



**Vesi & 2 others v Ndolo & another (Environment & Land Case  
E105 of 2022) [2024] KEMC 10 (KLR) (21 May 2024) (Judgment)**

Neutral citation: [2024] KEMC 10 (KLR)

**REPUBLIC OF KENYA  
IN THE MACHAKOS LAW COURTS  
ENVIRONMENT & LAND CASE E105 OF 2022  
CN ONDIEKI, PM  
MAY 21, 2024**

**BETWEEN**

**PIUS MBITHI VESI ..... 1<sup>ST</sup> PLAINTIFF  
JOSIAH KILUNGU ..... 2<sup>ND</sup> PLAINTIFF  
JOHN MUIA NDOLO ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**JACKSON KIILU NDOLO ..... 1<sup>ST</sup> DEFENDANT  
MBINYA MUSYOKA VESI ALIAS MBINYA MUSYOKA  
MBENZI ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. This matter was initially filed in the Machakos ELC (as Machakos ELC Number E006 of 2020) but later transferred to Machakos Magistrates' Court vide an Order of the said Court dated 13<sup>th</sup> October 2022.
2. It can be discerned from the analysis of decisional law in Kenya that until 5<sup>th</sup> October 2018, the law on whether a customary trust is an overriding interest - in circumstances where the suit property has been registered in the name of a person or persons, not indicated in the register as holding in trust of the entire family - and the ingredients necessary to prove a customary trust, was characterized with both imprecision and uncertainty. In particular, the thorny question whether proof of actual possession and occupation is a necessary ingredient thereof precipitated two schools of thought.
3. As so on 5<sup>th</sup> October 2018, considerable clarity was heralded by the apex Court. 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. This the framework within which I will determine this claim.

## **Part II: The Plaintiff's Case**

4. Vide a Plaint dated 28<sup>th</sup> September 2020 and filed on 1<sup>st</sup> October 2020, the Plaintiffs brought an action against the Defendants seeking Judgment for: (a) A declaration that parcel (sic) of land no. Mitaboni/Mutituni/1812 is held in trust in favour of the Plaintiffs and all other members of the family of Mbithi Kaloki. (b) An order directing that all rents or profit benefits emanating from plot no. Mitaboni/Mutituni/1812 be shared equally between the members of the family of Mbithi Kaloki according to the houses. (c) Costs be provided for (sic).
5. In their joint Plaint, it is claimed that the patriarch Mbithi Kaloki owned a parcel of land at Mutituni which was later registered as Mitaboni/Mutituni/1812 (hereinafter "the suit property"). It is claimed that the suit property was to be inherited by the patriarch's sons namely Ndolo Mbithi and Kilungu Mbithi. The Plaintiffs claim that they inherited the suit property and they use it to this date. It is claimed that during land adjudication in 1960s and 1970s, they nominated Musyoka Vesi and Kiilu Ndolo to be registered as owners but for the benefit of the entire family of the said patriarch. It is averred that in 1991, the family of the said patriarch decided to construct a plot of 50x100 feet but because they did not have sufficient money, they entered into an agreement with one Patrick Wambua Katilu to construct the plot for them in exchange of a plot measuring 100x100 feet. The Plaintiffs claim that they have been collecting rent from the shop which were erected on the said plot and depositing the money in various bank accounts and distributing it every end of the year. It is claimed that sometimes in 2011, the Defendants secretly applied for letters of administration intestate in Machakos Succession Causes Numbers 264 of 2011 and 335b of 2016 respectively and obtained confirmed Grants which they used to have the suit property registered in their names. In this connection, it is averred that on 3<sup>rd</sup> July 2020, the 1<sup>st</sup> Defendant lodged an application under Machakos Succession Cause Number 264 of 2011 to have the rents collected from the suit property remitted to him. It is in this regard that the Plaintiffs claim that the suit property is held by the Defendants in trust of the Plaintiffs and all other family members of the said patriarch.
6. At the hearing of the Plaintiffs' case, PW1, the 3<sup>rd</sup> Plaintiff adopted his witness statement dated 28<sup>th</sup> September 2020 and filed together with the Plaint as his evidence-in-Chief. In his said statement, PW1 rehearses the material facts in the Plaint. This Court thus finds it unnecessary to regurgitate. In addition, he stated that the 1<sup>st</sup> Defendant is a son to his late step-brother Vesi. In buttressing the claim, PW1 exhibited the following documents: (i) a copy of letter dated 10<sup>th</sup> March 1991 as the Plaintiffs' Exhibit 1; (ii) a copy of letter dated 17<sup>th</sup> March 1991 as the Plaintiffs' Exhibit 2; (iii) a copy of letter dated 21<sup>st</sup> August 1991 as the Plaintiffs' Exhibit 3; (iv) a diagram dated 26<sup>th</sup> August 1991 as the Plaintiffs' Exhibit 4; (v) a certificate of search dated 9<sup>th</sup> February 2016 as the Plaintiffs' Exhibit 5; (vi) a Grant of Letters of Administration dated 26<sup>th</sup> July 2016 as the Plaintiffs' Exhibit 6; (vii) a certificate of confirmation of Grant of Letters of Administration dated 23<sup>rd</sup> August 2017 as the Plaintiffs' Exhibit 7; (viii) a certificate of search dated 18<sup>th</sup> June 2020 as the Plaintiffs' Exhibit 8; (ix) copy of the agreement dated 10<sup>th</sup> March 1991 in Kamba language and a translation thereof as the Plaintiffs' Exhibit 9 and 10 respectively.
7. While under cross-examination, PW1 stated that the suit property belonged to his grandfather, Mbithi Kaloki. He stated that he could not recall the number of children of the said grandfather. He stated that he was not shown the title in the names of the Defendants. He stated that the said certificate of search



