**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MERU**

**ELC APPEAL E039 OF 2024**

CHARITY MUTHONI GILBERT……..1ST APPELLANT

ERIC MUNENE KIRIMI…….2ND APPELLANT

DENNIS MURITHI KIRIMI……..….3RD APPELLANT

COLLINS KIRIMI…… .4TH APPELLANT

VERSUS

JACOB KIRIMI M'MUNGANIA……. 1ST RESPONDENT

GERALD GIKUNDI M'RUKARIA……..2ND RESPONDENT

JOSPHAT MUGIRA M'RUKARIA……..3RD RESPONDENT

***[Being an appeal from the judgment and decree of Hon. J.M Njoroge – CM in Meru MCELC E038 OF 2022 delivered on 24th of April 2024]***

**JUDGEMENT**

1. The Appellants [*who were the Plaintiffs in the lower court]* filed the Plaint dated 21.04.2022 whereby the Appellants sought the following reliefs:

    ***I. A declaration that LR. No. Kiirua/ Ruiri/ 2083 is an ancestral land and that same be transferred to the plaintiffs and the 1st defendant as same is subject to trust.***

    ***II. An order directing the Land Registrar Meru Central to cancel the registration of LR. No. Kiirua/ Ruiri/ 2083 in the name of the 1st***

***defendant and the same be registered jintly in the names of the plaintiffs and 1st defendant and in the event the 1st defendant declines to execute the transfer documents, the Executive Officer of the court be ordered to execute the transfer documents on behalf of the 1st defendant.***

***III. An order of permanent injunction and inhibition to restrain the 2nd and 3rd defendants, their agents, servants, assigns, employees or successors from interfering with LR. No. Kiirua/ Ruiri/ 2083***

***IV. Cost of the suit and interest at court rates***

2. By the Plaint dated 21.4.2022, the appellants' averred that the 1st respondent was the husband to the 1st plaintiff while the father to the 2nd to 4th Appellants. It was contended that ***LR. No. Kiirua/ Ruiri/ 2083*** [*hereinafter referred to as the suit property*] was originally registered in the names of one M'MUNGANIA MUNGIRIA, now deceased and also the father to the 1st respondent. The appellants contended that the suit property was an ancestral land transferred to the 1st respondent who later on settled the 1st appellant on the suit property during the subsistence of their marriage and that the 2nd to 4th appellants by virtue of being children of the 1st appellant and the 1st respondent, same to were settled on the suit property.

3. The appellants particularized the particulars of Trust at paragraph 8 of the plaint whereby same alleged inter alia: that the 1st respondent held the suit property in trust for himself and the appellants. The appellants alleged that the 1st respondent had breached the trust that was placed on him by selling portions of the suit property to the 2nd and 3rd respondents without the appellants' consent and/or approval.

4. Upon being served with the plaint, the respondents herein lodged a statement of defense dated 14.05.2022 whereby the 1st respondent alleged that his father, now deceased had purchased the suit property and bequeathed him with the same. That, upon being registered as the owner of the suit property sometimes on 12.09.1994, same entered into sale agreement with the 2nd and 3rd respondents whereby he sold unto the 2nd respondent One (1) acre and the 3rd respondent half (1/2) acre; while retaining the other portion[s] whereby the 2nd to 4th appellants were residing.

5. The 1st respondent contended that same did not hold the land in trust for the appellants as he had been separated from the appellant for over 20 years. On the other hand, the 2nd and 3rd respondents alleged that same had been in occupation of the suit property for over 12 years hence the appellants claim was statute barred.

6. The suit before the lower court was heard and disposed of *vide* judgement delivered on 24.4.2024. The Learned Trial Magistrate [ Hon J.M. Njoroge – CM] found and held that the Appellants had not proved customary trust in respect of the suit property. In addition, the Learned Trial Magistrate also found that the suit property did not comprise family or ancestral land. To this end, the Learned Trial Magistrate proceeded to dismiss the Appellants' suit.

