Muutu & another v Muutu & another (Environment & Land Case 65 of 2020) [2024] KEMC 8 (KLR) (29 January 2024) (Judgment)

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REPUBLIC OF KENYA

IN THE MACHAKOS LAW COURTS

ENVIRONMENT & LAND CASE 65 OF 2020

CN ONDIEKI, PM

JANUARY 29, 2024

BETWEEN

MUNEE MALISU MUUTU ..... 1ST PLAINTIFF

PATRICK KIMATU MALISU ..... 2ND PLAINTIFF

AND

PETER MALISU MUUTU ..... 1ST DEFENDANT

SYLVESTER MUTWOTA MALISU ..... 2ND DEFENDANT

JUDGMENT

Part I: Introduction

1. For donkey's years, the judicial airwaves have been reigned with a cloud of dust on whether or not a customary trust is an overriding interest in the context of a registered land and as to whether proof of actual possession and occupation is a necessary ingredient thereof. As I write this, this cloud of dust has now been settled. I can now, without doubt, say that a customary trust is an overriding interest and that proof of actual possession and occupation, though a relevant fact, is not a mandatory ingredient thereof. All a claimant has to prove is that the land in question was before registration, family, clan or group land; the claimant belongs to such family, clan, or group; the relationship of the claimant to such family, clan or group is not so remote or tenuous as to make his/her claim idle or adventurous; the claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances; and that the claim is directed against the registered proprietor who is a member of the family, clan or group.

Part II: The Plaintiff's Case

2. Vide an Amended Plaint dated 20th July 2020 and filed on 22nd July 2020, the Plaintiffs brought an action against the Defendants seeking Judgment for: (a) An order of inhibition be issued against the

1st Defendant stopping any registration, sell (sic), alienation or transfer or any other dealing which may prejudice the Plaintiff's (sic) interests over parcel no. Mitaboni/Mutituni/1270. (b) A declaration that the 1st Defendant holds in trust the suit land in favour of the Plaintiffs. (c) (a) A permanent injunction against the Defendants stopping any registration, sell (sic), alienation or transfer or any other dealing which may prejudice the Plaintiffs' interest over parcel no. Mitaboni/Mutituni/1270. (d) General damages. (e) Costs of the suit plus interest.

3. In their Plaint, it is claimed that the 1st Plaintiff is a wife to the 1st Defendant and the 2nd Defendant is a son to the 1st Defendant. The Plaintiffs aver that at all material times, they have been in possession, actual occupation and cultivating the parcel of land known as Mitaboni/Mutituni/1270 (hereinafter "the suit property") with full knowledge of the Defendants. The Plaintiffs aver that the suit property is their ancestral land, which belonged to their grandfather before he passed on, and that it should thus be available for use by both the Plaintiffs and the Defendants. The Plaintiffs thus claim an overriding interest over the suit property and that the 1st Defendant holds it in trust of the Plaintiffs, the Plaintiffs' siblings and their children. The Plaintiffs aver that the 1st Defendant in cahoots with the 2nd Defendant have commenced the process of sub-division and alienation of the suit property without their consent. Finally, the Plaintiffs claim that the 1st Defendant did not seek spousal consent from the 1st Plaintiff to sell the suit property.

4. At the hearing of the Plaintiffs' case, PW1, the 2nd Plaintiff adopted his undated witness statement which was filed together with the Plaint as his evidence-in-Chief. In his said statement, PW1 rehashes the material facts in the Plaint. In addition, PW1 states that he has lived in the suit property since he was born in 1976. He claims that when he married in 1995, his late biological mother shared her share of the suit property among her three children in equal proportions and that he has since been cultivating his share of the suit property. He states that when he was informed that the 1st Defendant had sold to one Benedict Muinde Mavungo the suit property, together with his step-mother, the 2nd Plaintiff, they visited the said Patrick who confirmed that he had been approached by the Defendants to buy the suit property and that the said Patrick indicated willingness to avert the purchase on condition that his deposit had been refunded. In buttressing the claim, PW1 exhibited a copy of search as the Plaintiffs' Exhibit 1.

5. While under cross-examination, PW1 stated that the suit property is registered in the name of Muutu Munguti, his grandfather who is now deceased. He stated that the 1st Plaintiff is his step-mother. He stated that the 1st Defendant had two wives namely the 1st Plaintiff and the 2nd Plaintiff's mother, Teresia, who is now deceased. He stated that the both Plaintiffs, their dependants and all Defendants live in parcel 1103. He stated that the suit property has no building on it and is used only for cultivation by all family members. He stated that he had no sale agreement to prove the sale and he was not privy to the purchase price. He stated that the alleged purchaser is not their witness. He stated that he is not aware of a succession case over the suit property and that he has never filed a protest in a succession cause.

6. PW2, the 1st Plaintiff adopted her undated witness statement which was filed together with the Plaint as her evidence-in-Chief. In her said statement, PW2 rehashes the material facts in the Plaint. In addition, PW2 states that in March 2020, she heard rumours that the 1st Defendant had sold to one Benedict Muinde Mavungo the suit property. PW2 states that together with the 2nd Plaintiff, they visited the said Patrick who confirmed that he had been approached by the Defendants to buy the suit property and that the said Patrick indicated willingness to avert the purchase on condition that his deposit had been refunded.

7. While under cross-examination, PW2 stated that registered proprietor is a father-in-law, the 1st Defendant's father. She stated that the land was allocated to all the Plaintiffs and the Defendants and others not before this Court for cultivation.

8. In his written Submissions dated 24th November 2023 and filed on 29th November 2023, Mr. Ndolo instructed by the Firm of Messieurs Nyambura & Associates Advocates representing the Plaintiffs, has rehashed the substance of the suit and the testimonies. Counsel proposes three issues for determination as follows:

    (i) whether the 1st Defendant required spousal consent in order to transfer the suit property;

    (ii) whether the Plaintiffs have an overriding interest over the suit property; and

    (iii) whether the Plaintiffs are entitled to the injunction sought.

9. For the Plaintiffs, it is urged that they have made a case in favour of all the three questions, placing reliance upon section 28 of the *Land Registration Act*; *JKK v MFN & another* [2018] eKLR; *Kanyi v Muthiora* [1984] eKLR; and *Daniel K. Cheraisi & 2 others v Kipkoech Kangogo & another* [2018] eKLR.

Part III: The Defendants' Case

10. In their joint Statement of Defence dated 4th September 2020 and filed on 8th September 2020, the Defendants denied all material facts in the Amended Plaint save the descriptive parts of the Plaintiffs and the Defendants.

