IN THE COURT OF APPEAL AT NYERI

(CORAM: W. KARANJA, LESIIT & ALI-ARONI, JJ.A.)

CIVIL APPEAL NO. 145 OF 2019

BETWEEN

NDII MUBOTHI.....1ST APPELLANT

JOHN IRERI MUBOTHI.....2ND APPELLANT

JAMES NJERU MUBOTHI.....3RD APPELLANT

AND

AUGUSTINE KINYUA ITA.....RESPONDENT

*(An appeal from the Judgment and Decree of the Environment and Land Court at Embu **(Y. M. Angima J.)** dated 12th April 2018 in **ELCA Case No. 17 of 2014)***

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JUDGMENT OT THE COURT

1. The main issue for our determination in this second appeal is the

   construction and application of **section 30(g)** of the **Registered**

   Land Act (RLA), Cap 300) (now repealed).

2. To contextualize the appeal, we shall give a brief background on the circumstances culminating in this appeal. The dispute first landed at the Chief Magistrate's Court at **Siakago** in **Civil Case No. 23 of 2009**. Vide a plaint dated 24th April 2009 the 1st appellant, being the registered owner of **Title No. Mbeere/Kirima/3004** (hereinafter known as the "suit

property”) sued the respondent for illegal occupation and use of the suit property without his consent. It was pleaded that the respondent

had cultivated, constructed upon, used the suit property to the exclusion of the 1st appellant and failed to give the latter vacant possession thereof. The 1st appellant, therefore, sought an order for removal or eviction of the respondent and his family members from the suit property, damages for illegal occupation and costs of the suit.

3. The 1st appellant amended his plaint on 25th November 2010 to remove reference to the respondent's illegal occupation, cultivation and failure to give vacant possession of the suit property. Instead, he pleaded that the respondent was merely "interfering" with the suit property and had "commenced" construction of an illegal structure. He, therefore, sought a permanent injunction to restrain the respondent from interfering with the suit property and general damages for destruction of private property.

4. By his amended defence and counterclaim, the respondent denied the 1st appellant's claim. He pleaded that the 1st appellant's registration as proprietor of the suit property was invalid and a nullity since it was done in violation of orders of stay issued in ***Judicial Review Case No. 12 of 2007, Judicial Review cause No. 5 of 2009*** **and** ***Judicial Review Cause No. 38 of 2008,*** barring all dealings with the suit

property.

5. It was further pleaded that the respondent was lawfully in occupation of the suit property by virtue of the same being family property; that the respondent's family had been in occupation since the 1970s and 1980s; that the respondent was born and brought up on the suit property; and that he married whilst living there.

6. The respondent also pleaded that had the 1st appellant inquired on the status of the suit property prior to its acquisition, he would have discovered that the respondent and his family were in actual possession thereof and had a recognizable interest thereon.

7. By his counterclaim, the respondent pleaded that at all material times the suit property was part and parcel of **Title No. Mbeere/Kirima/2244,** which was trust land or community land held by Mbeere County Council on behalf of the local community. It was pleaded that the adjudication process in respect thereof was flawed and had been challenged in the three suits mentioned in which stay orders had been granted. It was averred that the 1st appellant had irregularly acquired the suit property during the pendency of the said suits.

8. The respondent, therefore, contended that he was the

possessory owner of the suit property and sought orders to restrain the

appellants from harassing or evicting him from the portion of the suit property in the actual occupation of his family; an order restraining the appellants from blocking access to the respondent's homestead on the suit property; an injunction to compel the appellants to remove any structures they have erected on the suit property, general damages; and costs.

9. Upon hearing the parties, the trial Magistrate Hon. S.M. Mokua, (SPM) delivered judgment on 6th February 2012 in favour of the 1st appellant in the main suit and dismissed the respondent's counterclaim.