(the Plaintiffs' Exhibit 8) indicates that the suit property was registered in the names of Kiilu Ndolo and Musyoka Vesi. He stated that the said Kiilu Ndolo and Musyoka Vesi were administrators of the estate of Mbithi Kaloki. He stated that Kiilu Ndolo was the 1<sup>st</sup> Defendant's father and that Musyoka Vesi was the 2<sup>nd</sup> Defendant's husband. He stated that when they died, the Defendants fraudulently registered themselves as the new owners of the suit property. He stated that there was an agreement on who was to build on the suit property and that Kiilu Ndolo was alive when the agreement was made. He stated that the said Kiilu Ndolo signed the agreement by thumb print because he was illiterate. He stated that they learnt about the Succession causes much later on a year he could not recall. He was referred to the citation listed in serial 6 of the Defendants' list of documents filed on 4<sup>th</sup> August 2023. He stated that he was aware of the injunction against rent collection. He stated that Musyoka Vesi and Kiilu Ndolo was registered as trustees. He stated that Mbithi had two parcels of land but the other one belonged to one Vesi Ndolo. He stated that he lives on another land which belonged to Mbithi Kaloki namely Mitaboni/Mutituni/786. He stated that he is not aware of any suit pending over the latter.

8. PW2, Patrick Wambua Katilu, adopted his witness statement dated 29<sup>th</sup> January 2021 and filed on 23<sup>rd</sup> February 2021 as his evidence-in-Chief. In his said statement, PW2 rehashes part of the material facts in the Plaintiff. In particular, PW2 states that on 17<sup>th</sup> March 1991, he entered into agreement with the family of Mbithi Kaloki to construct shop on a plot measuring 50x100 feet within the suit property and in exchange, he was paid in kind by way of a plot measuring 100x100 feet in the suit property, which he also developed.
9. While under cross-examination, PW2 stated that he does not reside on the suit property but he has rental houses thereon. He stated that he paid in kind for his portion. He identified exhibit 1 as the agreement between him and the family of Mbithi Kaloki. He stated that the handwriting is not the same. He stated that survey was done when Musyoka Vesi and Kiilu Ndolo were trustees. He stated that by the time the agreement in 1991, Kiilu Ndolo was dead but Musyoka Vesi was alive. He stated that he was not present when the land adjudicators surveyed the land. He stated that the title deed was indicated that they were holding in trust of the family of Mbithi Kaloki. He stated that the land in Mbukoni is registered in the name of Pius Mbithi. He stated that he was not aware when Succession Cause Number 264 of 2011 was filed. He stated that he has not filed a case to question the distribution of the deceased's property.
10. PW3, Joseph Josiah Kilungu, adopted his witness statement dated 28<sup>th</sup> September 2020 and filed together with the Plaintiff as his evidence-in-Chief. In his said statement, PW3 rehashes the material facts in the Plaintiff.
11. While under cross-examination, PW3 stated that the suit property belongs to the family of Mbithi Kaloki since it was handed down by the father of Mbithi Kaloki, PW3's grandfather. He stated that Mbithi Kaloki had four sons namely Ndolo Mbithi, Wambua Mbithi, Mbuvi Mbithi and Kilungu Mbithi. He stated that the children of Wambua Mbithi and Mbuvi Mbithi have a separate land and they do not have interest hereon. He stated that this dispute is between the families of Ndolo Mbithi and Kilungu Mbithi. He stated that the survey was done around 1984 when he was a teacher but he was not at home when the land adjudicators came on the ground. He stated that in 1984, his father, Mbithi Kaloki was alive but all other brothers to his father were dead. He stated that Kiilu Ndolo and Musyoka Vesi were registered because they were the ones available when the adjudicators came. He stated that the register did not however reflect them as trustees of the family of Mbithi Kaloki. He stated that at the time, they were acting in good faith and trust. He concurred that the certificate of search does not disclose them as trustees. He was referred to the Plaintiffs' Exhibit 1 and he stated that the agreement was between the family of Mbithi Kaloki and PW2. He stated that he was party to the agreement as one of the representatives of the family of Mbithi Kaloki. He stated that Musyoka Vesi



