

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC CASE NO. E004 OF 2024

SAMSON MUREGA M'IBURI1ST PLAINTIFF

PAUL MPUTHIA M'IBURI2ND PLAINTIFF

SUSAN KATHURE3RD PLAINTIFF

CHARLES KIRIGIA M'IBURI4TH PLAINTIFF

DAVID NKUMBO M'IBURI5TH PLAINTIFF

VERSUS

DANIEL RUKARIA IBURIDEFENDANT

JUDGMENT

1. The Plaintiffs approached the court *vide* **Plaint** dated **26th March 2024**; and wherein same have sought the following reliefs [verbatim]:

- (i) *A declaration that the land parcel title No. abothuguchi/Gaitu/41 registered in the names of Daniel Rukaria Iburi, measuring approximately 12 acres is subject to customary and beneficial trust for himself and his brothers, the plaintiffs herein.*
- (ii) *An order directing the deputy registrar of this honourable court to execute the instrument of subdivision, transfer and registration of the said land shares in favour of the plaintiffs and the defendant as per the wishes of their father reflected at paragraph 12 above.*
- (iii) *Permanent injunction restraining the defendant by himself, servants, agents or otherwise, howsoever from interfering with*

the plaintiffs' quiet enjoyment of their portions of land parcel No. Abothuguchi/Gaitu/41.

(iv) Costs of the suit plus interest.

(v) Any further or better relief

2. The Defendant was duly served with the summons to enter an appearance and the Plaintiff. Nevertheless, the defendant neither entered an appearance nor filed any statement of defence. To this end, the Plaintiff proceeded to and set down the matter for formal proof, culminating into the delivery of judgment dated 13th November 2024. It suffices to highlight that the court found and held that the plaintiffs' had established their claim based on customary trust.
3. Arising from the foregoing, the court proceeded to and decreed that the suit property be sub-divided in favour of the Plaintiffs and the defendant in the manner stipulated in paragraph 12 of the Plaintiff.
4. Subsequently, the defendant filed an application dated 2nd April 2025; and wherein same contended that the summons to enter appearance and plaintiff had not been served upon him. Furthermore, the defendant contended that same only discovered the existence of the suit and the subject proceedings long after the judgment had been issued. To this end, the defendant sought to set aside the Judgment and to be granted liberty to defend the suit.
5. The court heard the application dated 2nd April 2025; and thereafter proceeded to and delivered a ruling dated 24th June 2025. For coherence, the court proceeded to and set aside the default judgment which had

previously been issued. Moreover, the court also granted an opportunity to the defendant to enter an appearance and file a statement of defence [if any]. Additionally, the court also circumscribed the timelines for the filing of the statement of defence.

6. Despite being granted the opportunity to file a statement of defence and the attendant documents, the defendant failed to file the statement of defence, either within the prescribed timeline or at all. In this regard, the matter thereafter proceeded on the basis of the formal proof.
7. The Plaintiffs' case is premised on the evidence of three [3] witnesses, *namely*; Samson Murega Iburi, Paul Mbuthia Iburi and Charles Kirigia Iburi, respectively. Same testified as PW 1, PW2 and PW 3.
8. It was the testimony of the witness that same is familiar with the rest of the plaintiffs. In addition, the witness testified that the plaintiffs are his brothers. Furthermore, the witness averred that the defendant is also a brother of the Plaintiffs.
9. It was the further statement of the witness that same is conversant with the facts of this case. To this end, the witness referenced the witness statement dated 26th March 2024; and which witness statement the witness sought to adopt and reply on as is evidence in chief. Instructively, the witness statement under reference was duly adopted and constituted as the evidence in chief of the witness.

10. In addition, the witness testified that same has also filed assorted documents and which documents the witness sought to adopt and produce before the court as exhibits. In this regard, the witness produced a copy of the demand notice dated 19th February 2024 [exhibit P1]; and a certificate of official search in respect of the suit property [exhibit P2].
11. The witness further referenced the plaint dated 26th March 2024 and whose contents the witness sought to adopt and rely on. Moreover, the witness also sought the reliefs contained in the body thereof.
12. The second witness who testified on behalf of the plaintiffs was Paul Mbuthia Iburi. Same testified as PW 2.
13. It was the testimony of the witness that same is the 2nd Plaintiff. Furthermore, the witness averred that the rest of the plaintiffs and the defendant are his siblings. Moreover, the witness testified that same has since recorded a witness statement dated 26th March 2024. To this end, the witness sought to adopt and rely on the contents of the said witness statement. Suffice it to state that the witness statement was adopted as the evidence in chief of the witness.
14. The last witness who testified on behalf of the Plaintiff was Charles Kirigia Iburi. Same testified as PW3.
15. It was the testimony of the witness that same is familiar with the rest of the plaintiffs and the defendant. Moreover, the witness testified that the defendant is his brother. Moreover, the Witness averred that the Suit Property was registered in the name of the Defendant to hold on trust for the rest of the plaintiffs and himself.