11. At the hearing of this suit, DW1, the 1st Defendant, adopted his witness statement dated 24th May 2023 and filed on even date as his evidence-in-chief. In his said statement, DW1 states that he has not sold the suit property. He states that his late father, Muutu Munguti, had three parcels of land namely Mutituni/Mitaboni/313; Mutituni/Mitaboni/1103; and Mutituni/Mitaboni/1270. He states that there is a succession cause where the grant was confirmed on 6th March 2023 where the each of the three sons of Muutu Munguti received one parcel each upon distribution of the estate and the suit property (Mutituni/Mitaboni/1270) was allocated to the 1st Defendant. He states that the Plaintiffs were aware of the succession cause, but they raised no objection or protest. DW1 exhibited a confirmed grant which was issued on 23rd February 2023 as the Defendants' Exhibit 1.

12. During cross-examination of DW1, he states that the suit land belonged to his late father and that for now, they live in 1103 which was allocated to his brother in the succession cause. He confirmed that the suit property is used for cultivation.

13. DW2, Joseph Musau Muutu, adopted his witness statement dated 24th May 2023 and filed on even date as his evidence-in-chief. The statement restates the evidence of DW1.

14. During cross-examination of DW2, he stated that he is an administrator of the estate of Muutu Munguti.

15. In her written Submissions dated 16.9.2020 and filed in the Court Registry on 18.9.2020, Ms. Nzilani instructed by the Firm of Messieurs D.M. Muumbi & Company Advocates representing the Defendants has proposed four issues for determination as follows:

    (i) whether the Plaintiffs have locus standi to sue without a grant of letters of administration;

    (ii) whether the Defendants have locus standi to be sued without letters of administration;

(iii) whether the suit is merited; and

(iv) costs.

16. Except costs, all the proposed questions have been answered in the negative, placing reliance upon *Joseph Muriuki Kithinji v Peterson Ireri Mwaniki & 3 others* [2021] eKLR; and *Mcvoy v United Africa Co. Ltd* [1961] 3 ALL ER 1169.

17. This Court is urged to dismiss the claim with costs.

Part IV: Points for Determination

18. Gleaning from the Amended Plaint; Statement of Defence; and the rival written submissions, this Court has distilled three questions for determination as follows:

i. First, whether a grant of letters of administration is requisite to sustain a claim for a customary trust.

ii. Second, whether on a balance of preponderance, the Plaintiffs have established the claim of a customary trust.

iii. Third, which party shall shoulder the costs of this suit?

Part V: Analysis of The Law; Examination of Facts; Evaluation of Evidence And Determination

19. This Court now embarks on analysis, interrogation, assessment, and evaluation of each of the three questions, seriatim.

(i) Whether a grant of letters of administration is requisite to sustain a claim for a customary trust

20. In a customary trust claim, in circumstances where the claimant brings the action in his/her own right as a member of the family, a grant of letters of administration is not a requisite to afford the claimant locus standi. See the judicial view expressed in *Isaya Theuri M'Lintari & Another v George Mbithi Kiebia & another* (2009) eKLR by Kasango, J., which judicial view was upheld by the Court of Appeal in *George Mbiti Kiebia & another v Isaya Theuri M'lintari & another* [2014] eKLR, per Visram, Koome & Otieno-Odek (as they then were). Although the same case rose to the Supreme Court and although this was one of the grounds which informed the application seeking certification of the appeal as a matter of general public importance, it seems to me that that this ground was abandoned *Isack M'inanga Kiebia v Isaaya Theuri M'lintari & another* [2018] eKLR, per Maraga, CJ & P, Ibrahim, Ojwang, Wanjala & Njoki, SCJJ. It translates that the position of the Court of Appeal in this regard prevails.

21. However, a claimant will lack locus standi if no grant of letters of administration has been secured in circumstances where the claimant brings the action for and on behalf of the estate of a deceased person. See *Joshua Kamoing v Simon Barchok & 2 others* [2016] eKLR.

22. In this case, the Plaintiffs claim to have brought this action on their own behalf as members of the family the deceased, Muutu Munguti and not on behalf of the estate of Muutu Munguti. And so, a grant of letters of administration is not a requisite to afford the the Plaintiffs herein locus standi.

(ii) Whether on a balance of preponderance, the Plaintiffs have established the claim of a customary trust

23. What amounts to a trust? The term "trust" has not been directly defined by statute. The *Trustee Act* defines it by exclusion (what it is not) rather than by inclusion (what it is). Section 2 of the *Act* defines it that "trust": "does not include the duties incident to an estate conveyed by way of mortgage, but, with this exception, the expressions "trust" and "trustee" extend to implied and constructive trusts, and to cases where the trustee has a beneficial interest in the trust property, and to the duties incident to the office of a personal representative, and "trustee" where the context admits, includes a personal representative, and "new trustee" includes an additional trustee."

24. Henry Black, in his magnum opus work known as The *Black's Law Dictionary*, Ninth Edition, at pages 1647-1648, defines a "trust" in the following terms:

> " 1. The right, enforceable solely in equity, to the beneficial enjoyment of property to which another person holds the legal title; a property interest held by one person (the trustee) at the request of another (the settlor) for the benefit of a third party (the beneficiary). For a trust to be valid, it must involve specific property, reflect the settlor's intent, and be created for a lawful purpose. The two primary types of trusts are private trusts and charitable trusts (see below).
>
> 2. A fiduciary relationship regarding property and charging the person with title to the property with equitable duties to deal with it for another's benefit; the confidence placed in a trustee, together with the trustee's obligations toward the property and the beneficiary. A trust arises as a result of a manifestation of an intention to create it. See fiduciary relationship under relationship.
>
> 3. The property so held."

25. Is a customary trust an overriding interest? It is imperative to highlight some history in this regard and how it paved the road to the current status.

26. In *Obiero v Opiyo* [1972] EA 227, Bennett, J (as he then was) while concluding that customary trust is not among the overriding interests listed in section 30 of the Registered Land Act stated at p. 228 that

> " Had the legislature intended that the rights of a registered proprietor were to be subject to the rights of any person under customary law, nothing could have been easier than for it to say so."

27. After the Obiero decision (*supra*), the High Court (rendered on 23.6.1973) in *Esiroyo v Esiroyo and another* [1973] 1 EA 388, Kneller, J. (as he then was) sitting in Kisumu, had occasion to consider the import and purport of section 30 of the *Registered Land Act* (now repealed) an equivalent to section 28 of the *Land Registration Act*, 2012. His Lordship came to a conclusion that the overriding interests contemplated under section 30 of the then *Registered Land Act* did not include a customary trust. In this case, the Plaintiff sued the Defendants for an injunction restraining them from trespassing on the land registered in his name under the then *Registered Land Act*. In defence, the Defendants who were the sons of the Plaintiff claimed that they were entitled to certain portions of the Plaintiff's land and to occupy those portions and to cultivate them together with their wives and children and servant because it is the land had passed down generations from their fore-forefathers. Although the Plaintiff testified that he bought the land in 1929, the Court concurred with the Defendants that the Plaintiff inherited it from his father and grandfathers and so forth before him. The Defendants proved that

under Luhya customary law they would have an interest in the land. In his Judgment, while adopting the reasoning in an earlier decision in *Obiero v Opiyo*, [1972] EA 227, His Lordship concluded and held that the Plaintiff's title was free of all encumbrances as the rights under customary law are not over-riding interests. His Lordship reasoned as follows: -