and Kiilu Ndolo were not parties to the said agreement. He was referred to the Plaintiffs' Exhibit 2 and he stated that Kiilu Ndolo used to sign by pen. He stated that Kiilu was in the meeting and he signed the agreement. He was referred to the Plaintiffs' Exhibit 3 and he stated Musyoka Vesi signed. He stated that Kiilu Ndolo is not party to the letter. He stated that there is another land measuring 40 acres where they are registered as trustees of the family of Mbithi Kaloki and all members of the Mbithi Kaloki family including the Defendants are beneficiaries in that case too, the register does not reflect them as trustees but reflects them as owners. He was referred to the Plaintiffs' Exhibit 1 where 1812 is written and he stated that the handwriting is that of the Assistant Chief who wrote the agreement in his hand. He stated that there handwritings had no variance with the rest of the body. He stated that the Assistant Chief is alive but he is not a witness. He stated that Mitaboni/Mutituni/1786, where his father was buried, has a case in Court too MCELC Number E055 of 2021. He stated that he was not aware of the Succession proceedings.

12. PW4, Pius Mbithi Vesi, adopted his witness statement dated 28<sup>th</sup> September 2020 and filed together with the Plaint as his evidence-in-Chief. In his said statement, PW4 adopted the facts as stated by PW1 and PW3.
13. While under cross-examination, PW4 stated that adjudication was done in 1970s. He stated that when the adjudication was done, he was at work in Nairobi and thus not available and for this reason, those were available namely Musyoka Vesi and Kiilu Ndolo were registered as trustees of the family of Mbithi Kaloki. He stated that the certificate of search does not indicate that they were registered in that capacity. He stated that he also registered in a similar style as Musyoka Vesi and Kiilu Ndolo in respect to other parcels of land of the late Mbithi Kaloki, without indication in the register that he is registered a trustee of another land but he recognizes the fact that he is a trustee of the family of Mbithi Kaloki. He stated that the responsibility is based on good faith and trust. He stated that Kiilu Ndolo used to sign by pen. He stated that he was party to the agreement between the family of Mbithi kaloki and PW2. He stated that he was not aware of the Succession cause. He stated that when he discovered, he filed a citation and Mbinya Vesi was given the permission to file petition.
14. In his written Submissions dated 22<sup>nd</sup> November 2023 and filed on 24<sup>th</sup> November 2023, learned Counsel Mr. Mutuku instructed by the Firm of Messieurs P.M. Mutuku & Company Advocates representing the Plaintiffs, has rehashed the substance of the suit and the testimonies.
15. Further, it is submitted for the Plaintiffs that the Defendants admitted that the shop standing the suit property were financed by PW2 who, in his testimony, testified that he was given the portion of land measuring 100x100 feet by the family of Mbithi Kaloki.
16. This Court is urged to find that the Plaintiffs and the Defendants belong to the same family of Mbithi Kaloki; that the suit property belongs to the family of Mbithi Kaloki; that it is held by the Defendants in trust of the family of Mbithi Kaloki; and that the Succession and registration in the names of the Defendants did not extinguish the fact that the suit property belongs to the family of Mbithi Kaloki.

### **Part III: The Defendants' Case**

17. In their joint Statement of Defence dated 30<sup>th</sup> November 2020 and filed on 4<sup>th</sup> December 2020, the Defendants denied all material facts in the Amended Plaint save the descriptive parts of the Plaintiffs and the Defendants.
18. In particular, the Defendants aver that the suit property was bought by Kiilu Ndolo and Musyoka Vesi who were then registered as joint owners in equal shares and that the suit property never belonged to Mbithi Kaloki.