10. Aggrieved by the judgment, the appellant filed **ELC Appeal No. 17 of 2014** at the Environment and Land Court (ELC), Embu. Upon hearing the parties, the learned Judge (Y.M. Angima, J.) dismissed all other grounds of appeal except the ground on overriding interest under **section 30 (g)** of the **Registered Land Act** (now repealed). The learned Judge pronounced himself as follows:

> ***"26. In the circumstances of this case, the court finds that the Appellant had adequately established his right of possession and occupation within the meaning of section 30 (g) of the Registered Land Act (now repealed). The learned trial magistrate, therefore, erred in failing to accord that right due recognition as an overriding interest on the 1st Respondent's title with***

respect to the

portion of land in actual occupation of the Appellant. The court, therefore, finds merit in this ground of appeal. The court made the following orders:

"a) The judgement and decree of Hon S.M. Mokua (SPM) dated 6th February 2012 is hereby set aside.

b) The 1st Respondent's suit before the Magistrate's court is hereby dismissed with costs.

c) The Appellant's amended counterclaim before the Magistrate's court is hereby allowed in terms of prayers (a) (b) and (c).

d) Prayer (d) of the amended counterclaim is allowed only to the extent that the Appellant is declared to be in lawful occupation of the part of the suit property in actual occupation of the Appellant and his family.

e) The 1st Respondent shall bear the costs of the appeal."

11. Dissatisfied with the above findings, the appellant lodged this appeal in which he challenges the judgment on eight grounds namely; that the Judge erred in law in arriving at findings that were contrary to the law and evidence; in holding that the respondent had an overriding interest in Land Parcel Number Mbeere/Kirima/3004 which land lawfully belongs to the 1st appellant; in finding that the respondent had an overriding interest over the suit land without adequately considering the circumstances under which a person is said to have acquired such rights; in finding that the respondent was in lawful

occupation of the suit land and that he had possessory rights to the said land;

in granting prayers (a), (b) and (c) of the respondent's amended counterclaim without considering the 1st appellant's rights over Land Parcel Number Mbeere/Kirima/3004; in arriving at findings that deprived the 1st appellant of his proprietary rights over Land Parcel Number Mbeere/Kirima/3004 which rights are provided for by the Constitution and the relevant laws; in not finding that the 1st appellant as the registered proprietor of Land Parcel Number Mbeere/Kirima/3004 was entitled to constitutional and legal rights as a proprietor which were superior to the respondent's claim which has no basis at all in law and in finding that the respondent was entitled to ownership of Land Parcel Number Mbeere/Kirima/3004 which is the property of the 1st appellant.

12. When the appeal came up for hearing before us on 3rd February 2024, learned counsel Mr. Okwaro and Mr. Gachuba appeared for the appellants and the respondent, respectively. Both learned counsel adopted their written submissions and made brief oral highlights.

13. In the submissions dated 28th October 2024, filed by counsel for the appellants, with regards to grounds 1, 2, 3, 4, 5, 6, 7 and 8 it was submitted that the respondent's use or occupation of the suit

land is illegal and an infringement of the 1st appellant's proprietary rights to the said land.

14. It was submitted that the rights being referred to under **Section 28(h**) are those that arise from adverse possession of land, under **Sections 7, 13** and **38** of the **Limitations of Actions Act**. Further, the ELC found that the respondent has the right to occupy the 1st appellant's land, but did not state why, even in that case, the 1st appellant should continue holding a title to land a portion of which he cannot utilize, occupy or otherwise exercise proprietary rights over. It was submitted that there was an interference with the respondent's occupation of the 1st appellant's land when the 1st appellant filed the suit in the Principal Magistrates' Court and as such that the 1st appellant asserted his rights to the suit land and effectively dispossessed the respondent and with that assertion that the overriding interests, if any, by the respondent under **Section 28(h)** were terminated. Reliance was placed on ***Peter Kamau Njau -vs- Emmanuel Charo Tinga [2016] eKLR*** and ***Joseph Gachumi Kiritu -vs- Lawrence Munyambu Kabura [1996] KECA 222 (KLR), Benson Mukuwa Wachira -vs- Assumption Sisters of Nairobi Registered Trustee [2016]***

eKLR and ***Amos Weru Murigu -vs- Marata Wangari Kambi &***

Another ***[2009] eKLR*** all on adverse possession and when time

stops running in a claim for adverse possession.