> "According to the customary law, the father should indicate which Part each son has to cultivate and occupy and he would have to do this before he died, of course. This right of the sons to some portion of the family's land would, of course, be forfeited according to customary law, if their behaviour was such that their father owed no more duty to them. I am unable to find on the evidence before me that the sons by their behaviour have in any way forfeited their right under customary law to such portions of land. They probably had a very difficult father to deal with during all this. Their sole remedy against him for smashing a radio or tearing up trees and so forth was probably to report him to the local police or take him before the local Courts. I also find that 5 acres each out of the 22 acres, remembering all the other sons who have to have some land and Jones Williams who has his 0.4 hectares elsewhere, would, under customary law, be reasonable and sufficient for each of these Defendant brothers. I would also find that these customary laws, aPart from an exception which I will deal with next, still obtain in that area. It may be that the Plaintiff, if he is reconciled to the two Defendants, may come to have this portion of land re-registered or, at any rate, may leave some directions in his will about this and so forth. Nevertheless, according to the law and the exception which I now turn to, he is not bound to do this any longer. The matter is taken out of the purview of customary law by the provisions of the *Registered Land Act*. {{em The Plaintiff is the registered proprietor of the plot 309. The rights of the Defendants under customary law have been extinguished. S. 28 of the *Registered Land Act* confers upon a registered proprietor "a title free from all other interests and claims whatsoever", subject to the lease, charges and encumbrances shown in the register and such over-riding interests as are not quoted in the register. There are no encumbrances noted on the land certificate. The Plaintiff's title is free of encumbrances. Rights arising under customary law are not among the interests listed in s. 30 of the Act as over-riding interests...So, in effect, the facts in that case and in this one are almost on all fours. Bennett, J. decided that in Obiero v. Opiyo the Defendants had made no serious attempt to prove that the Plaintiff widow obtained registration by fraud or mistake. He was not satisfied on the evidence that the Defendants ever had any right to the land under customary law. In this case, I have decided that the Defendants had rights under customary law. One further point of distinction is that the Defendants in this case never went to any Land Adjudication committee or authority to ask for any decision in their favour. Bearing in mind these distinctions which I do not find material, I propose to follow, with respect, the decision of Bennett, J. The Plaintiff has proved, on the balance of probabilities, that he is entitled to the relief which he seeks. There will be an order for the eviction of each Defendant from plot 309. If they do not remove themselves, their wives or children or agents within the next 60 days from the date of this order, there will be a perpetual injunction to restrain them, their wives and children or servants from continuing or repeating any acts of trespass on the land in dispute with effect from 60 days from the date of this order. One point that always arises in cases like this, and I think I had better make provision for it, is the right of the members of the family of each Defendant to re-enter on the land for harvesting over a period of two days any crop that may mature on that land. This will be restricted, of course, to crops which they have planted themselves. It will be subject to arrangement with the Plaintiff and will only arise if the Plaintiff does not harvest the crops himself and hand them to each Defendant or his family. This will terminate at the end of 90 days from the

date of this order. The assessment of damages will be on the basis that for each acre, 10 bags of maize can be harvested by a diligent labourer each year. There were two years which the Plaintiff could not use this land for the planting of this maize. The profit on each bag of maize was Shs. 20/-. Each Defendant was cultivating, occupying and harvesting 5 acres or they were doing 10 between them. None of this was controverted by any Defendant. Bearing in mind all the circumstances of this case and doing the best I can, I would calculate the damages at Shs. 4,000/- for trespass on this land from the date set out in the Plaint, namely, 19 May 1970, up till the time of this judgment. There will be judgment for the Plaintiff for that sum and costs together with interest and there will be orders that I have already set out." {Emphasis supplied}

28. A myriad are decisions of the superior Courts which adopted the construction of section 30 read with 28 of the Registered Land Act in Esiroyo and Obiero cases. For instance, in Joseph Karisa Musonga v Johnson Nyati [1984] eKLR, Kneller, J. (as he then was) was at it again indicating that unless the legislature specifies a customary trust as one of the overriding interest, it will for as long it is not so enacted remain that it is not. His Lordship rendered himself thus:

> "The Defendant as the registered proprietor has a title free from all interests and claims whatsoever, but subject to any lease, charge and encumbrance shown in the register together with such overriding interests that exist and are not required to be noted in the register under Sections 28 and 30 of the *Registered Land Act*. Rights arising under customary law are not among the rights listed in Section 30 of the Act as overriding interests. Bennet J ... pointed this out and added 'had the legislature intended that the rights of a registered proprietor were to be subject to the rights of any person under customary law, nothing could have easier than for it to say so.' And 12 years later, it still has not done so."

Even the Court of Appeal in *Muriuki Marigi v Richard Marigi & 2 others* (Nyeri C.A No. 189/96: unreported) restated the holding in Obiero and Esiroyo cases. It stated thus:

> We earlier set out the provisions of Sections 27 and 28 of the *Registered Land Act*, which in effect state that the rights of a registered proprietor of land registered under the Act are absolute and indefeasible and are only subject to rights and encumbrances noted on the register or overriding interests which are set out in Section 30 of the Act.....The only other aspect outstanding for consideration is whether the customary law rights, if they exist at all, are overriding rights or interests recognizable under that Section. The issue was considered in the following two reported cases of Obiero v. Opiyo and Esiroyo v. Esiroyo and in both cases it was held that they are not. The Court in both cases was bound to come to that conclusion because of the clear language of Section 30 above..." In *Gathiba v Gathiba* [2001] 2 EA 368, Khamoni, J. (as he then was), concluded too that "rights under customary law, are not overriding interests under Section 30 of the *Registered Land Act*."

29. However, in a few decisions, superior Courts departed from the Obiero and Esiroyo jurisprudence. For instance, in *Kanyi v Muthiora* [1984] KLR 712, while departing from the Obiero and Esiroyo school of thought, Nyarangi Ag JA (as he then was) flipped the Bennett, J. reasoning in the Obiero case and reasoned that had legislature intended that customary law rights were to be excluded, nothing would have been easier than for it to say so. His Lordship rendered himself as follows:

> "I doubt like Madan JA did in *Kiama v Mathunya*..., if rights under customary law are excluded by Section 30 of the Act. Had the legislature intended that customary law rights were to be excluded, nothing would have been easier than for it to say so. I would say any

valid rights are included in Section 30 of the Act just as a trustee referred to in Section 28 of the Act could not fairly be interpreted and applied to exclude a trustee under customary law. Be that as it may, the trust, in favour of Maritha is a resulting one by virtue of Section 163 of the Act. Besides, having been in occupation of a portion of the suit land and no inquiry having been made, Maritha had created rights of an overriding nature under Section 30 (g) to which the appellant as proprietor was subject."

