IN THE COURT OF APPEAL
AT NAIROBI

(CORAM: MUSINGA (P), JOEL NGUGI, ODUNGA, JJ.A)

CIVIL APPEAL NO.E441 OF

2023 BETWEEN

SAMUEL WAINAINA KAMAU.....1ST APPELLANT
TERESIA WAIRIMU KAMAU..... 2ND APPELLANT
(*Legal Representative of the Estate of*
FRANCIS KAMAU WAINAINA
(Deceased)

AND

MARY WANJIRU MWANGI.....RESPONDENT

(An appeal from the Judgment and Decree of the Environment and Land Court of Kenya at Thika (Kemei, J.) dated 14th August, 2025 and 18th August 2025 respectively

in

ELC OS Cause NO. E010 of 2021)
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JUDGMENT OF THE COURT

1. This is a first appeal from the judgment of the Environment and Land Court at Thika (J. G. Kemei, J.) in ***ELC (O.S.) Cause No. E010 of 2021*** in which the learned Judge, upon an amended originating summons, declared that Land Parcel No. Kiganjo/Gachika/805 ("the suit property") was subject to a customary trust in favour of the respondent (as the legal administrator of the estate of her late husband, Joseph Mwangi Wainaina) and ordered that a portion measuring 1.35 Ha (approximately

3.26 acres) be hived off and transferred to the respondent to hold in trust for herself and the children of the late Joseph Mwangi Wainaina.

2. The appeal was heard before us on 11th November, 2025. Mr. P. M. Karanja, learned counsel, appeared for the appellants, while Mr. Fredrick Muiruri, learned counsel, appeared for the respondent. Both parties had filed written submissions and accompanying lists/digests of authorities, and each counsel made brief oral highlights of the submissions on record.
3. The appellants invite us to interfere with the decision of the trial court primarily on the basis that: (i) the learned Judge relied on proceedings and decisions of the (now defunct) Land Disputes Tribunal system which had earlier been quashed by the High Court by an order of certiorari; (ii) the court relied on documents (including a survey report) whose makers were not called; (iii) the court failed to give due weight to a succession cause relating to the estate of the late registered proprietor; and (iv) the evidence tendered was insufficient in quality to establish a customary trust to the standard required by law. The respondent, on her part, maintains that she proved the trust on a balance of probabilities, that the trial court properly evaluated the evidence, and that the appeal lacks merit.
4. As a first appellate court, our duty is to re-evaluate, re-assess and re-analyse the entire record and draw our own conclusions, bearing in mind that we did not see or hear the witnesses testify and should give due allowance for that. This principle is settled. In ***Selle & another v Associated Motor Boat Co. Ltd & others [1968] EA 123***, the predecessor of this Court stated that an appellate court is not bound necessarily to follow the trial judge's findings of fact if it appears that the judge failed to take account of particular circumstances or probabilities materially affecting the evaluation of the evidence, or if the impression

based on the demeanor of a witness is inconsistent with the evidence as a whole. The same approach has repeatedly been affirmed in our jurisprudence on first appeals.

5. With that standard in mind, we turn to the record.
6. The suit property, Kiganjo/Gachika/805, is approximately 7 acres. The green card produced in evidence shows that the land was first registered in 1958 in the name of Francis Kamau Wainaina (the deceased registered proprietor), and a title deed was issued in 1964. Francis Kamau Wainaina was the elder brother of Joseph Mwangi Wainaina (the deceased husband of the respondent). The respondent's case was that Francis held the suit property in trust for himself and for his brother Joseph, and that in the early 1970s the two brothers divided the land into two equal portions, which division was marked on the ground by boundary trees/hedges and has been respected in occupation and use ever since. The appellants, who are the widow and son of Francis (and administrators of his estate), resisted the claim and contended that Francis owned the land absolutely and that the respondent's occupation was, at most, permissive and limited to about 2 acres allocated in the succession process.
7. In the Environment and Land Court, the respondent called two witnesses. She testified as PW1 and adopted her witness statement. She described her marriage to Joseph, her entry onto the land, and her long occupation of the portion she claimed as Joseph's share. She testified that in 1972/1973, the two brothers caused the land to be demarcated into two equal portions in the presence of elders and witnesses, and that after the demarcation they planted boundary trees which remain on the ground. She further testified that an