15. It was submitted that the 1st appellant is the proprietor of the suit property, which was not denied by the respondent, and that at the time he acquired ownership the respondent was not in possession/occupation of the land and thus the respondent never

possessed the land openly; that is without force or without

permission of the land owner otherwise the land owner would have

moved to court to have him evicted and permanently restrained

from interfering with the land.

16. Counsel posed the question whether overriding interests which are by way of possession of land are superior to proprietary rights, and further whether there is any basis for a person holding a title to land yet the person cannot exercise proprietary rights over the land because of occupation by another person who does not have a title or has not even sought a title by way of adverse possession.

17. It was submitted that the respondent never sought a title to the portion of the suit land that he occupies but merely sought

to be declared as a *bona fide* owner and as such that the ownership sought by the respondent and which the court granted was ambiguous and is not founded in law because the said purported occupation did not confer ownership of part of the suit land to the

respondent. Counsel went on to state that it is not stated how long the said ownership or occupation is supposed to last whether it is forever or for a certain period of time and that the ELC did not state if the said occupation can be terminated. It was thus submitted that the holding by the ELC was unlawful and amounted to an infringement of the 1st appellant's proprietary rights under **Article 40** of the **Constitution** and **Sections 24, 25,** and **26** of the **Land Registration Act.**

18. In opposition, the respondent relied on the written submissions dated 22nd January 2025. As to whether the respondent is a trespasser on land Mbeere/Kirima/300, it was submitted that the respondent took possession of the suit land in 1987 when the same was trust land within the meaning of **Section 115** and **116** of the **Constitution** (repealed) and the **Trust Land Act**, **cap 288** (repealed). Further, the suit land was known as plot 2244 and was owned by seventeen clans of the Mbeere tribe which included the respondent's Ngithi Clan and, therefore, he was not a trespasser by virtue of **Section 61(2)** and **69** of the **Trust Land Act**, cap 288 (repealed). It was contended that the respondent's resulting customary trust interests subsisted and

affected land parcels number Mbeere/Kirima/2244, Mbeere/Kirima/2962 and Mbeere/Kirima/3004 as at 2008 when the registrations were

done. It was submitted that the interests override the appellants' proprietary interests under **Section 30** of the **Registered Land Act, cap 300 (repealed).** Reliance was placed in ***Kiebia -vs- M'lintari & another*** ***(Petition 10 of 2015) [2018] KESC 22 (KLR).***

19. It was submitted that the respondent is not a trespasser on land parcel number Mbeere/Kirima/3004 as his customary trust's interests therein entitled him to its occupation, possession and utilisation. That his said overriding interests are not subject to any interference or disturbance that is sought by the appellants.

20. As to whether possession or actual possessory interest override proprietary interest it was submitted that the appellants' registration of Mbeere/Kirima/2962 and Mbeere/Kirima/3004 was careless as they failed to investigate whether the respondent's possession or actual occupation subsisted and affected the land.

Reliance was placed on ***Janet Ngendo Kamau -vs- Mary Wangari Mwangi*** ***[2007] eKLR; David Ogutu Onda -vs- Walter***

Ndede Owino **[2016] eKLR,** and ***Wensley Barasa -vs- Immaculate Awino Abongo [2017] eKLR*****.** In support of the

submission that the respondent's possession or actual occupation interests override the appellants' proprietary interests in land parcel number Mbeere/Kirima/3004.

21. Counsel submitted extensively on the question of indefeasibility of the 1st applicant's title to the suit property. We note however that the challenge to the 1st appellant's title was before the ELC and the court dismissed that ground of appeal. That issue is not, therefore, before us and we will not revisit the same.

22. We are urged to dismiss the appeal with costs to the respondent

as the same lacks merit.

23. We have carefully considered the record of appeal in its entirety,

the respective submissions of the parties, both written and oral

,and the relevant law. We observe that this appeal revolves around

two issues:

i) whether the respondent is a trespasser on land Mbeere/Kirima/3004; and

ii) whether possession or actual occupation interests override proprietary interest. Did the learned Judge err in

finding that the respondent had possessory rights on the

portion he occupies on the suit property?