In this decision, where Kneller JA (as he then was) sat with Nyarangi, Ag. JA after rising to the Court of Appeal seems to have loosened his rigid reasoning which he had earlier deployed in *Esiroyo v Esiroyo* and *Joseph Karisa Musonga v Johnson Nyati* (both discussed supra) gleaning from the following statement:

> " Furthermore, the Respondent under the trust which arose between her and the appellant in the circumstances of this case had rights against the appellant stemming from her possession and occupation of Part of Muthiora's land though it was registered in the name of the appellant. This is an overriding interest which is not required to be noted on the register and the appellant's proprietorship is subject to it." In the same case, Chesoni JA (as he then was) took a view that: "The registration of the suit land in the name of Kanyi under the *Registered Land Act* did not extinguish Nyokabi's rights under the Kikuyu customary law, Kanyi was not relieved from her duty or obligation to which she was as a trustee to Muthora's land: see proviso to Section 28 of the Act..."

30. In the Court of Appeal decision in *Mbui Mukangu v Gerald Mutwiri Mbui* [2004] eKLR, O'kubasu, Githinji & Waki, JJA (as they then were) embraced the concept of a customary trust and stated that

> " It cannot be argued too strongly that the proper view of the qualification or proviso to Section 28 is that trusts arising from customary law claims are not excluded in the proviso. Such claims may stem from possession and occupation of Part of the registered land which strictly it (sic) may not be an overriding interest under Section 30(g), it nevertheless gives rise to a trust which is capable of protection under the Act."

31. There is a tectonic shift prompted by the *Constitution* of Kenya, 2010. In the advent of the *Land Registration Act*, seemingly seeking to remove all doubt which had been raised by Bennet, J. in the Obiero case, the Act makes provisions under section 28 thereof introducing two new categories of overriding interests. First, "spousal rights over matrimonial property" and second, "trusts including customary trusts." Unless the contrary is expressed in the register, all registered land shall be subject to overriding interests without being noted on the register which interests are trusts including customary trusts; rights of way, rights of water and profits subsisting at the time of first registration under this Act; natural rights of light, air, water and support; rights of compulsory acquisition, resumption, entry, search and user conferred by any other written law; charges for unpaid rates and other funds; rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription; electric supply lines, telephone and telegraph lines or poles, pipelines, aqueducts, canals, weirs and dams erected, constructed or laid in pursuance or by virtue of any power conferred by any written law and any other rights provided under any written law. Section 28 of the *Act* on the other hand provides for overriding interests. It states that

> " 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—
>
> (a) deleted by Act No. 28 of 2016, s. 11(a);

(b) trusts including customary trusts;

(c) rights of way, rights of water and profits subsisting at the time of first registration under this Act; (d) natural rights of light, air, water and support;

(e) rights of compulsory acquisition, resumption, entry, search and user conferred by any other written law;

(f) deleted by Act No. 28 of 2016, s. 11(b);

(g) charges for unpaid rates and other funds which, without reference to registration under this Act, are expressly declared by any written law to be a charge upon land;

(h) rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription;

(i) electric supply lines, telephone and telegraph lines or poles, pipelines, aqueducts, canals, weirs and dams erected, constructed or laid in pursuance or by virtue of any power conferred by any written law; and

(j) any other rights provided under any written law, Provided that the Registrar may direct the registration of any of the liabilities, rights and interests hereinbefore defined in such manner as the Registrar deems necessary."

32. Courts have since made it trite that all registered land is subject to overriding interests without being noted on the register. Included in this catalogue of overriding interests are all forms of trusts; rights acquired or in the process of being acquired by virtue of any written law relating to limitation of actions or by prescription and any other rights provided under any written law. In the Court of Appeal decision in *Willy Kimutai Kitilit v Michael Kibet* (Civil Appeal No. 51 of 2015; [2018] eKLR, while interpreting section 28 of the *Land Registration Act*, 2012, E. M. Githinji, Hannah Okwengu and J. Mohammed, JJA expressed themselves that

> "Under Section 28 of the *Land Registration Act*, all registered land is subject to overriding interests without being noted on the register specified therein which includes trusts, including customary trusts, rights acquired or in the process of being acquired by virtue of any written law relating to limitation of actions or by prescription and any other rights provided under any written law."

In addition, the Supreme Court of Kenya decision in Isack M'inanga Kiebia v Isaaya Theuri M'lintari & another [2018] eKLR, has since (in black and white) removed all doubt by enunciating that customary trusts are overriding interests.

33. 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. Shedding light on the transition to the *Land Registration Act* from the Registered *Land Act* (now repealed), the Supreme Court in Isack M'inanga Kiebia v Isaaya Theuri M'lintari & another [2018] eKLR, expressed itself as follows:

> "[57] With the repeal of the *Registered Land Act* (Cap 300), Parliament enacted the *Land Registration Act* No. 3 of 2012. The provisions of Section 28 of the former, including the proviso thereto, were re-enacted as Section 25 of the latter; while the provisions of Section 30 of Cap 300 were re-enacted as

> Section 28 of the *Land Registration Act*. However, Parliament introduced two new categories of overriding interests, the first category is what are now called "spousal rights over matrimonial property"; while the second category is what are, rather curiously called "trusts including customary trusts". Even more curious, is the fact that "the rights of a person in possession or actual occupation of land to which he is entitled in right only of such possession or occupation," as earlier provided for under Section 30 (g) of the *Registered and Act*, are no longer on the list of overriding interests under Section 28 of the *Land Registration Act*. [58] What are we to make of these changes? Several interpretations are plausible. 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..."

34. What are the ingredients of and indicators to a customary trust? For donkey's years, the law on first, whether or not a customary trust is an overriding interest and second, the ingredients necessary to prove a customary trust have suffered Ping-Pong in the justice corridors. Gladly, the two thorns in the flesh were settled by the Supreme Court of Kenya (SCORK) on 5th October 2018. Since the introduction of the Torrens System of Registration of rights in land in Kenya, a state of improbability characterized the law on customary trusts, principally driven by the contradictory precedents thereon, as discussed supra. While the question of customary or inter-generational trust has been determined from time to time, until 5th October 2018, the resulting body of precedent was contradictory on whether a claimant of a customary law trust needed to prove actual physical possession or occupation. Whereas it was hoped that the overhaul of the previous land laws and the enactment of the *Land Registration Act*, 2012, aimed at consolidating and rationalizing the registration of titles was to put the issue to rest, it didn't. In its decision, the SCORK's decision in *Isack M'inanga Kiebia v Isaaya Theuri M'lintari & another* [2018] eKLR, the Petitioner sought clarity in this regard by designing the question in a manner which obliged the SCORK to harmonize the contradictory precedents. In brief, the Respondents claimed that they were members of the Athimba clan, which owned a large parcel of ancestral land in Njia Location, Nyambene District and that during the process of land adjudication in 1963, it had been agreed that the land would be sub-divided and each portion registered in the name of an appointed member who would then hold the land in trust on behalf of a specific household. The Respondents averred that pursuant to this agreement, two land parcels No. Njia/Kiegoi Scheme 86 and Njia/Kiengoi Scheme/70 were allocated to their grandfather's household (M'Kiebia Baithambu) and registered in the names of two of his three sons (Respondents' uncles) to hold in trust on behalf of the entire household of M'Kiebia Baithambu. In this context, it was the Respondents' case that the appellants held one third of the land in trust on behalf of their deceased father, Musa Lintari (who was one of their grandfather's three sons). The Respondents asserted that they had lived on the said property, were in possession of it and had made substantial developments on the same which assertion was denied by the appellants. In the High Court, Kasango J. held that the Plaintiffs (Respondents in the SCORK)

