stated that according to the records held at the Land Registry, the suit property was registered in the name of the 1<sup>st</sup> defendant as the owner thereof and that the 1<sup>st</sup> defendant acquired the property from the 3<sup>rd</sup> defendant on 24<sup>th</sup> January, 2001. He stated that there was no way the land registrar could have known that the 3<sup>rd</sup> defendant held the suit property as a trustee for the plaintiffs. He stated that it was the responsibility of the 3<sup>rd</sup> defendant to tell the land registrar that she was holding the property in trust. He stated that the 3<sup>rd</sup> defendant was registered as the absolute owner of the suit property.

16. The 1<sup>st</sup> defendant was the last to give evidence. The 1<sup>st</sup> defendant, Francis Gichiri Ndua (DW2) adopted his witness statement dated 10<sup>th</sup> March, 2011 as his evidence in chief. He also gave oral testimony and produced a number of documents as exhibits. In his testimony, he stated as follows: He purchased the suit property from the 3<sup>rd</sup> defendant in 2001. The sale was approved by the Land Control Board after which the suit property was transferred to his name. After he was issued with a title deed, he occupied the suit property peacefully from 2001 until 2010 when he was approached through his brother by the relatives of the 3<sup>rd</sup> defendant with a proposal that he sells the suit property to them. He told them that the suit property was not on sale after which the plaintiffs served him with a demand letter and subsequently filed this suit. DW2 told the court that there was nothing in the title that was held by the 3<sup>rd</sup> defendant showing that she was holding the suit property in trust. He stated that he was not aware of the plaintiffs until they brought the present suit. DW2 urged the court to dismiss the plaintiffs' suit.

17. After the conclusion of the evidence, the parties made closing submissions in writing. The plaintiffs filed their submissions on 3<sup>rd</sup> May, 2019 while the 1<sup>st</sup> defendant filed his submissions on 28<sup>th</sup> January, 2020. The 2<sup>nd</sup> defendant filed his submissions on 23<sup>rd</sup> January, 2020. I have considered the evidence on record and the submissions by the parties' advocates. The parties did not frame and file in court a statement of agreed issues. In their submissions, each party framed its own set of issues for determination by the court. From the pleadings, the following in my view are the issues that arise for determination in the suit before the court:

a) Whether the 3<sup>rd</sup> defendant held the suit property in trust for the plaintiffs.

b) Whether the sale of the suit property by the 3<sup>rd</sup> defendant to the 1<sup>st</sup> defendant was carried out in breach of the said trust.

- c) Whether the 1<sup>st</sup> defendant had notice of the plaintiffs' interest in the suit property while purchasing the same.
- d) Whether the plaintiffs are entitled to the reliefs sought in the amended plaint.
- e) Who is liable for the costs of the suit?

**Whether the 3<sup>rd</sup> defendant held the suit property in trust for the plaintiffs and whether the sale of the suit property to 3<sup>rd</sup> defendant was in breach of the said trust.**

18. The suit property was registered under the Registered Land Act, Chapter 300 Laws of Kenya (now repealed). The 3<sup>rd</sup> defendant did not enter appearance. All the averments contained in the amended plaint against the 3<sup>rd</sup> defendant more particularly that she held the suit property in trust were therefore not controverted. The 1<sup>st</sup> and 2<sup>nd</sup> defendants on the other hand contended that there was nothing in the register of the suit property or in the title that was held by the 3<sup>rd</sup> defendant showing that the 3<sup>rd</sup> defendant held the suit property in trust for the plaintiffs or anyone else. I am in agreement with the submissions by the 1<sup>st</sup> and 2<sup>nd</sup> defendants that the registration of the 3<sup>rd</sup> defendant as the proprietor of the suit property conferred upon the 3<sup>rd</sup> defendant absolute ownership of the suit property together with all the rights and privileges associated with such ownership and that such rights were not liable to be defeated save as was provided in the Registered Land Act, Chapter 300 Laws of Kenya (now repealed).