19. Further, the Defendants claim that the only ancestral land of the Mbithi Kaloki family is Mitaboni/Mutituni/1786 and that the same was distributed to the family of Mbithi Kaloki in Succession in equal shares of 1/3 amongst Kilonzo Kiilu, Kilungu Mbithi and Mutua Mbithi. The Defendants claim that Musyoka Vesi and Kiilu Ndolo used to sign by thumbprint. The Defendants state that they were actively involved in Machakos High Court Succession Cause Number 264 of 2011 and Machakos Magistrates' Court Succession Cause Number 335B of 2016 and the Plaintiffs did not object to the distribution of the suit property.
20. At the hearing of this suit, DW1, the 1<sup>st</sup> Defendant, adopted his witness statement dated 24<sup>th</sup> July 2023 and filed on 4<sup>th</sup> August 2023 as his evidence-in-chief. In his said statement, DW1 rehashes the material facts in the defence. In particular, DW1 states that the suit property was bought by Kiilu Ndolo and Musyoka Vesi who were then registered as joint owners in equal shares and that the suit property never belonged to Mbithi Kaloki. DW1 further states that the late Kiilu Ndolo and Musyoka Vesi were registered as owners since they were found in possession of the suit property during land adjudication and that there was no objection at all from the Plaintiffs. In addition, DW1 states that the suit property is now registered in the name of Defendants in equal shares, as a result of distribution in Machakos Magistrates' Court Succession cause Number 335B of 2016 which was filed by the 2<sup>nd</sup> Defendant and Machakos High Court Succession Cause Number 264 of 2011 which was filed by the 1<sup>st</sup> Defendant. It is stated that the suit property was before the distribution registered in the name of Kiilu Ndolo (now deceased), the 1<sup>st</sup> Defendant's father and Musyoka Vesi (now deceased), the 2<sup>nd</sup> Defendant's husband in equal shares. In buttressing the defence, DW1 exhibited the following documents: (i) a copy of certificate of confirmation of Grant in Machakos High Court Succession Cause Number 264 of 2011 as the Defendants' Exhibit 1; (ii) a copy of Grant of Letters of Administration in Machakos High Court Succession Cause Number 264 of 2011 as the Defendants' Exhibit 2; (iii) a certificate of confirmation of Grant in Machakos Magistrates' Court Succession Cause Number 355B of 2016 as the Defendants' Exhibit 3; (iv) a copy of the title deed of the suit property as the Defendants' Exhibit 4; (v) a copy of certificate of search over the suit property as the Defendants' Exhibit 5; (vi) a copy of citation in Machakos Magistrates' Court Succession Cause Number 114 of 2016 as the Defendants' Exhibit 6; (vii) an affidavit of verification of the said citation as the Defendants' Exhibit 7; and (viii) a copy of the Court order in the citation as the Defendants' Exhibit 8.
21. During cross-examination of DW1, he stated that the High Court stopped payment of rent in 2020 because the Plaintiffs are not owners of the property. He stated that he was the administrator of the estate of his father, Kiilu Ndolo. He stated that in that capacity, he was entitled to collect rent. He stated that the shop were built by PW2. He stated that the 3<sup>rd</sup> Plaintiff is his uncle. He stated that he was born in 1978. He stated that Kiilu Ndolo and Musyoka Vesi inherited the land from Ndolo.
22. DW2, the 2<sup>nd</sup> Defendant, adopted her witness statement dated 24<sup>th</sup> July 2023 and filed on 4<sup>th</sup> August 2023 as her evidence-in-chief. DW2's statement is a replica of that of DW1. It thus rehashes the material facts in the defence. This Court finds it unnecessary to regurgitate.
23. During cross-examination of DW2, she stated that she was married in 1979. She stated that her husband used to sign by pen. DW2 stated that she could not recall when Kiilu Ndolo and Musyoka Vesi bought the suit property and she did not have the sale agreement or any document in support of the purchase. She stated that there are two houses attending on the suit property which were built by PW2 in exchange of a plot which was given by Kiilu Ndolo and Musyoka Vesi, to build his own house too. DW2 stated that since 1992, the rental income was being collected by Musyoka Vesi and when he died, a dispute arose and the house was closed. DW2 stated that the rent for Kiilu Ndolo's house is paid to Court.



24. In his written Submissions dated 18<sup>th</sup> March 2024 and filed on 27<sup>th</sup> March 2024, learned Counsel Mr. Kilonzo instructed by the Firm of Messieurs Kilonzo Muli & Associates representing the Defendants has proposed one key issue for determination namely whether the Plaintiffs have proved their case against the Defendants on a balance of probabilities as required by law.
25. In relation to the said sole issue, it is submitted that the Plaintiffs have failed to prove their case on a balance of probabilities that the suit property at any point belonged to Mbithi Kaloki.
26. For the Defendants, it is submitted in this regard that the Defendants have sufficiently demonstrated that the suit property was purchased jointly by the 1<sup>st</sup> Defendant's father and 2<sup>nd</sup> Defendant's husband in 1970s and that this explains why they were registered to hold as tenants in common. It is submitted that if it was true that the suit property was family land, nothing would have been easier than to reflect in the green card that the 1<sup>st</sup> Defendant's father and the 2<sup>nd</sup> Defendant's husband were so registered as trustees.
27. It is further submitted that the Plaintiffs exhibited no documentary evidence from the Land Adjudication office to support a proposition that the 1<sup>st</sup> Defendant's father and the 2<sup>nd</sup> Defendant's husband were so registered as trustees.
28. In addition, for the Defendants, it is urged that the Defendants are legally so registered as proprietors after following due process and upon transmission in Succession vide Machakos Magistrates' Court Succession cause Number 335B of 2016 which was filed by the 2<sup>nd</sup> Defendant and Machakos High Court Succession Cause Number 264 of 2011 which was filed by the 1<sup>st</sup> Defendant. In this connection, it is submitted that although the Plaintiffs were aware of the Succession proceedings, they did not lodge objections or protests.
29. In the premise, learned counsel argues since a customary trust being a matter of fact, must be pleaded and proved, this Court is urged to find that a customary trust was not pleaded and proved. In this connection, reliance is placed upon Richard Nyamera (sic) Auka & 2 others vs. Josephine Motaroki & 2 others (sic) as quoted in Elijah Ouko Matagaro & another vs. Roselyne Dola & 4 others [2017] eKLR. It is further submitted that parties are bound by their pleadings placing reliance in Independent Electoral and Boundaries Commission & another vs. Stephen Mutinda Mule & others [2014] eKLR.
30. Finally, citing the doctrine of sanctity of title, it is submitted that a title is indefeasible unless it is demonstrated that it was obtained by fraud. In this regard, reliance is placed upon Paul Kirinya vs. Delfina Kathiri [2019] eKLR; and Borana Mbwiria vs. Basilio Njagi [2018] eKLR.
31. This Court is thus urged to dismiss the claim with costs.