had established the existence of a trust in their favour on the basis of their being in actual occupation and also as bona fide members of the household. The High Court, accordingly, entered Judgment for the Plaintiffs (turned Respondents in SCORK) by declaring that the 1st Respondent held 3 acres of LR. No. Njia/Kiegoi Scheme/86 in trust for the Plaintiffs and the 2nd Respondent held 3 acres of LR. No. Njia/Kiegoi Scheme 70 in trust for the Plaintiffs. Aggrieved by the decision of the High Court, the petitioners appealed to the Court of Appeal. The Appellate Court (constituted of Visram, Koome & Otieno-Odek, JJA) held that the evidence on record was sufficient proof that the Respondents had been born and raised on LR. No. Njia/Kiegoi Scheme/86 and had been in possession and occupation of the said parcel of land. With regard to parcel No. Njia/Kiegoi Scheme/70, the appellate Court held that the evidence on record was contradictory and thus could not provide conclusive proof that the Respondents had been in possession and occupation of the said parcel. As such, the Respondents could not found their claim upon Section 30(g) of the *Registered Land Act* (now repealed). However, the Court opined that if the Respondents were basing their claim on the existence of a customary trust, they could be protected, as long as the said trust was proved. The clincher by the Court of Appeal came when they departed from the long held jurisprudence on actual possession and occupation as one of the key elements to prove by declaring that

> " to prove a trust in land (read customary trust), one need not be in actual physical possession and occupation of the land...Unless a trust is proved, the Respondents have neither possessory nor occupational rights that can be protected as overriding interests... We hasten to add that to prove a trust in land; one need not be in actual physical possession and occupation of the land."

The Court found that the trial Judge did not err in finding that a trust existed in relation to LR No. Njia/Kiegoi Scheme/86 (Plot No. 86) and LR No. Njia/Kiegoi Scheme/70 (Plot No. 70). It proceeded to dismiss the appeal in its entirety. For ease of contextualization, in extenso, I wish to quote Maraga, CJ. (as he then was); Ojwang, SCJ (as he then was); Ibrahim, Wanjala and Ndungú, SCJJ who rendered themselves as follows:

> " [22] On its way to dismissing the appeal and affirming the High Court's Judgment, the Court of Appeal made what we consider a pronouncement of jurisprudential import. The Court stated thus:
>
> > " Unless a trust is proved, the Respondents have neither possessory nor occupational rights that can be protected as overriding interests... We hasten to add that to prove a trust in land; one need not be in actual physical possession and occupation of the land."
>
> In so asserting, the Appellate Court was echoing (and therefore affirming) an earlier holding by the High Court in *James N. Kiarie v. Geoffrey Kinuthia & Another* (2012) eKLR wherein the Court stated:
>
> > "...While occupation may be relevant and has been found to be relevant in some cases in raising the inference of a trust, it is not ... a necessary ingredient for a trust to be established."
>
> [23] The foregoing declaration forms the basis of the appeal before us, for in strenuously disagreeing with the appellate Court, Mr. Nowrojee, Counsel for the appellant, argues that a customary trust in relation to registered land can only be founded upon the actual physical possession or occupation of the

land by the claimant. In other words, absent the possession or occupation of the land, or Part of it by an unregistered claimant, there can be no customary trust to which the registered proprietor would be subject. Herein lies the conundrum that has characterized disputes between registered and unregistered claimants to land...

[52] {{em 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 act 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:

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

[53] {{em We also declare that, rights of a person in possession or actual occupation under Section 30(g) of the *Registered Land Act* {{em , 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. [54] 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* {{em , 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* . Although the Respondents herein were not in possession or actual occupation of Parcel No. Njia/Kiegoi Scheme 70, both the High Court and Court of Appeal were entitled to enquire into the circumstances of registration, to establish whether a trust was envisaged. Since the two superior Courts were satisfied that indeed elements of a customary trust in favour of the Respondents pertaining to the parcel existed, we see no reason to interfere with their conclusions.

... [57] {{em With the repeal of the *Registered Land Act* {{em (Cap 300), Parliament enacted the Land Registration Act No. 3 of 2012. The provisions of Section 28 of the former, including the proviso thereto, were re-enacted as Section 25 of the latter; while the provisions of Section 30 of Cap 300 were re-enacted as Section 28 of the Land Registration Act. However, Parliament introduced two new categories of overriding interests, the first category is what are now called "spousal rights over matrimonial property"; while the second category is what are, rather curiously called "trusts including customary trusts".

Even more curious, is the fact that "the rights of a person in possession or actual occupation of land to which he is entitled in right only of such possession or occupation," as earlier provided for under Section 30 (g) of the *Registered Land Act* , are no longer on the list of overriding interests under Section 28 of the *Land Registration Act*. [58] What are we to make of these changes" Several interpretations are plausible. 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..." {Emphasis supplied}

35. If the Defendant is the original allottee of the suit land, there is no basis for a customary trust since the element of inter-generational hand-down is absent. In *Eunice Kemunto Nyaundi & 6 others v Charles Nyangai* [2018] eKLR, the Plaintiffs were all children of the Defendant and the Defendant was the registered owner of land parcel number Gesima Settlement Scheme/71 measuring 7.2 hectares or thereabouts. The Plaintiffs claimed that the Defendant was registered as such proprietor in trust for them and their late mother Hellen Mandere Nyangai. The Plaintiffs claim the Defendant in 2015 attempted to subdivide the said land with the intention of transferring the same to third parties which would have prejudiced the Plaintiffs' interest in the said land. They thus sought a declaration that the Defendant held the land in trust and for their benefit and a permanent injunction restraining the Defendant from in any manner dealing with the suit property. On the other hand, the Defendant

denied that he held the said land in trust and for the benefit of the Plaintiffs arguing that he was allocated the suit land following Application to the Settlement Fund Trustees (SFT) who after he repaid the loan it had advanced to him secured a transfer of the land to his name as the sole owner and not as trustee for the Plaintiffs. The Defendant further denied that he had breached the imaginary trust. The Defendant lodged an Application under Order 2 Rule 15; Order 37 Rules 1 and 2 and Order 51 Rule 1 of the *Civil Procedure Rules* and Sections 3 and 3A of the *Civil Procedure Act* seeking orders that the Court strikes out the suit on grounds that the suit is frivolous, scandalous, vexatious, an abuse of the Court process and discloses no cause of action since he is the registered proprietor of the suit land and that he has absolute and exclusive rights over the same to the exclusion of all and sundry, the Plaintiffs not excepted and that any further delayed dispensation of the matter herein summarily is a slap on the proprietary rights of the Defendant/ Applicant over the suit land. Concurring with the Defendant that this suit was frivolous, scandalous, vexatious, an abuse of the Court process and discloses no cause of action and thus summarily dismissing it, J.M. Mutungi, J. had the following to say: -