16. Upon the close of the plaintiffs' case, learned counsel for the plaintiffs [Miss D.M Nyamu] sought time to file written submissions.
17. To this end, the court granted liberty to learned counsel to file written submissions. For good measure, the counsel thereafter filed written submissions. The written submissions are, however, undated.
18. I have considered the pleadings on record; the evidence tendered and the written submissions filed by/on behalf of the Plaintiff. To my mind, the determination of the subject matter turns on one key issue, *namely*; whether the plaintiffs have established/proved their claim as pertains to customary trust or otherwise.
19. It is instructive to highlight that the plaintiffs and the defendant are siblings. Moreover, there is evidence that the suit property previously belonged to and was registered in the name of one M'Mibwi Nkure [now deceased], who was the father of the parties.
20. Furthermore, it was contended that the suit property was subsequently registered in the name of the defendant, albeit to hold on trust for the plaintiffs and himself. Evidence abound that even though the suit property was registered in the name of the defendant, the Plaintiffs herein have remained in occupation thereof to date.
21. Additionally, the Plaintiffs also testified that the suit property is also demarcated on the ground and that each party occupies a demarcated portion. In this regard, the witnesses referenced the contents of paragraph 12 of the plaint, which highlight the portions occupied by each party. In

particular, it was averred that the 1st plaintiff occupies 2 acres; the 2nd plaintiff occupies 2 acres; the third plaintiff occupies 2 acres; the fourth plaintiff occupies 1 acre; the 5th plaintiff occupies 2 acres; while the defendant [Rukaria Iburi] occupies 3 acres.

22.It is imperative to recall and reiterate that the testimonies by the plaintiffs were not controverted and or impeached. In this regard, the testimony/evidence on record remains credible and thus believable. In any event, there is no gainsaying that the defendant was afforded the opportunity to challenge the evidence on record but same failed or neglected to do so.

23.In my humble view, the evidence that was tendered by and on behalf of the plaintiffs suffices to warrant a finding that the plaintiffs have established their case on a balance of probability. Moreover, there is no gainsaying that a balance of probability only requires the plaintiff to place before the court some probable evidence, to tilt the pendulum in their favour.

24.Instructively, a score 50.5% is enough to warrant a finding in favour of the Plaintiffs. [See ***Miller vs Minister of Pensions (1974) ALL ER 372***].

25.Regarding the elements pertaining to customary trust, it is important to point out that the suit property was previously family land. Moreover, the land in question could have been registered in the names of the plaintiffs and the defendant, *save* that the father of the parties entrusted the land upon the defendants. For good measure, the defendant became registered

as the owner of the land, albeit subject to the customary rights; and overriding Interests of the Plaintiffs.

26. Additionally, it is not lost on me that the Plaintiffs are in occupation of designated portions of the suit property. In this regard, it is worthy to underscore that other than the customary trust, the plaintiffs herein also have rights flowing from occupation of the suit property. Such rights constitute overriding interests, which attach to the suit property. [See the provisions of Section 28 of the Land Registration Act, 2012 [2016].

27. Before concluding on this issue, it is instructive to reference the decision of the Supreme Court [the Apex Court] in the case of **Kiebia v M'lintari & another (Petition 10 of 2015) [2018] KESC 22 (KLR) (5 October 2018) (Judgment)** where the court distilled the elements that must be established before a plea of customary trust can be deemed as proven/established.

28. For coherence, the apex court stated thus;

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.

29.Guided by the holding of the Supreme Court in terms of the preceding paragraph, I come to the conclusion that the plaintiffs herein have established and proved the requisite elements to warrant a declaration of customary trust. In any event, there is no gainsaying that the evidence of

the plaintiffs and more particularly, the evidence pertaining to occupation has not been impugned.

FINAL DISPOSITION.

30. Flowing from the analysis contained in the body of the Judgment, I come to the conclusion that the Plaintiffs herein have duly proved their claim to the suit property. In this regard, I find and hold that the Plaintiffs' suit is meritorious.

31. In the upshot, and for the reasons alluded to; the final orders that commend themselves to the court are as hereunder;

- a) **A declaration be and is hereby issued that L.R No. Abothuguchi/Gaitu/41 [the suit property] is registered in the name of the defendant to hold on trust for himself and the Plaintiffs herein.**
- b) **The Defendant be and is hereby ordered to sub-divide the suit property in accordance with the wishes of their father and thereafter to transfer the resultant sub-divisions to the Plaintiffs and himself.**
- c) **For the avoidance of doubt the sub-divisions shall be as hereunder;**
 - (i) **Samson Murega – 2 acres**
 - (ii) **Rukaria Iburi – 3 acres**
 - (iii) **Susan Kathure – 2 acres**
 - (iv) **Paul Mbuthia – 2 acres**
 - (v) **Charles Kirigia – 1 acre**
 - (vi) **David Nkumbo – 2 acres**

- d) In default by the Defendant to sub-divide the suit property in terms of clause [c] hereof the Deputy Registrar of the Court shall execute the requisite mutation form; application for land control board consent and the attendant transfer instrument to facilitate the subdivision of the suit property and the ultimate transfer of the resultant subdivisions thereof to the parties.
- e) Subject to the sub-division and consequential transfer in favour of the parties, an order of permanent injunction shall issue prohibiting the defendant either by himself, agents, servants and or employees from interfering with the plaintiff's rights and or entitlement to the resultant sub-divisions and or titles.
- f) The Plaintiffs and the defendant shall share the costs of survey and the registration fees subject to advice by the designated land officers.
- g) Each Party shall bear own costs of the proceedings.

32.It is so ordered.

**DATED, SIGNED AND DELIVERED AT MERU THIS 30TH DAY OF
OCTOBER 2025**

**OGUTTU MBOYA, FCIArb; CPM [MTI-EA].
JUDGE**

In the presence of:

Hussein – Court Assistant

Ms. D.M Nyamu for the Plaintiffs
No appearance for the Defendant