agricultural officer thereafter

supervised tea planting on the respective portions and each brother obtained a tea growing number. She relied, among other documents, on a survey report said to depict occupation, use and vegetation on the ground and the portion she occupied, as well as on records of prior proceedings in the Land Disputes Tribunal system where the land had earlier been the subject of a dispute.

8. PW2, Peter Kagwe Njoroge, testified as an agricultural officer who served in the area for many years. He adopted his statement and testified, in essence, that he supervised tea planting on the suit property upon the instructions of the two brothers and that, before tea planting, a boundary had to be erected to mark each brother's share. His evidence, taken as a whole, was relied upon by the trial court as corroboration that the suit property was, in practice, divided and used as two portions corresponding to the two brothers' households.

9. The appellants called three witnesses, with the 1st appellant (Samuel Wainaina Kamau) testifying as DW1 and adopting his statement. He acknowledged the respondent's occupation, the existence of family arrangements, and that the land was held "in trust for the family", but disputed that the respondent was entitled to half the land. He insisted that at most, the respondent was entitled to 2 acres. The appellants also called DW2 (Anthony Njuguna Kamau) and DW3 (Faith Muteti, the Land Registrar, Gatundu) who produced the green card and testified to the registration history and the caution lodged by the respondent.

10. At the close of the trial, parties filed written submissions. The trial court framed the key question as whether a customary trust existed over the suit property in favour of the respondent's late husband

and, upon evaluation of the evidence, held that the respondent had proved such

trust on a balance of probabilities. The trial court, therefore, made the declarations and consequential orders now challenged in this appeal.

11. Having carefully considered the memorandum of appeal, the record, the written submissions and oral highlights, we are of the view that the appeal turns on four inter-related questions which can be addressed in a flowing analysis: first, whether the trial court misapprehended or misapplied the law on customary trust; second, whether the evidence on record, properly evaluated, supported the conclusion that a customary trust existed in respect of the portion claimed; third, what effect, if any, should be given to the earlier tribunal proceedings said to have been quashed; and fourth, whether the succession proceedings ousted or diminished the respondent's claim in the Environment and Land Court.

12. The legal foundation of customary trusts in Kenya is now well settled. Under section 28(b) of the Land Registration Act, trusts, including customary trusts, are overriding interests that may subsist and affect registered land without being expressly noted in the register. That statutory recognition, taken together with the long line of authority under the repealed Registered Land Act, makes plain that registration of title does not, by itself, extinguish rights arising under customary law nor relieve a registered proprietor of obligations as a trustee where a trust is proved. The classic statement appears in ***Kanyi v Muthiora [1984] KLR 712*** where the Court held, inter alia, that registration did not extinguish rights under Kikuyu customary law and that a proprietor could still be subject to duties as a trustee.

13. The Supreme Court in ***Isack M'inanga Kiebia v Isaaya Theuri M'lintari & another, SC Petition No. 10 of 2015 [2018] KESC***

22 set out guiding considerations for determining whether a customary trust

exists. The apex Court emphasized that each case turns on its own merits and the quality of evidence. Among the non-exhaustive factors it identified were whether the land was family/clan/group land before registration; whether the claimant belongs to the family/clan/group; whether the claimant's relationship is not so remote as to make the claim idle; whether the claimant could have been registered but for intervening circumstances; and whether the claim is directed against a registered proprietor who is a member of that family/clan/group. The Court was also clear that occupation is not the only indicator; the inquiry is anchored in the nature of the holding and the intention and arrangements within the family or community context.