"

> " 9. In the present suit the Defendant who is the Plaintiffs' father has not denied the Plaintiffs right of occupation of the suit land and neither does he deny that the Plaintiffs have an entitlement to the land as beneficiaries. As per the pleadings it is apparent the Plaintiffs want to be the ones to determine how the suit property and/or indeed the Defendant's properties ought to be shared out and/or distributed. The issue for the Court to ponder is whether the Defendant's children would legally be entitled to restrain him from dealing with his property as he deems fit during his lifetime provided he does not deal with the properties in such a manner as would result in disinheriting them. The *Law of Succession Act*, Cap 160 Laws of Kenya which comes into operation once a person is deceased, under Part III Sections 26 to 30 makes provisions for dependants of a deceased person. Under Section 29(a) the Plaintiffs qualify as dependants of the Defendant in the event of his death. In my view it is only in the event of the Defendant's death would the Plaintiffs be entitled to participate in the distribution of the Defendant's estate as his dependants and beneficiaries and that would have to be in succession proceedings as envisaged under the *Law of Succession Act*, Cap 160 of the Laws of Kenya.
>
> 10. The evidence available establishes the Defendant was allocated the suit property by the Settlement Fund Trustees (SFT) in 1964 and after repayment of the SFT loan he was registered as the absolute owner of land parcel Nyamira/Gesima Settlement Scheme/71 on 4th December 2007. The rights of a registered owner of property are clearly set out under Sections 24, 25 and 26 of the *Land Registration Act*, 2012. Section 24(a) provides: -
>
> > 24. Subject to this Act- (a) The registration of a person as proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto. Section 25(1) provides that such a registered owner's rights are indefeasible and are held free from all other interests and claims and that the rights can only be defeated in the manner provided under the Act. The rights of a registered owner are however subject to overriding interests declared by Section 28 of the Act as not requiring noting in the register. In

the event a registered owner holds the property as a trustee, the rights conferred by registration would be subject to the duty or obligation placed upon him as such trustee.

11. In the instant matter it is necessary therefore to determine whether the Defendant held the title subject to any overriding interests and/or as a trustee as asserted by the Plaintiffs. The evidence is in abundance that the Defendant is the registered owner of the suit property and that the Plaintiffs are indeed his children. There is also ample evidence that the Defendant has all along acknowledged the Plaintiffs have a beneficiary interest over the suit property. The Plaintiffs claim the Defendant is holding the suit property in trust for them. There can be no basis for the Defendant to be said to hold the suit land in trust for the Plaintiffs when infact he may even have acquired the land before some of the Plaintiffs were born (back in 1964). While the Defendant cannot deal with the suit property in total disregard of the Plaintiff's interest as beneficiaries my view is that the Plaintiffs cannot equally prevent the Defendant being the registered owner of the property from dealing with the suit property in any manner he chooses including determining how to distribute the same amongst the beneficiaries. If a father who is registered as owner of property was to be held to hold such property as a trustee of his children, such position would create confusion and uncertainty which would make it virtually impossible to carry out any transactions affecting land as practically the bulk of land would be subject to trust. There is no basis upon which the Court can hold that the Defendant holds the suit property in trust for the Plaintiffs...

13. In the instant case, the Defendant was the original allottee of the suit land. The Plaintiffs are his children and he has a right to determine how he wishes to deal with and/or distribute his estate during his lifetime. The Plaintiffs have not sought to have the trust they claim discharged which begs the question what happens if the Court were to declare the Defendant holds the suit property in trust for the Plaintiffs. Does it mean they would still have to wait until the Defendant dies before they distribute his estate" The Defendant is alive and wishes to settle the affairs of his estate to obviate the obvious wrangles that would be there once he exits the scene. The Plaintiffs should not place unnecessary hurdles on his path. The best option would be for the Plaintiffs and their father to agree on the distribution of his estate now that he has shown a willingness to actually distribute the land he owns when he is still alive, otherwise after he dies there is bound to be protracted litigation as the Plaintiffs' action shows, which can be avoided.

14. From my foregoing discussions, it must have become apparent that I am not persuaded the Plaintiffs have any reasonable cause of action against the Defendant. The suit amounts to an abuse of the Court process and accordingly I order the suit commenced by the Plaint dated 30th October 2015 struck out for being incompetent and an abuse of the Court process. 15. Each party shall bear their own costs of the Application and the suit." (Emphasis supplied).

Similarly, in *Alice Wairimu Macharia v Kirigo Philip Macharia* [2019] eKLR, the Court found no evidence that the land in question was ancestral land. In dismissing the claim, J.G. Kemei, J. held that

> " 23. .. From the evidence led by both parties they agree that the land was registered and owned by their father and husband respectively and upon his death it devolved to the two mothers as per the 2 houses that he had as a polygamist. There is no evidence tendered before this Court to show that the land is such as is a customary land that is to say is land that was encumbered with a trust.
>
> 24. From the forgoing it is clear that the Applicant failed to satisfy her burden of proof during evidence as to how the trust was created, the circumstances under which it was created and the common intention as to its establishment and or creation. The Applicant simply averred that trust was created in 1980's. She also averred that the property belonged to her late father and as a beneficiary she ought to be allowed to inherit or have equal share with her brothers and her mother.
>
> 25. It is noteworthy that the succession of this land took place before the enactment of the current *Law of Succession Act,* which came into force on the 1/7/82. According to the certificate of succession dated the 8/5/1980, the land was succeeded in 1980s before the enactment of the current laws. The Court notes that there is no evidence on the record of the certificate of succession to denote the presence of customary or family trust. Be that as it may it is apparent from the record that the Respondent got land from the estate of her late husband as a beneficiary.
>
> 26. The Court understands the case of the Applicant to be that she is a beneficiary of the estate of her late father for which is in the hands of the mother. She derives her alleged trust from succession of the suit lands. I also understand her claim to be that she has not been sufficiently provided for in the said estate. That the Respondent has taken certain actions which lead to the state of affairs that she is unhappy with; which is that she has sold some of the land without her consent as a beneficiary; she did not account or share the proceeds of the sale with her; she appropriated the proceeds to some of the beneficiaries and left her out despite being entitled; she has subdivided the land and given to some beneficiaries (sons) 4 acres each; she has offered her 1.35 acres, which in her own words, is neither equal nor equitable provision; she has offered her land which does not access the river for water resources that she so needs. The Respondent has averred that she has made provisions for the Applicant in form of 1.35 acres but she has rejected it for more.
>
> 27. The long and short of her case is that it relates to a claim in succession. This Court is not seized with the jurisdiction to determine matters succession.
>
> 28. The upshot is that the Applicant has not proved her case. It is dismissed.
>
> 29. Since the parties are related, I order that each party to meet the costs of the suit." {Emphasis supplied}