#### **Part IV: Questions For Determination**

32. Gleaning from the Plaintiff; Statement of Defence; and the rival written submissions, this Court has distilled four questions for determination as follows:
  - i. First, whether a customary trust was pleaded.
  - ii. Second, whether on a balance of preponderance, the Plaintiffs have established the claim of a customary trust.
  - iii. Whether the Plaintiffs have made a case for an order directing that all rents or profit benefits emanating from the suit property to be shared equally between the members of the family of Mbithi Kaloki, by dividing into two shares to reflect the two houses.



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

### **Part v: Analysis Of The Law; Examination of Facts; Evaluation of Evidence and Determination**

33. This Court now embarks on analysis, interrogation, assessment, and evaluation of each of the four questions.

#### **(i) Whether a customary trust was pleaded**

34. In their written submissions, the Defendants have contended - correctly so - that since a customary trust is a matter of fact, it must be pleaded and proved. This Court was urged to find that a customary trust having not been pleaded and proved by the Plaintiffs, the claim must fail since a party is bound by his pleadings.
35. First, I concur with the position taken by the Defendants that a customary trust must be pleaded and proved. See *Joseph Wanjala Oduba vs. Pascal Okumu Kaburu & 2 others* [2021] eKLR; *Mumo vs. Makau* (2002) 1EA 170; *Elijah Ouko Matagaro & another vs. Roselyne Dola Ouko & 4 others* (2017) eKLR; *Richard Nyamwembe Auka & 2 others v Josephine Motaroki & 2 others* [2014] eKLR; and the Supreme Court decision in *Isack M'inanga Kiebia vs. Isaaya Theuri M'lintari & another* [2018] eKLR.
36. This Court is alive to the now settled principle of law that a party is bound by his pleadings so that if a material fact was not pleaded, no evidence whatsoever can be led in that regard. See *Independent Electoral and Boundaries Commission & another vs. Stephen Mutinda Mule & 3 others* [2014] eKLR; *Dakianga Distributors (K) Ltd vs. Kenya Seed Company Limited* [2015] eKLR; *Malawi Railways Ltd vs. Nyasulu* [1998] MWSC 3; and *Adetoun Oladeji (Nig) Ltd vs. Nigeria Breweries Plc S.C.* 91/2002.
37. The failure to plead bears the consequence of having the suit determined on a preliminary point, without the burden of considering the evidence and merit of the suit. It is in this connection that this Court shoulders the onus to inquire into this thesis and determine it as a matter of priority.
38. This Court has scoured through the Complaint and it notes although the words “customary trust” are not used in black and white, the Plaintiffs have used the following words: (i) “the patriarch Mbithi Kaloki owned a parcel of land at Mutituni which was later to be registered as no. Mitaboni/Mutituni/1812” at paragraph 4; (ii) that Musyoka Vesi and Kiilu Ndolo were “registered as the owners but for the benefit of the entire family of the patriarch Mbithi Kaloki” at paragraph 5; and (iii) “the Plaintiffs now state that parcel of land no. Mitaboni/Mutituni/1812 is properly held in trust for the benefit of the Plaintiffs and all other members of the patriarch Mbithi Kaloki” at paragraph 10.
39. Gleaning from the said averments, in the context of the formulation of a customary trust under section 28(b) of the [Land Registration Act](#) as construed in *Joseph Wanjala Oduba vs. Pascal Okumu Kaburu & 2 others* [2021] eKLR; *Mumo vs. Makau* (2002) 1EA 170; *Elijah Ouko Matagaro & another vs. Roselyne Dola Ouko & 4 others* (2017) eKLR; and the Supreme Court decision in *Isack M'inanga Kiebia vs. Isaaya Theuri M'lintari & another* [2018] eKLR, it can be discerned that the Plaintiffs pleaded a customary trust without using the words “customary trust”. This Court so concludes.

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

40. 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.”

41. 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.”
42. 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.
43. In *Obiero vs. Opiyo* [1972] E.A. 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.”
44. After the *Obiero* decision (*supra*), the High Court (rendered on 23.6.1973) in *Esiroyo vs. 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 vs. Opiyo*, [1972] E.A. 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*. 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}

45. 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 vs. 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 vs. 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 vs. 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*.”