7. It is the said Judgment and the consequential decree that have aggrieved the Appellants and thus provoked the appeal. The appeal is premised on the memorandum of appeal dated 21.5.2024.

8. The subject appeal came up for direction[s] on 26.1.2026, whereupon learned counsel for the Appellants intimated to the court that same had since filed and served the record of appeal. In addition, learned counsel posited that the record of appeal was complete. The counsel thereafter sought directions as pertains to the hearing and disposal of the appeal. Furthermore, counsel proposed to have the appeal canvassed by way of written submissions.

9. With the concurrence of Learned Counsel for the Respondent, the court proceeded to and issued directions in line with **Order 42 Rule 13 of the Civil Procedure Rules 2010**. The directions were: The appeal shall be heard before one judge sitting at Meru: the appeal shall be canvassed by way of written submissions; the Appellants shall file and serve written submissions within 14 days from the date of directions; the Respondents shall file and serve written submissions within 14 days from the date of service; and the Appellant shall be at liberty to file rejoinder submissions, if any, and same to be filed and served within 7 days from the date of service. The court thereafter fixed a return date for mention to confirm compliance.

10. The Appellants filed written submissions dated 5.1.2026. The Appellants have raised and canvassed two key issues. The issues highlighted by the Appellants are: The Appellant tendered and adduced credible evidence to demonstrate the existence of customary trust and that the sale of portions of the suit property measuring 1½ acres was in breach of trust; and the Learned Trial Magistrate misapprehended, misconceived and misapplied the law as pertains to customary trust.

**11.** Learned counsel for the Appellants have thereafter cited and referenced various decisions, including **Midega v Midega & Another [2025] KEELC 7349 (KLR), Mbui Mukangu vs Mutwwiri Mbui C.A No. 281 of 2000, NM v DM (2018) KEELC 1372 (KLR), Isack Kiebia v Isaaya Theuri M'Lintari & Another [2018] eKLR, Nakuru CACA No. 84 of 2004; Fred C. Fedha & Another v Edwin E. Asava Majani and Gathuku v Nakuru Workers Housing Cooperative Ltd & Another KEELC 20434 (KLR) respectively.**

12. The Respondents filed written submissions dated 26.8.2024, wherein the Respondents has raised and canvassed two key issues. The issues are: whether a customary trust exists over ***LR. No. Kiirua/ Ruiri/ 2083***; and whether the sale of a portion of the suit property to the 2nd and 3rd respondents was a breach of the trust.

13. Learned counsel for the Respondents has thereafter reviewed the totality of the evidence that was tendered before the trial court; highlighted key legal principles underpinning customary trust; and thereafter cited various decisions. The decisions cited are **Ngugi v Kamau & Another, Njenga Chogera v Maria Wanjira Kimani & 2 others [2005] eKLR, Peter Ndungu Njenga v Sophia Watiri Ndungu [2000] eKLR, Kiebia vs M'Lintari & another 2018 KESC 22, Muthuita v Muthuita (1982-88) 1 KLR 42, Juletabi African Adventures Limited & Another vs Christopher Michael Lockley (2017) eKLR, Kurshed Belgium Mirza v Jackson Kaibunga [2017] eKLR and Captain Harry Gandy v Caspair Air Charters Ltd [1956] 23 EACA .**

14. Flowing from the foregoing submissions and taking into account the various case laws cited, learned counsel for the Respondents contended that the Learned Trial Magistrate correctly apprehended the law on customary trust; correctly applied the law to the facts of the case; and arrived at the correct conclusion. The court has been invited to find that the subject appeal is meritless.