14. It follows that the task before the trial court was not to treat registration as conclusive against any claim, nor to treat relationship alone as sufficient, but to examine the surrounding circumstances and evidence to determine whether, on a balance of probabilities, the registered proprietor held the land (or part of it) for the benefit of other family members as a matter of customary trust.

15. On the record before us, the familial relationship is common ground. Francis and Joseph were brothers. The respondent is the widow and legal administrator of Joseph's estate. The appellants are the widow and son of Francis respectively and are administrators of his estate. There is also no serious dispute that the respondent has occupied a distinct portion of the suit property for decades, and that her occupation corresponds substantially to the approximately 3.26 acres described in the trial court's decree. Indeed, during the hearing before us, counsel for the appellants accepted that the respondent has all along occupied about 3.26 acres.

16. The controversy, therefore, is not about whether the respondent is on the land, but whether her occupation is referable to a legally cognizable customary trust in favour of Joseph's household, or merely a permissive occupation or a post-hoc allocation arising from the generosity of Francis's estate or the succession process as the appellants claim.

17. The trial court preferred the respondent's account that the father of the two deceased brothers was the original owner of the land, who had authorized the same to be registered in the name of Francis; and that, in the early 1970s, the two brothers caused the land to be demarcated into two equal portions in accordance with family arrangements, and that the respondent's occupation traces to Joseph's share. In our own re-evaluation, we find significant support for that conclusion in the totality of evidence, including: (i) the respondent's long, settled and distinct occupation consistent with an allocated share; (ii) the evidence of PW2, an agricultural officer, that tea planting was supervised upon instructions from both brothers and that boundary demarcation preceded tea planting; (iii) the registration of a caution in 2002 asserting beneficial interest — an act consistent with assertion of a claimed right rather than mere licence; (iv) the appellants' own evidence acknowledging trust-like arrangements within the family; and (v) the pattern of occupation and use as depicted in the survey material produced, which the trial court found consistent with the respondent's claim.

18. We are mindful of the appellants' critique that the survey report and other documents were not proved by calling their makers. However, the record shows that the documents formed part of the parties' bundles and were received in evidence without objection at the trial.

While it is

correct that admission of a document does not necessarily dispense with the need to evaluate its probative value, the trial court was entitled to consider the documents alongside *viva voce* testimony and other material on record, and to assign them weight it considered appropriate in light of all the circumstances. In our view, even putting the survey report to one side, the consistent evidence on long occupation and on demarcation preceding tea planting, coupled with the familial context and the admissions elicited in cross-examination, provided an evidentiary foundation upon which the trial court could reasonably infer the existence of a customary trust.

19. The appellants placed heavy reliance on the contention that the respondent's second witness did not witness the cultural ceremony and, therefore, did not corroborate the respondent's account. On our reading, PW2's testimony was not directed to proving the ritual details of the ceremony but to establishing that the land was practically demarcated into two shares before tea planting and that the demarcation corresponded to the instructions of the two brothers. That evidence directly supports the respondent's narrative that the brothers treated the land as consisting of two distinct beneficial holdings. The trial court's use of PW2's evidence as corroborative of the existence of demarcation and separate use was, in our view, within the proper bounds of fact evaluation.

20. We also note that the appellants' own evidence was not free from internal tensions. DW1 accepted that the suit property was held in trust for the family and that the respondent's household was allocated a portion, though he attempted to limit the trust to two acres. The evidence on what, if anything, was allocated to other persons (including a person

referred to as Lucia) appeared inconsistent between DW1 and DW2 as to acreage and occupation. While such inconsistencies do not automatically prove the respondent's case, they weaken the appellants' suggestion that the trial court's findings were wholly unsupported.

21. The appellants next argued that the trial court erred by relying on tribunal proceedings and decisions that had been quashed by an order of *certiorari* in judicial review proceedings at the High Court. The appellants' position was that once quashed, the tribunal materials were null and void and could not be relied upon for any purpose. The respondent's answer was that what was quashed was the decision (for want of jurisdiction) and not the record of proceedings; and, in any event, the proceedings were produced as public records relevant to facts in issue, particularly because they contained testimony of witnesses who were no longer available many years later.