36. Another indicator to a customary trust is the fact the land in question is an ancestral land. In *Mbui Mukangu v Gerald Mutwiri Mbui* [2004] eKLR, it was held that in inferring a customary trust, the

fact that the subject land was ancestral land that devolved to the Defendant from his late father was a clear testament of existence of a customary trust and that this kind of trust serves intergenerational equity where the land is held by one generation for the benefit of succeeding generations.

37. Another sure-fire pointer to a customary trust is that a property has been handed down generations to serve inter-generational equity. In *Douglas Macharia Waithaka v Samuel Mugo Njoki* [2018] eKLR, J.G. Kemei, J. reasoned as follows:

> " 21. Further the Court does not find for the determination of the trust of the suit property at this stage save to find that the suit land is encumbered by a trust. The land is ancestral land having devolved from the Plaintiff's father and it is expected that it will so devolve to his children in similar manner in accordance with the concept of intergenerational trust.
>
> 22. Having found that the suit land is trust land, this Court does not find any justification in the caution remaining on the title. It is hereby ordered to be removed." {Empasis supplied}

38. Another key guiding ray in inferring a customary trust is intention of the parties that the land be held in trust of the coming generations. In *James N. Kiarie v Geoffrey Kinuthia & Another* [2012] eKLR, which echoed by the Supreme Court in *Isack Kieba M'Inanga v Isaaya Theuri M'Lintari & Another* [2018] eKLR, P. Nyamweya, J. held that the intention of parties and not possession or occupation is the key in determining whether there is a customary trust so that if the intention pointed to the direction that the 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. Similarly, in *Peter Ndungu Njenga v Sophia Watiri Ndungu* [2000] eKLR, Kwach, Shah and O'Kubasu, JJA (as they then were) held that a trust can never be implied by the Court unless there was intention to create a trust in the first place. In their words, they said thus:

> " The concept of trust is not new. In case of absolute necessity, but only in case of absolute necessity, the Court may presume a trust. But such presumption is not to be arrived at easily. The Courts will not imply a trust save in order to give effect to the intention of the parties. The intention of the parities to create a trust must be clearly determined before a trust is implied."

39. In *Alice Wairimu Macharia v Kirigo Philip Macharia* [2019] eKLR, while unpacking the matrix laid down by the Supreme Court in *Isack Kieba M'Inanga v Isaaya Theuri M'Lintari & Another* [2018] eKLR, by converting the matrix into pertinent questions to be posed by a Court, J.G. Kemei, J. in laid down the practical steps to be undertaken by a Court before drawing inferences in the following words:

> " 23. Going by the decision of the SCOCK referred to in para 20, it follows that evidence must be led that points to the root of the land. Pertinent question that must concern this Court are such as; how was the land first registered? Was it clan, communal or family land before registration? Was the land inherited or passed down from the family lineage of Mr Macharia? How did Macharia acquire this land? Did he inherit or he acquired by way of purchase or a gift? From the evidence led by both parties they agree that the land was registered and owned by their father and husband respectively and upon his death it devolved to the two mothers as per the 2 houses that he had as a polygamist.

There is no evidence tendered before this Court to show that the land is such as is a customary land that is to say is land that was encumbered with a trust."

40. As the Supreme Court of Kenya said in its obiter dictum in *Isack Kieba M'Inanga v Isaaya Theuri M'Lintari & another* [2018] eKLR, each case has to be determined on its own merits and quality of evidence since not every claim of a right to land that will qualify as a customary trust.

Determination

41. My discernment of the law of customary trust is that all doubt has now been removed as to whether it one of the overriding interests recognized by law. On the ingredients necessary to prove a customary trust, although Courts have for donkey's years held that the ingredient of actual physical possession and occupation of the land is necessary to prove this kind of trust, the Supreme Court has now settled this cloud of dust by taking a stance to the effect that unless a trust is proved, prove of possession and occupation in itself cannot pass as an overriding interest protectable by law and that while possession and occupation is a relevant fact, in concluding that a trust exists, this is not a necessary ingredient for a customary trust to be established. Instead, it is the customary law and practice of that particular community which clothes the rights of a person who is in possession or actual occupation, with legal validity and as such, if a customary law and practice does not recognize such possession or actual occupation, then it cannot be a right to which a person is entitled. Put differently, mere possession and occupation without recognition is and cannot be a protectable right and that the only way a person can claim a customary trust is to prove that the possession and/or actual occupation of the land is recognized and/or permitted by customary law and practice. Distilled are the five key ingredients which ought to be proven for a Court to infer a customary trust. First, the land in question was before registration, family, clan or group land. Second, the claimant belongs to such family, clan, or group. Third, the relationship of the claimant to such family, clan or group is not so remote or tenuous as to make his/her claim idle or adventurous. Fourth, the claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances. Fifth, the claim is directed against the registered proprietor who is a member of the family, clan or group. In other words, possession and/or occupation which has been held as a key ingredient for many years is not a necessary ingredient although it is relevant. Further, a Court shoulders the obligation to satisfy itself that it was the intention of the parties that one of them holds the suit land for the benefit of other members of the family whether or not the claimant is in possession or actual occupation of the land. This intention may be inferred from inter alia evidence that the suit land has been handed down generations and/or is ancestral land. Equally important, a Court must satisfy itself that the current registered owner (the Defendant) is not and should not be the original allottee in which case the concept of trust does not apply.

42. To prove a customary trust, the onus is on the shoulders of the Plaintiffs to prove on a preponderance of evidence: (i) that the suit property was before registration a family land; (ii) that the Plaintiffs belong to the said family; (iii) that the relationship of the Plaintiffs and the said family is not so remote or tenuous as to make her claim idle or adventurous; (iv) that the Plaintiffs could have been entitled to be registered as owners or other beneficiary of the suit land but for some intervening circumstances; and (v) that the claim is directed against the registered proprietor who is a member of the said family.

43. This Court bears the obligation to cast its net wide and far to detect the intention of the parties which is supreme and in this regard, the guiding ray will whether it was the intention of the parties that the subject land be held for the benefit of other members of the family whether or not the claimant is in possession or actual occupation of the land including whether the land in question has been handed down generations and/or ancestral land. In this connection, before a Court infers a customary trust,

it should be satisfied to standard that the circumstances point to an intention to create a trust for the coming generations. In addition, and not derogation, the current registered owner is not and should not be the original allottee.