46. However, in some decisions, superior Courts departed from the Obiero and Esiroyo jurisprudence. For instance, in Kanyi vs. Muthiora [1984] KLR 712, while departing from the Obiero and Esiroyo school of thought, Nyarangi Ag. J.A (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 extinguished by registration of some person as a proprietor, nothing would have been easier than to say so. His Lordship rendered himself as follows: “I doubt like Madan J.A 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 J.A (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 vs. Esiroyo and Joseph Karisa Musonga vs. Johnson Nyati (both discussed supra) gleaned 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 J.A (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 Muthiora’s land: see proviso to Section 28 of the Act...”
47. In the Court of Appeal decision in Mbui Mukangu vs. 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.”
48. A tectonic shift was precipitated by *the Constitution* of Kenya, 2010 and the *Land Registration Act*, 2012. In a bold move that expels all doubt which ruled the judicial airwaves since the Obiero case, the Act makes provision, 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.” {Emphasis supplied}

49. 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 vs. 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, JJ.A 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 vs. Isaaya Theuri M’lintari & another [2018] eKLR, has since (in black and white) removed all doubt by enunciating that customary trusts are overriding interests.
50. 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 vs. 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 *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...”

51. What are the ingredients of and indicators to a customary trust? 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. It can be discerned from the foregoing analysis that 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, was characterized with both imprecision and uncertainty. Gladly, the two thorns in the flesh were settled by the Supreme Court of Kenya (SCORK) on 5<sup>th</sup> October 2018. While the question of customary or inter-generational trust has been determined from time to time, until 5<sup>th</sup> 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 vs. 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/Kiegoi 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 1<sup>st</sup> Respondent held 3 acres of L.R. No. Njia/Kiegoi Scheme/86 in trust for the Plaintiffs and the 2<sup>nd</sup> Respondent held 3 acres of L.R. 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



L.R. 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 L.R. No. Njia/Kiegoi Scheme/86 (Plot No. 86) and L.R. 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] Flowing from this analysis, we now declare that a customary trust, as long as the same can be proved to subsist, upon a first registration, is one of the trusts to which a registered proprietor, is subject under the proviso to Section 28 of the Registered *Land Act*. Under this legal regime, (now repealed), the content of such a trust can take several forms. For example, it may emerge through evidence, that part of the land, now registered, was always reserved for family or clan uses, such as burials, and other traditional rites. It could also be that other parts of the land, depending on the specific group or family setting, were reserved for various future uses, such as construction of houses and other amenities by youths graduating into manhood. The categories of a customary trust are therefore not closed. It is for the Court to make a determination, on the basis of evidence, as to which category of such a trust subsists as to bind the registered proprietor. Each case has to be determined on its own merits and quality of evidence. It is not every claim of a right to land that will qualify as a customary trust. In this regard, we agree with the High Court in *Kiarie v. Kinuthia*, that what is essential is the nature of the holding of the land and intention of the parties. If the said holding is for the benefit of other members of the family, then a customary trust would be presumed to have been created in favour of such other members, whether or not they are in possession or actual occupation of the land. Some of the elements that would qualify a claimant as a trustee are: 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] We also declare that, rights of a person in possession or actual occupation under Section 30(g) of the Registered Land Act, are customary rights. This statement of legal principle, therefore reverses the age old pronouncements to the contrary in *Obiero v. Opiyo* and *Esiroyo v. Esiroyo*. Once it is concluded, that such rights subsist, a Court need not fall back upon a customary trust to accord them legal sanctity, since they are already recognized by statute as overriding interests. [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, 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] 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 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}

52. Further and in relation to ingredients of a customary trust, in circumstances where 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. See *Eunice Kemunto Nyaundi & 6 others vs. Charles Nyangai* [2018] eKLR, per JM Mutungi, J.; and *Alice Wairimu Macharia vs. Kirigo Philip Macharia* [2019] eKLR, per J.G. Kemei, J.
53. It follows that one of the cornerstone pillars of a customary trust is the fact the land in question is an ancestral land or handed down generations. In *Mbui Mukangu vs. 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. See also Douglas Macharia Waithaka vs. Samuel Mugo Njoki [2018] eKLR, where 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.”

54. The intention of the family is also key and a customary trust can then be implied from the intention of the family. In James N. Kiarie vs. Geoffrey Kinuthia & Another [2012] eKLR, which echoed by the Supreme Court in Isack Kieba M’Inanga vs. 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 vs. 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 parties to create a trust must be clearly determined before a trust is implied.”
55. In determining such a claim, a Court should then conduct a deep excavation of the root of the title and discern the intention of the family. In Alice Wairimu Macharia vs. Kirigo Philip Macharia [2019] eKLR, while unpacking the matrix laid down by the Supreme Court in Isack Kieba M’Inanga vs. Isaaya Theuri M’Lintari & Another [2018] eKLR, by converting the matrix into pertinent questions to be posed by a Court, J.G. Kemei, J. 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.”
56. Finally, as the Supreme Court of Kenya said in its obiter dictum in Isack Kieba M’Inanga vs. 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

57. I have applied my mind to the law, facts and evidence of this case. My exposition of the law on customary trusts is that it is now – without doubt – an overriding interest recognized and protected by section 28(b) of the *Land Registration Act*.
58. Regarding 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.