22. We have considered this question carefully. We agree with the appellants that a decision quashed by *certiorari* cannot be relied upon as a valid adjudication conferring rights or as a binding determination. However, it does not necessarily follow that a record of what transpired in earlier proceedings is, for all purposes, inadmissible as evidence of historical facts, especially where the Evidence Act permits the reception of public records and judicial records subject to the rules of relevance and weight. In this appeal, the key point is this: the trial court did not treat the earlier tribunal decision as binding; rather, it considered the tribunal record as part of the evidentiary narrative touching on occupation, family arrangements and the history of the dispute.

23. Even if we were to accept, for argument's sake, that the trial court should have approached those materials with greater caution, our own re-

evaluation leads us to the same outcome on the basis of the direct oral evidence and other material on record. The respondent's long occupation, the corroborative evidence of demarcation linked to tea planting, and the appellants' admissions regarding trust-like family arrangements provide sufficient basis to support the finding of customary trust. In that sense, the tribunal materials were not dispositive.

24. The appellants also asserted that the respondent's claim was essentially a succession dispute and ought to have been ventilated in ***Succession Cause No. 1785 of 2015*** relating to the estate of Francis Kamau Wainaina, where the respondent was allocated two acres. The respondent's response, consistent with the position taken before the trial court, was that the question before the Environment and Land Court was not distribution of the estate per se, but a declaration of trust and determination of rights in land — a matter falling within the jurisdiction of the Environment and Land Court under Article 162(2)(b) of the Constitution and the enabling statutes.

25. We agree with the trial court and the respondent on this point. Where a dispute turns on whether land registered in the name of a deceased person is held subject to a trust in favour of another, and the relief sought is a declaration of trust and consequential orders concerning title and occupation, the proper forum is the Environment and Land Court – and not the probate court. A probate court's mandate is administration and distribution of estates; it does not, as a general rule, determine contested questions of title or trust over land except to the extent necessary to facilitate distribution where rights are undisputed. In this case, the respondent's very complaint was that the allocation in the

succession process did not reflect her lawful beneficial entitlement under customary trust. That is precisely the kind of dispute that required adjudication by the Environment and Land Court.

26. We add that the existence of a confirmed grant allocating two acres to the respondent did not, without more, extinguish the respondent's asserted beneficial entitlement if, in fact, a customary trust existed in her favour. A beneficiary's (or claimant's) proprietary entitlement under a trust is not created by the grant; it precedes it. If proved, it constrains how the estate may be distributed because it identifies what, in truth, forms part of the free property of the deceased available for distribution.

27. The appellants repeatedly emphasized the suit property's first registration in 1958 and the principle of indefeasibility. That is an important consideration, but it is not conclusive against customary trust because statute itself preserves trusts as overriding interests. The law insists on proof. The question is not whether a registered proprietor has strong rights, but whether the evidence establishes that the proprietor held the land subject to an obligation, recognized by customary law and protected by statute, for the benefit of another family member or household.

28. Considering the evidence as a whole, we are satisfied that the respondent proved, on a balance of probabilities, that Francis held the suit property subject to a customary trust in favour of Joseph's household, and that the respondent's occupation of approximately half the land is consistent with that trust. The trial court, in our view, properly directed itself on the governing principles and arrived at a conclusion supported by the evidence.

29. The upshot is that we find no basis upon which to interfere with the learned Judge's evaluation of evidence and application of the law. The appeal, therefore, fails.

30. In the result, the appeal is dismissed with costs to the respondent.

Dated and delivered at Nairobi this 30th day of January, 2026.

D. K. MUSINGA, (PRESIDENT)
.....
JUDGE OF APPEAL

JOEL NGUGI
.....
JUDGE OF APPEAL

G. V. ODUNGA
.....
JUDGE OF APPEAL

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