44. The surest way to the destination of establishing whether or not a customary trust exists is to trace the root of the suit property (Mitaboni/Mutituni/1270). Without this, it will be difficult to unravel the intention of the parties and further, it will be arduous to infer whether or not the concept of a customary trust is applicable.

45. The first step is to interrogate the question whether the suit land was before registration, a family land as claimed by the Plaintiffs. Gathering from the Certificate of Official Search dated 30th June 2020 (which was exhibited by the Plaintiffs as Exhibit 1) the registered proprietor before succession was Muutu Munguti, who indisputably is the 1st Defendant's father. This Court has already discussed supra that if the Defendant is the original allottee of the suit land, there is no basis for a customary trust since the element of inter-generational hand-down is absent. Emerging from the Defendants that upon distribution of the estate of Muutu Munguti, the 1st Defendant was allocated the suit property as a beneficiary of the estate of Muutu Munguti. Having been handed down from his late father Muutu Munguti, and not independently acquired by the 1st Defendant, this Court finds the claim for a customary trust fortified by inter-generational acquisition and thus justified. Reasons wherefore I can now safely conclude that the suit land namely Mitaboni/Ngiini/2058 was and remains family land.

46. Second, on the question whether the Plaintiffs belong to the family of Muutu Munguti, this was not disputed and it is thus answered in the affirmative.

47. Third, on the question whether the relationship of the Plaintiffs and the family of Muutu Munguti is remote or tenuous as to make the Plaintiffs' claim idle or adventurous, it is answered in the negative.

48. Fourth, on the question whether there is a possibility that the Plaintiffs could have been entitled to be registered as owners or beneficiaries of the said family land but for some intervening circumstances, it also answered in the affirmative, applying the conclusions reached in the first three questions.

49. Fifth, concerning the question whether this claim is directed against the registered proprietor who is a member of the family of Muutu Munguti, it is certainly answered in the affirmative, applying the conclusions reached in the first three questions.

50. Sixth, although it is not a necessary ingredient, this Court further finds and so concludes that the Plaintiffs have been in actual possession and occupation of their share of the suit property.

51. Seventh, this Court further finds that the Defendants are not the original allottees of the suit property but beneficiaries of the estate of Muutu Munguti.

52. It follows that for all intents and purposes, the 1st Defendant is by operation of law customary trustee.

(iii) Which party should bear the costs of this suit?

53. The law on costs as I discern it is that first, an award of costs and interest is discretionary. Second, save where costs and interest are compromised, the Court retains the discretion thereon. See *Morgan Air Cargo Ltd v Everest Enterprises Ltd* (2014) eKLR, Gikonyo, J. Third, even where a suit has been compromised without including costs and interest in the compromise, the discretion of the Court aforesaid remains unscathed. See *Rose Kaume & another v Stephen Gitonga Mbaabu & another* [2016] eKLR, per C. Kariuki, J.

54. How then is this discretion exercised? Discretion is not the same thing as carte blanche. Beacons demarcating how discretion is exercised are as follows.

55. First, discretion ought to be exercised with circumspection and judiciously. See *Christopher Kiprotich v Daniel Gathua & 5 others* [1976] eKLR; *Mbogo and another v Shah* [1968] EA 93 and *Mohindra v Mohindra* (1953) 20 EACA 56; *Sharp v Wakefield* [1891] 64 L.T Rep. 180 Ap. Ca.173, per Lord Halsbury L. C.; and Rooke's case, 5 Rep. 99b (1598), cited in approval by Mativo, J. in *Republic v Public Procurement Administrative Review Board & 2 others* [2018] eKLR.

56. Second, costs follow the event unless the Court finds a good cause to negate this trajectory. See *Cecilia Karuru Ngayu v Barclays Bank of Kenya & another* [2016] eKLR). In this context, the meaning ascribed to the words "costs shall follow the event" is that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the Defendant or Respondent will bear the costs. See the seminal works of Kuloba, J. (as he then was), *Judicial Hints on Civil Procedure* 2nd edition at page 99; *Dipchem East Africa Limited v Karutturi Limited (In Receivership)* [2015] eKLR, per Gikonyo, J.; *Cecilia Karuru Ngayu v Barclays Bank of Kenya & Another* (2016) eKLR, per Mativo, J.; and *Jasbir Singh Rai & 3 others v Tarcholan Singh Rai & 4 others* (2014) eKLR, per Mutunga, CJ & P (as he then was) Tunoi, Ojwang and Rawal, SCJJ (as they then were) Ibrahim and Wanjala, SCJJ.

57. Third, and closely intertwined with the second is that costs should not be used to penalize the losing party but rather to compensate the successful party for the trouble invested in the proceeding or defending the suit. See *Joseph Oduor Anode v Kenya Red Cross Society* [2012] eKLR, per Odunga, J.

58. Fourth and also closely connected with the second and third is that the purpose served by an award of costs is guided by the principle restitution in integrum i.e to reimburse the successful party the money expended in the case. See the SCOK decision in *Jasbir Singh Rai & 3 others v Tarcholan Singh Rai & 4 others* (2014) eKLR, per Mutunga, CJ & P (as he then was) Tunoi, Ojwang and Rawal, SCJJ (as they then were) Ibrahim and Wanjala, SCJJ.

59. Fifth and connected to the second, third and fourth beacons is that a successful party should ordinarily be awarded costs unless its conduct is such that it would be denied costs, or the successful issue was not attracting costs. See *Orix Oil (Kenya) Ltd v Paul Kabeu & 2 Others* (2014) eKLR; and *Morgan Air Cargo Ltd v Everest Enterprises Ltd* (2014) eKLR, Gikonyo, J.

60. Upon considering the cause of action and circumstances unique to this case including but not limited to the fact that this a family matter, this Court has found a good cause to dePart from the general proposition of the law that costs follow the event.

Part Vi: Disposition

61. Wherefore this Court finds claim meritorious and enters Judgment in favour of the Plaintiffs in the following terms:

    i. A declaration is hereby issued that the 1st Defendant holds Mitaboni/Mutituni/1270 in trust of entire family including the Plaintiffs.

    ii. An order of permanent injunction is hereby issued restraining the Defendants, their agents, servants, or any other person claiming under them from selling, disposing of, alienation, transfer or any other dealing which may prejudice the Plaintiffs' interest in relation to the suit property, except with the consent of all the beneficiaries of the said trust.

    iii. Each party shall bear his/her own costs of this suit.

62. It is so ordered.

DELIVERED, SIGNED AND DATED IN OPEN COURT AT MACHAKOS LAW COURTS THIS 29TH DAY of JANUARY 2024

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C.N. ONDIEKI

PRINCIPAL MAGISTRATE

Advocate for the Plaintiffs:.....

Advocate for the Defendants:.....

Court Assistant:.....