59. 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.
60. 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.
61. 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.
62. 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/1812). Without this, it will be difficult to unravel the intention of the parties and further, it will be arduous to infer whether a customary trust exists.
63. The first step is to interrogate the question whether the suit land was before registration, a family land belonging to Mbithi Kaloki, as claimed by the Plaintiffs. It's not in dispute that the Defendants are registered as the absolute owners in common of the suit property and not as trustees of the family of Mbithi Kaloki. It is also not in dispute that the 1<sup>st</sup> Defendant's father and the 2<sup>nd</sup> Defendant's husband



were too registered as the absolute owners in common of the suit property and not as trustees of the family of Mbithi Kaloki.

64. Even so, the Plaintiffs asserted that the suit property belonged to Mbithi Kaloki and in fortifying this position, exhibited a copy of an agreement dated 10<sup>th</sup> March 1991 in Kamba and its English translation (the Plaintiffs' Exhibit 1, 9 & 10); a copy a further agreement dated 17<sup>th</sup> March 1991 (the Plaintiffs' Exhibit 2); and a copy of letter dated 21<sup>st</sup> August 1991 (the Plaintiffs' Exhibit 3). The said Exhibits 2 and 3 speak about the "family of Mbithi" as the party to the portion of land measuring 100x100 feet, within the suit property, which was allocated to PW2 as payment in kind for financing construction of a shop, two rooms and a toilet for the family.
65. Turning to the Defendants, three irreconcilable positions emerged from the defence which precipitated three questions in the mind of this Court. Was the property purchased or was it inherited or was it registered on account that Kiilu Ndolo and Musyoka Vesi were the ones available when land adjudicators came to the ground? In a classic case of vacillation and flip-flopping, in their evidence, the Defendants left a mark of being consistently inconsistent. The Defendants ventured into approbation and reprobation as more particularly elaborated below:
- i. First, in their witness statements, without exhibiting evidence of purchase or at least disclosing particulars of the vendor, DW1 and DW2 state (at page 1) that the suit property was purchased by Kiilu Ndolo and Musyoka Vesi who were then registered as owners in common and that the suit property never belonged to Mbithi Kaloki. Shortly after in the same statement, at page 2, DW1 and DW2 state a position inconsistent and at war with the foregoing position to the effect that "the late Kiilu Ndolo and Musyoka Vesi were registered as since they were found in possession of the parcel of land no. Mitaboni/Mutituni/1812 during land demarcation, adjudication and surveying process. There was no objection at all from the Plaintiffs at that time." Which is which? Is it that they purchased or they were registered as owners on account that they were found in possession when the land adjudication officers came to the ground?
  - ii. Second, further inconsistency emerged during cross-examination of DW1 when in answer to a question on how his father acquired the suit property, DW1 stated that his father Kiilu Ndolo and his uncle Musyoka Vesi, inherited the suit property from Ndolo.
  - iii. Third, in his testimony which was not shaken at all by the defence, PW2 asserted that he entered into an agreement with the family of Mbithi Kaloki - and not Musyoka Vesi and Kiilu Ndolo as asserted by the Defendants - to finance construction of a shop on the suit property for the said family and in exchange, he was paid not by way of monetary compensation, but in kind using a plot measuring 100x100 feet located in the suit property on which he also erected a shop. He asserted that he signed the agreements which was exhibited by the Plaintiffs (Exhibits 1, 2, 9 and 10) and this assertion was not shaken by the defence. Notably, during cross-examination, DW1 and DW2 admitted that construction of the shop standing on the suit property was financed by PW2. In particular, DW2 stated that PW2 financed construction of the shop for Kiilu Ndolo and Musyoka Vesi, who paid him in kind, by way of a portion of land located in the suit property, where PW2 also build his shop. However, the same Defendants denied knowledge of the agreements which were exhibited by the Plaintiffs and affirmed by PW2. Further, the Defendants took a position that neither Musyoka Vesi nor Kiilu Ndolo were parties to the agreement. What stunned this Court - if at all the Defendants are to be deemed as honest, trustworthy and reliable persons - is that with this full knowledge that PW2 financed construction of a shop and that he was paid in kind by way of a portion of land measuring 100x100 feet where he also build his own shop, it can be evidently discerned from the Succession proceedings exhibited by both Defendants (namely the certificate of



confirmation of Grant in Machakos High Court Succession Cause Number 264 of 2011 exhibited as the Defendants' Exhibit 1; the certificate of confirmation of Grant in Machakos Magistrates' Court Succession Cause Number 355B of 2016 exhibited as the Defendants' Exhibit 3) that PW2, was not disclosed as a creditor of the estate and eventually not Granted his due share of the suit property. This conduct of the Defendants reeks of unbridled greed. This alone is a determinative vote which renders credence to the Plaintiffs' claim.