20. That legal position is anchored on sections 27 and 28 of the Registered Land Act cited by the 1<sup>st</sup> defendant in his submissions. See also sections 24 and 25 of the Land Registration Act, 2012 cited by the 2<sup>nd</sup> defendant in his submissions. There is however a proviso in section 28 of the Registered Land Act which provides that the rights of a proprietor of land set out above are subject to any duty or obligation such proprietor may have as a trustee. In Kanyi v Muthiora [1984] KLR 712, Chesoni, Ag J.A stated as follows at page 723:

**“Section 143 of the Registered Land Act did not apply as there was no question of rectification of the register but a transfer by a trustee to a beneficial owner. The registration of the suit land in the name of Kanyi under the Registered Land Act did not extinguish Nyokabi's rights under Kikuyu customary law. Kanyi was not relieved from her duty or obligation to which she was a trustee to Mathiora's land: see proviso to section 28 of the Act and Gatimu Kinguru –vs- Muya Gathangi [1976] KLR 253. There was overwhelming evidence of a trust in favour of Nyokabi.”**

In John Gitiba Buruna & Another v Jackson Rioba Buruna, Court of Appeal at Kisumu, Civil Appeal No. 89 of 2003, the court stated as follows:

**“Although the rights of a registered proprietor of land are indefeasible under section 28 of the Registered Land act, such registration does not as the proviso to section 28 states relieve a proprietor from any duty or obligation to which he is subject as a trustee.”**

21. It is clear from the foregoing cases that the 3<sup>rd</sup> defendant's title over the suit property could be impeached on account of any duty that she owed as a trustee to the plaintiffs. In Mwangi Mbothu & 9 others v Gachira Waitimu & 9 Others [1986] eKLR, the court stated that:

**“The law never implies, the court never presumes a trust but in case of absolute necessity. The court will not imply a trust save in order to give effect to the intention of the parties. The intention of the parties to create trust must be clearly determined before a trust will be implied.”**

22. I am satisfied from the totality of the evidence placed before the court that the plaintiffs have proved the existence of a trust relationship between them and the 3<sup>rd</sup> defendant in relation to the suit property. In Njenga Chogera v Maria Wanjira Kimani & 2 Others [2005] eKLR, the Court of Appeal stated as follows on proof of trust:

**“It was argued on behalf of the appellant that there was no sufficient evidence to prove customary law trust. On our own re-evaluation of the evidence we are satisfied that there was ample evidence of the history of the suit land and of the relevant customary law on which the learned judge could find as he did.”**

23. In Juletabi African Adventure Limited & another v Christopher Michael Lockley [2017] eKLR, the Court of Appeal stated as follows when dealing with a case similar to the one before this court:

**“ 27. In Twalib Hatayan Twalib Hatayan & Anor vs. Said Saggat Ahmed Al-Heidy & Others. [2015] eKLR, this Court examined and stated the law on trusts as follows:**

**“According to the Black's Law Dictionary, 9<sup>th</sup> Edition; a trust is defined as**

**“1. The right, enforceable solely in equity, to the beneficial enjoyment of property to which another holds legal title; a property interest held by one person (trustee) at the request of another (settlor) for the benefit of a third party (beneficiary).”**

**Under the Trustee Act, “... the expressions “trust” and “trustee” extend to implied and constructive trust, and cases where the trustee has a beneficial interest in the trust property...”**

In the absence of an express trust, we have trusts created by operation of the law. These fall within two categories; constructive and resulting trusts. Given that the two are closely interlinked, it is perhaps pertinent to look at each of them in relation to the matter at hand. A constructive trust is an equitable remedy imposed by the court against one who has acquired property by wrong doing. ... It arises where the intention of the parties cannot be ascertained. If the circumstances of the case are such as would demand that equity treats the legal owner as a trustee, the law will impose a trust. A constructive trust will thus automatically arise where a person who is already a trustee takes advantage of his position for his own benefit (see Halsbury's Laws of England supra at para 1453). As earlier stated, with constructive trusts, proof of parties' intention is immaterial; for the trust will nonetheless be imposed by the law for the benefit of the settlor. Imposition of a constructive trust is thus meant to guard against unjust enrichment. ...