15. Having reviewed the record of appeal, the pleadings by the parties, the evidence tendered, [both oral and documentary], the written submissions and upon taking into account the applicable law, I come to the conclusion that two issues crystallize for determination. The issues are:

    i. ***Whether the Appellant has proved the plea of customary trust to the requisite standard or otherwise;***

    ii. ***Whether the Learned Trial Magistrate misapprehended and misapplied the law as pertains to customary trust or otherwise.***

16. Before venturing to address the thematic issues that have been isolated in the preceding paragraph, it is important to highlight that what is before me is a first appeal. By virtue of being a first appeal, this court is mandated to undertake a fresh and exhaustive scrutiny, review, and analysis of the totality of evidence tendered before the court of first instance. The court is obligated to review the evidence and determine whether the finding[s] and conclusion[s] arrived at by the trial magistrate accord with the evidence on record and the legal principles.

17. The court is seized of the authority and jurisdiction to arrive at an independent conclusion and to depart from the findings of the trial court. However, it is established that the appellate court can only depart from the factual finding and conclusion of the trial court where it is demonstrated; that the conclusions were based on no evidence; the conclusions are perverse to the evidence on record; the findings are based on misapprehension of the evidence and law; and that there is a demonstrable error of principle which vitiates the findings of the trial court.

18. Suffice it to state that, barring the foregoing, the first appellate court is enjoined to defer to the findings and conclusions of the trial court. Notably, the jurisdiction of the first appellate court to interfere with the findings/conclusions of the trial court is circumscribed. The jurisdiction is not at large. The jurisdiction is not boundless.

19. The jurisdictional remit of the first appellate court, while undertaking its mandate as pertains to the first appeal, has been the subject of various court decisions. In the case of **Odera t/a AJ Odera & Associates v Machira t/a Machira & Co Advocates [2013] KECA 208 (KLR),** the Court of Appeal expounded on the scope of the jurisdiction.

20. The court stated thus

> *46. We also wish to be guided by the reasoning of this court in the case of Mwana Sokoni versus Kenya Business Limited (1985) KLR 931 page 934,934 thus:-"Although this court on appeal will not lightly differ from the Judge at first instance on a finding of fact, it is undeniable that we have the*

*power to examine and re-evaluate the evidence on a first appeal if this should become necessary. As was said by the House of Lords in Sottos Shipping versus Sauviet Sohold, The Times, March 16, 1983.*

*"It is uncertain whether their Lordships should have reached the same conclusion on the evidence, but it is important that, sitting in the appellate court they should be over mindful of the advantages enjoyed of the trial Judge who saw and heard the witnesses and was in a comparably better position than the Court of Appeal to assess the significance of what was said, how it was said, and equally impotent what was not said" Again in Peters versus Sunday Post Limited (1958) EA424, a decision of the Court of Appeal for Eastern Africa, Sir Kenneth O' Conner, P said at page 429: "It is a strong thing for an appellate court to differ from the finding on a question of fact of the Judge who tried the case and who has had the advantage of seeing and hearing and the witnesses*

19. Recently, the Court of Appeal re-visited the jurisdictional remit in the case of **Kenya Urban Roads Authority & another v Belgo Holdings Limited [2025] KECA 764 (KLR).** The Court stated as hereunder:

*37. We have considered the appeal, and this being a first appeal, we are under a duty to subject the entire evidence and the judgment to a fresh and exhaustive examination with a view to reaching our own conclusions in the matter. In carrying out this duty, we have to remember that we had no opportunity of seeing and hearing the witnesses who testified during the trial and to make an allowance for the same. We have also to remember that it is a big thing to overturn the findings of a trial court which has had the singular opportunity of reaching its conclusions based on a combination of*

*the evidence adduced and observation by the court of the demeanour of witnesses. In a nutshell, a first appellate court must of necessity proceed with caution in deciding whether or not to interfere with the findings of a trial court, but of course, where such findings are not supported by the evidence on record or where they are founded on a misapprehension of the law, the axe must fall on the impugned judgment. This position is anchored in section 78 of the* Civil Procedure Act*, which requires a first appellate court to re-evaluate, reassess, and reanalyse the extracts of the record and draw its own conclusions. These provisions have been underscored in numerous decisions of the Superior Courts among them Peters v Sunday Post Limited [1958] EA 424, where the predecessor to this Court expressed itself as follows: "Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law an appellate court has jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this really is a question of law), the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial Judge as to where credibility lies is entitled to great weight. This is not to say that the Judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to the*

*courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given…*

> *Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial Judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial Judge's conclusion. The appellate court may take the view that, without having seen or heard the witnesses it is not in a position to come to any satisfactory conclusion on the printed evidence. The appellate court, either because the reasons given by the trial Judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question…It not infrequently happens that a decision either way may seem equally open, and when this is so, then the decision of the trial Judge who has enjoyed the advantages not available to the appellate court becomes of paramount importance and ought not be disturbed. This is not an abrogation of the powers of a Court of Appeal on questions of fact. The judgment of the trial Judge on the facts may be demonstrated on the printed evidence to be affected by material inconsistencies and inaccuracies, or he may be shown to have failed to appreciate the weight*

*or bearing of circumstances admitted or proved or otherwise to have gone plainly wrong."*

21. Bearing in mind the principles enunciated in the decisions [supra], it is now apposite to revert to the issues for determination. I shall address the issues sequentially.

**ISSUE Number One [1].**

***Whether the Appellant has proved the plea of customary trust to the requisite standard or otherwise***

22. The appellants' case was that the 1st respondent was a husband to the 1st appellant and a father to the 2nd to the 4TH Appellants. The 1st appellant adduced evidence that her father in law, one M'Mungania Mingiria, now deceased was the original registered owner of the suit property and that by the time the suit property was being transferred to the 1st respondent, she and the 1st respondent were already married and residing on the said property. Besides, the 2nd-4th appellants had already been born and residing on the suit property. It was her evidence that her matrimonial home had been built on the suit property and over time, same had planted trees and assorted crops on the suit property.

***23.*** During cross examination, the 1st appellant who was PW1 testified that,'

***…I got married when the 1st defendant had the land already. I was married in 1984 and we were blessed with 3 children. The land belongs to the 1st defendant but my children should get the share…'*** On the other hand, the 1st Respondent during cross examination testified that,'

***…L. P 2083 belongs to my father. I was given in 1993 and the title deed issued. The 1st plaintiff was my wife then and had 2 children. I had built the house on the land. I sold part of the land when we had separated whereby all the defendants knew I was married with children…the 1st plaintiff has built a permanent house on the land. We have not divorced…'***

24. P EXH 1 was the register of the suit property. On the 12.9.1994, the suit property was transferred to the 1st respondent. He confirmed that during this time he was married to the 1st appellant and had 2 children already. He further confirmed that he had built a house on the suit property and that the 1st appellant had also constructed a permanent house on the suit property. PW3 one Dorrine Karimi upon being cross examined testified that,'

***…she left the home while she was young but she occasionally visits. The father stays with the children…'***

25. From the foregoing evidence, it is explicit that by the time the 1st respondent's father was transferring the suit property to the 1st respondent, he [First Respondent] had already been married with children and further settled his family on the suit property. He further confirmed that other than the house he built, the 1st appellant had also constructed a permanent house on the suit property. Why was the 1st respondent allowing the 1st appellant to construct a permanent house on a portion of the suit property if the same was not family land?

26. He let the 1st appellant use the suit property because he recognised that the 1st appellant, as his spouse had interest on the suit property. He further stated that despite the separation, same had not divorced the 1st appellant and the 2nd to 4th

appellants were residing on the suit property and this was also confirmed by PW3.