- iv. Fourth, in their Statement of Defence and witness statements, in an attempt to discredit the agreements exhibited by the Plaintiffs (as Exhibits 1, 2, 9 and 10) by advancing a thesis that they were not signed by Kiilu Ndolo and Musyoka Vesi, the Defendants averred in both the defence and stated in their respective witness statements that both Kiilu Ndolo and Musyoka Vesi, used to sign by thumbprint. However, while fielding a question on how Musyoka Vesi used to sign documents during cross-examination of DW2, without patting an eyelid and with a straight face, DW2 assertively gave a contradictory position by stating that her late husband used to sign by pen.
66. In connection to the foregoing, time without number, it has been held that a party or witness should not create an impression in the mind of the Court that (s)he is not a straight-forward person or raise a suspicion about his/her trustworthiness or say something which indicates that (s)he is a person of doubtful integrity and therefore unreliable witness which makes it unsafe to accept his evidence. See the Court of Appeal decisions in *Ndungu Kimanyo vs. R* [1979] KLR 282 and *Khalif Haret vs. Republic* [1979] eKLR. And the evidence of a discredited witness is absolutely worthless. See the Court of Appeal holding in *Rashid Thomas vs. Republic* [2008] eKLR, per Tunoi, Onyango Otieno & Aganyanya, JJA (as they then were). Besides, a party seeking a remedy from Court should be ready and willing to give a good account of himself/herself failing which a Court would be reluctant to extend its hand to a person with dirty and unclean hands, for to do so, is to soil the hands of justice. In *Johnson Kimeli vs. Barclays Bank of Kenya Ltd Kisumu HCCC No. 171 of 2003* (unreported) it was said of such parties as follows: "Where the Plaintiff is seeking a remedy from Court he must show a good account of himself for the Court would be reluctant to extend its hand to a person with dirty and unclean hands for he would soil the hands of justice..."
67. Ultimately, the Plaintiffs' evidence in this regard was insufficiently shaken by the Defendants and it made a favourable impression in my mind, a feat the Defendants' evidence failed.
68. Second, concerning the question whether the Plaintiffs belong to the family of Mbithi Kaloki, this was not disputed and it is thus answered in the affirmative.
69. Third, in relation to the question whether the relationship of the Plaintiffs and the family of Mbithi Kaloki is remote or tenuous, as to make the Plaintiffs' claim idle or adventurous, it is answered in the negative.
70. 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.
71. Fifth, concerning the question whether this claim is directed against the registered proprietor who is a member of the family of Mbithi Kaloki, it is certainly answered in the affirmative, applying the conclusions reached in the first three questions.
72. Sixth, this Court further finds that the Defendants are not the original allottees of the suit property but beneficiaries, just like the Plaintiffs, of the estate of Mbithi Kaloki.



73. It follows that for all intents and purposes, the Defendants are by operation of law customary trustees of the Plaintiffs and indeed all members of the family of the late Mbithi Kaloki.

**(iii) Whether the Plaintiffs have made a case for an order directing that all rents or profit benefits emanating from the suit property to be shared equally between the members of the family of Mbithi Kaloki, by dividing into two shares to reflect the two houses**

74. Limited to this, parties having intimated that there is a suit pending determination in the High Court sitting in Machakos, under the doctrine of res sub judice housed in section 6 of the *Civil Procedure Act*, this Court declines to pronounce itself on this issue. Determination of this question is thus stayed.

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

75. 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**

76. In the premise, this Court finds this claim partially meritorious and enters Judgment in favour of the Plaintiffs in the following terms:

- i. A declaration is hereby issued that the Defendants hold the parcel of land known as Mitaboni/Mutituni/1812, in trust of entire family of the late Mbithi Kaloki, including but not limited to the Plaintiffs.
- ii. The Machakos County Land Registrar is hereby ordered to reflect this position – that the Defendant holds Mitaboni/Mutituni/1812 in trust of entire family of Mbithi Kaloki - in the register.
- iii. Each party shall bear his/her own costs of this suit.
- iv. However, regarding the question of sharing rent equally between the two houses, this Court declines to pronounce itself thereon now and declares its determination stayed.

77. It is so ordered.

**DELIVERED, SIGNED AND DATED IN OPEN COURT AT MACHAKOS LAW COURTS THIS 21<sup>ST</sup> DAY OF MAY, 2024.**

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**C.N. ONDIEKI**

**PRINCIPAL MAGISTRATE**

Mr. F. Musyimi holding brief for Mr. Mutuku for the Plaintiffs

N/A for the Defendants

Mr. Ndonge, Court Assistant