24. In answering these two issues, we must remind ourselves of

our jurisdictional remit not to interfere with any findings of fact made by the 2 courts below, and defer to them. We must also confine ourselves to matters of law only. We must also appreciate the fact

that the claim by the respondent was not based on adverse possession, but was based on section **30(g)** of the repealed Registered Land Act as an overriding interest.

25. It is trite, that under **sections *27*** and ***28*** of the **Registered Land Act (RLA), Cap 300)** (now repealed) a registered proprietor enjoys absolute rights over his land subject only to express exceptions and overriding interests which need not be noted in the register. The **sections**, as relevant, provides as follows:

> ***"27. Subject to this Act –***
> ***(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;***
> ***28. The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject -***
> ***(b) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and***
> ***(c) <u>unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section</u>***

30 not to require noting on the register:

> ***Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee."*** [Emphasis added].

26. Then comes **section 30** which enumerates eight of the '*liabilities, rights and interests* that do not require registration but still override the interests of the registered owner. For purposes of this appeal, the rights listed under **30(g)** are the relevant ones.

> ***"(g) 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, save where inquiry is made of such person and the rights are not disclosed."***

27. The respondent's claim over the suit property is that he and his family occupied the suit land for many years when it was held by the county council as Trust land. After adjudication, the property was transferred to 17 clans, which were supposed to distribute it to their members. The appellant and his family were members of one of the clans. His stand is that the clans held the land in trust for its members. His possessory and occupational rights over the suit land were, therefore, overriding interests which were attached to the land regardless of any change in the registered owner.

28. For a long time, until the recent decision of the Supreme Court

in the case of ***Isack M'inanga Kiebia -vs- Isaaya Theuri M'lintari***

& Another [2018] eKLR, the construction and application

of **section 30(g)** was, to say the least, confusing. Both the High Court and this Court, in various decisions, construed and applied it so inconsistently that there was no precedential value in the decisions. For example, in the case of ***Alan Kiama -vs- Ndia***

Mathunya & Others C. A. 42/197, Madan, JA referred to them

as **"equitable rights",** stating:

> ***"What meaning is to be given to section 30(g)? The rights under customary law may be argued to be extinguished by section 28 – Kneller, J. in Esiroyo vs Esiroyo [1973] E.A. 388, at p. 390. It must refer to equitable rights, it cannot be otherwise, it has to be so to be sensibly interpretable. Over-riding interests which arise in right only of possession or actual occupation without legal title are equitable rights which are binding on the land, therefore on the registered owner of it. Under section 30(g) they possess legal sanctity without being noted on the register; they have achieved legal recognition in consequence of being written into statute; they are not subject to interference or disturbance such as by eviction save when inquiry is made and they are not disclosed. In this case the respondents were in possession and actual occupation of the land and they also cultivated it to the knowledge of the appellant. He made no inquiry, any inquiry by him would have been superfluous; he had himself lived on the land together with the respondents for a time and knew that they cultivated it.***
>
> ***Over-riding interests which so exist or are so created are entitled to protection because they are equitable rights even if they have a***

customary law flavour or the concomitant aspect of cultivation, which is not listed in section 30. Equity always protects the just rights of the oppressed. Equity always prevents an injustice being perpetrated. Equity sanctifies the administration of justice. Cultivation of land is incidental and an

appurtenance of an over-riding interest in right only of possession or actual occupation. There is nothing repugnant about the economic exploitation of land. That is what land is for."

29. **Porter, JA** in the same case found there was a '**trust**' arising out of physical possession, thus:

> ***"The learned Judge held that the suit land was transferred to the appellant subject to the resulting trust in favour of the respondent. I think that was correct, not because of any fraud, but because the land was subject to an overriding interest created by the trust, under section 30(g) of the Land Registration Act (sic). The respondents are in actual occupation of the land".***

30. In the case of ***Kanyi* -vs- *Muthiora* (1984,) KLR 712***, Nyarangi,

JA thought they were '**valid rights**':

> ***"I doubt like* Madan, J.A *did in Kiama vs 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."***