A resulting trust is a remedy imposed by equity where property is transferred under circumstances which suggest that the transferor did not intend to confer a beneficial interest upon the transferee ... This trust may arise either upon the unexpressed but presumed intention of the settlor or upon his informally expressed intention. (See Snell's Equity 29<sup>th</sup> Edn, Sweet & Maxwell p.175). Therefore, unlike constructive trusts where unknown intentions maybe left unexplored, with resulting trusts, courts will readily look at the circumstances of the case and presume or infer the transferor's intention. Most importantly, the general rule here is that a resulting trust will automatically arise in favour of the person who advances the purchase money. Whether or not the property is registered in his name or that of another, is immaterial (see Snell's Equity at p.177) (supra)." Emphasis added

28. Applying the emphasized principles to the case before us, all indications are that a resulting trust arose as between the respondent and the 1<sup>st</sup> appellant. As stated in the authority above, a resulting trust will automatically arise in favour of the person who advances the purchase money. Whether or not the property is registered in his name or that of another, is immaterial. It is common ground that all the purchase money for both the vehicle and the parcel was advanced by the respondent. The parcel and vehicle were therefore held in trust for the respondent by the 1<sup>st</sup> appellant. See also

plaintiffs' interest in the suit property that was sold to the 1<sup>st</sup> defendant. The 1<sup>st</sup> defendant admitted in evidence that the suit property is situated in the village where he was born. I am of the view that if the 1<sup>st</sup> defendant had carried out adequate due diligence, he would have been given the history of the suit property from which he would have learnt that the 3<sup>rd</sup> defendant was a trustee of the suit property. The defence of innocent purchaser for value without notice is therefore not available to the 1<sup>st</sup> defendant.

**Whether the plaintiffs are entitled to the reliefs sought in the amended plaint.**

27. The 2<sup>nd</sup> defendant had contended in his submission that the plaintiff's suit was time barred. I did not frame this as one of the issues for determination by the court intentionally. This was because the issue was not raised in the parties' pleadings. In any event, I find no basis for the contention. From the evidence on record, the suit property was transferred to the 1<sup>st</sup> defendant in breach of trust on 24<sup>th</sup> January, 2001 while this suit was filed on 22<sup>nd</sup> February, 2011. The suit was in my view filed within the 12 years' limitation period for the recovery of land.

28. I am satisfied that the plaintiffs have proved their case against the defendants on a balance of probabilities. The plaintiffs sought several reliefs that I have set out at the beginning of this judgment. From the findings I have made above, the plaintiffs are entitled to prayers (a) to (c) in the amended plaint. With regard to prayer (d), I am of the view that the same cannot be granted in the manner it is framed. I am of the view that the property should remain in the name of the 3<sup>rd</sup> defendant who is one of the beneficiaries thereof but with a rider that she is holding the same as a trustee for the children of Wairimu Mwambia. The plaintiffs are at liberty to file a separate suit for the dissolution of the trust and partitioning of the suit property. This suit was not brought for that purpose. The plaintiffs had also sought damages for trespass and mesne profits. In the circumstances of this case, I am not satisfied that trespass was established against the 1<sup>st</sup> defendant. With regard to mesne profits, no evidence was placed before the court in support of the claim. I also find the alternative prayer not proved.

**Who is liable for the costs of the suit?**

29. As was stated in the case of **Jasbir Singh Rai & Others v Tarlochan Singh Rai and 4 others [2014] eKLR**, costs follow the event. In this case, the plaintiffs have succeeded in their claim against the defendants. No reason has been put forward by the defendants to warrant a departure from the general rule on costs. The plaintiffs shall have the costs of the suit.

**Conclusion:**

30. In conclusion, I hereby enter judgment for the plaintiffs against the defendants jointly and severally in terms of prayers (a), (b) and (c) of the amended plaint dated 22<sup>nd</sup> September, 2014. I also order that upon the rectification of the register for Ngenda/Kimunya/1195 by cancellation of the name of the 1<sup>st</sup> defendant as the registered owner thereof and the title deed that was issued to him, the property shall revert to the name of the 3<sup>rd</sup> defendant but the 2<sup>nd</sup> defendant shall add the following words beside the name of the 3<sup>rd</sup> defendant in the register, **"as a trustee for the children of Wairimu Mwambia"**. The plaintiffs shall have the costs of the suit as against the 1<sup>st</sup> and 3<sup>rd</sup> defendants.

**Delivered and Dated at Nairobi this 24<sup>th</sup> day of September 2020**

**S. OKONG'O**

**JUDGE**

Judgment read through Microsoft Teams Video Conferencing platform in the presence of;

Mr. Mburu for the plaintiffs

N/A for the 1<sup>st</sup> defendant

N/A for the 2<sup>nd</sup> defendant

N/A for the 3<sup>rd</sup> defendant

Ms. C. Nyokabi - Court Assistant