***27.*** For clarity, the 1st appellant was still a spouse to the 1st respondent and that's why same according to PW3, allowed the 1st appellant to occasionally visit the suit property. In his evidence in chief vide the adopted witness statement dated 14.5.2022, DW1 also the 1st respondent testified that:

> ***…the plaintiffs have never used the land belonging to my co-defendants and in any case, they have my share to use although they have never farmed since they have no interest…'***

28. Looking at the evidence adduced by the 1st respondent, who testified as DW1, same admitted that he held the suit property in trust for the appellants. He confirmed that same were entitled to benefit from the suit property, particularly the 1 ½ acres of the suit property that was remaining after the sale of the equal portion to the 2nd and 3rd respondents. Otherwise, why was he admitting that the appellants herein were entitled to the portion of the suit property? The 1st respondent confirmed that he had settled his family on the suit property despite the separation with the 1st appellant, he continued to reside on the suit property with the 2nd to the 4th appellants, who were/ are his children and this was demonstrated *vide* P EXH 2 which were bundle of Certificates of birth.

29. The 1st respondent had sold a portion of the suit property and even proceeded to have a mutation prepared but this was thwarted by the caution lodged by the 1st appellant. The land registrar was convinced that the 1st appellant had made out a

case for the lodging of the caution on grounds that the 1st respondent held the land in trust for the appellants.

30. I beg to state that any claimant, the Appellants not excepted, is enjoined not only to plead customary trust but also to supply the particulars underpinning the plea of customary trust. It is only after the particulars have been supplied that the claimant is called upon to tender plausible, cogent, compelling and concrete evidence to prove the plea of customary trust. The evidence to be tendered must relate to a proper pleading before the court.

31. At paragraph 8 of the plaint dated 21.4.2022, the appellants listed particulars of trust. According to the appellants, the suit property was a family/ancestral land that originally belonged to the 1st respondent's father and thereafter, transferred to him. It is this land that the 1st respondent confirmed that he built a house and settled the appellants.

**32.** While still addressing the first issue, it is thus critical to interrogate whether the ingredients that must be proven before a plea of customary trust were demonstrated. The elements to be established were distilled by the Supreme Court of Kenya in the case of **Kiebia v M'lintari & another [2018] KESC 22 (KLR).**

33. The Apex court stated thus:

> *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 the 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 the 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**.*

34. The Appellants were enjoined to prove and demonstrate that the suit property was family or ancestral land. However, it is common ground that the suit property was originally registered in the name of the 1st appellant's father-in-law who later transferred the suit property to the 1st respondent. This transfer was done when the 1st respondent and the 1st appellant were already married with two children and the 1st respondent settled his family on the suit property. ***Firstly***, the 1st respondent as the head of the family, was registered as the owner of the suit property who in turn settled the family, including the appellants on the land.

35. ***Secondly***, the appellants are family members of the 1st respondent and by extension to the original owner of the suit property. ***Thirdly***, the relationship between the appellants and the 1st respondent was not remote. PW3 confirmed that the 2nd to the 4th appellants are the children to the 1st respondent and that the 1st appellant is the wife to the 1st respondent. DW1 on the other hand, confirmed that he hadn't divorced the 1st appellant. The connotation being that same were still married. In fact, PW1 occasionally visited the suit property and that DW1 confirmed that she had constructed a permanent house on the suit property.

36. Fourthly, all the appellants herein could have been registered as the owners of the suit property by virtue of being family members of the 1st respondent *save* for intervening circumstance. The bottom line is that the claimant must show that the land in question could very well have been registered in his name, save that the claimant was either a minor, of unsound mind, was not available at the point in time, or there was a family agreement warranting the registration in the name of the registered owner.

37. Can it be said that the suit property could have been registered in the name of the Appellant? The suit land did belong to the ancestry or family of the Appellants. Lastly, the claim on trust has been directed to a member of the family to the appellants. The 1st respondent is a husband to the 1st appellant and a father to the 2nd to the 4th Appellants, a fact that is not in dispute. To that extent, it is my considered view that the appellants proved the ingredients of customary trust.

38. Proof of trust, including customary trust, is dependent on the evidence tendered. The evidence must be consistent, credible and compelling. Absent evidence, the plea of trust, including customary trust dissipates into thin air; or collapses.