31. So did **Kneller, JA** in the same case, stating thus:

> ***"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."***

32. The Supreme Court in ***Isack M'Inanga Kiebia*** (Supra) had framed the following question for its determination:

> ***"Is there a state of uncertainty in the law, arising from contradictory precedents, and warranting this Court's resolution of the doubt" While the question of customary, or generational trust has been determined from time to time, the resulting body of precedent is not clear on the singular question, whether a claimant of a trust in customary law needs to prove actual physical possession, or occupation. Despite an overhaul of the previous land laws, and the enactment of a new Land Registration Act (2012), to consolidate and rationalize the registration of titles, the manner of resolution of the said question will affect pending matters, as well as matters to be heard in the future (pursuant to Section 28(b) of the Land Registration Act). The issue, therefore, will continually engage the workings of the judicial organs."***

33. The Supreme Court considered the issue and the above decisions of the High Court of Kenya and this Court in relation to recognition of customary trusts under African customary law and whether customary trusts constituted an overriding interest as recognized by **Sections 28** and **30** of the repealed **Registered Land Act** and came to a conclusion at paragraph 45 of the Judgment as follows:

"In our considered view, the language of Section 117 (2) of the retired Constitution, was wrongly imported into Sections 27, 28 and 30 of the Registered Land Act (now repealed) by the Judges in the cited decisions. Had the judges' view been informed by a proper appreciation of the nature, scope and content of the rights, interests and benefits to land under African customary law, subsisting before individualization of tenure, both the proviso to Section 28 and Section 30(g) of the Registered Land Act, would have been contextually interpreted. In this regard, there would have been no difficulty in construing a "customary trust" under the proviso to Section 28 of the Act. Surely, before a first registration, what other trust, if not "a customary one", could have subsisted over land held under African customary law as to bind a registered proprietor."

34. The Court went on to state as follows:

"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."

35. The powerful and binding findings now form the new jurisprudence in the area of customary trusts and have cleared the way for all courts on what constitutes an overriding interest as recognized by the laws relating to ownership of land in Kenya.

36. In the circumstances of this case this Court poses the question as to whether there was an overriding interest under **Section 3 (g)** of the **Registered Land Act (RLA),** to bind the 1st appellant as the registered proprietor and whether there was any inquiry made to determine whether the rights claimed by the respondent under **section 30(g)** existed and, if so, the nature and extent thereof? We have gone through the record but we are not satisfied that the relevant inquiry in terms of **section 30(g*)*** was made by the appellant. He was interested in the land only, and he appeared unconcerned about the presence of the respondent and his family on the suit land.

37. In his submissions he states that he only came to learn about the respondent's presence on the suit land in 2008. From the record, it is clear that the respondent had been on the suit land for about 23 years, as he testified that he attended a local primary school within the area. It was his case that he moved into the suit property in 1987 when he was about 7 years old

and living with his parents. His testimony was corroborated by that of Michael

Njeru who was the Chief of Mavuria Location. The Chief testified that it was the respondent's grandparents who first moved into the suit property in 1980s and later were followed by the respondent's parents. At the time the land was a block known as parcel No. Mbeere/Kirima/2244. The respondent and his family resided there peacefully without interference until 2008, when the

appellant came to claim the suit property.

38. We are not persuaded that the appellant was unaware of the

respondent's occupation of the suit land. There was ample

evidence before the court that the respondent and his family were

in occupation of the land, so when the appellant bought the land,

his Title came encumbered with the respondent's overriding right

of possession and occupation of the land. The local County

Council held the land in trust for him, and so did the clan, which

was later registered as the owner before the land was transferred

into private Titles, and eventually transferred to the 1st appellant

and others.

39. Learned counsel for the appellant posed a few questions, e.g. that the plot occupied by the respondent was not properly defined; for how long the possessory rights would last; whether possessory rights were more superior to the appellant's Title and whether they were not an affront to the appellant's constitutional right to

property. All we can say is that those questions will remain rhetorical for purposes of this judgment as they were not canvassed and/or determined before the two courts below.

40. We think we have said enough to demonstrate that the learned Judge acted within the law when he made the findings now impugned. We find no merit in this appeal and we dismiss it with costs to the respondent.

Dated and Delivered at Nyeri this 11th day of December, 2025.

W. KARANJA

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

ALI-ARONI

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JUDGE OF APPEAL

I certify that this is a true copy of the original
Signed
DEPUTY REGISTRAR