39. In the case of **Kazungu Fondo shutu vs Japhet Noti charo 2021 KECA**, the Court of Appeal stated thus:

> *28. The concept of trust must however, be proved. This Court in the case of Mumo v Makau [2002] 1EA.170, held that "trust is a question*

*of fact to be proved by evidence…..” See also Kanyi Muthiora v Maritha Nyokabi Muthiora, Nairobi Court of Appeal No.19 of 198*

*29. In Juletabi African Adventure Limited & another v Christopher Michael Lockley [2017] eKLR, this Court dealt with the issue of trust at length. The Court referred Twalib Hatayan Twalib Hatayan & Anor v Said Saggar Ahmed Al-Heidy & Others [2015] eKLR and re-stated the law on trusts as follows: -*

*“According to Black’s Law Dictionary, 9th Edition, a trust is defined as*

*“1. The right, enforceable solely in equity, to the beneficial enjoyment of property to which another holds legal title; a property interest held by one person (trustee) at the request of another (settlor) for the benefit of a third party (beneficiary).”*

*Under the Trustee Act, “… the expressions' trust' and 'trustee' extend to implied and constructive trust, and cases where the trustee has a beneficial interest in the trust property…”*

*In the absence of an express trust, we have trusts created by operation of the law. These fall within two categories: constructive and resulting trusts. Given that the two are closely interlinked, it is perhaps pertinent to look at each of them in relation to the matter at hand. A constructive trust is an equitable remedy imposed by the court against one who has acquired property by wrongdoing. … It arises where the intention of the parties cannot be ascertained. If the circumstances of the case are such as would demand that equity treat the legal owner as a trustee, the law will impose a trust. A constructive trust will thus automatically*

*arise where a person who is already a trustee takes advantage of his position for his own benefit (see Halsbury's Laws of England supra at para 1453). As earlier stated, with constructive trusts, proof of parties' intention is immaterial; for the trust will nonetheless be imposed by the law for the benefit of the settlor. Imposition of a constructive trust is thus meant to guard against unjust enrichment. …*

*A resulting trust is a remedy imposed by equity where property is transferred under circumstances which suggest that the transferor did not intend to confer a beneficial interest upon the transferee ...*

*This trust may arise either upon the unexpressed but presumed intention of the settlor or upon his informally expressed intention. (See Snell's Equity 29th Edn, Sweet & Maxwell p.175). Therefore, unlike constructive trusts, where unknown intentions may be left unexplored, with resulting trusts, courts will readily look at the circumstances of the case and presume or infer the transferor's intention. Most importantly, the general rule here is that a resulting trust will automatically arise in favour of the person who advances the purchase money. Whether or not the property is registered in his name or that of another is immaterial(see Snell's Equity at p.177) (supra)."*

*31. As earlier stated, the existence of a trust is a question of evidence. In the* ***Juletabi*** *case (supra), the court held that the onus lies on the party relying on the existence of a trust to prove it through evidence. That is because: "The law never implies, the Court never presumes a trust, but [only] in case of absolute necessity. The Courts will not imply a trust save in order to give effect to the intentions of the parties. The*

*intention of the parties to create a trust must be clearly determined before a trust will be implied."*

*32. The onus to prove the existence of a trust lay squarely on the Appellants. Section 107 of the Evidence Act further provides that: "Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.*

*(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person."*

37. I further wish to rely on a recent court of appeal decision of **Mungai v Njoroge & another [2026] KECA 373 (KLR),** whereby the facts in the said case were similar with the instant appeal before me.

38. The court held that,

***16. We have considered the record, the impugned judgment and the submissions. There is no dispute that land Kiambaa/ Ruaka/139 which was registered in the name of the deceased was family land. It was registered in his name to hold in trust for himself, his siblings and his mother. This is the root of the title that he was holding. He did not have an absolute claim to the parcel of land. He became registered when he had already married the 2nd respondent whom he settled here and begun to have a family***

***17. In our considered view, the 2nd respondent may not have contributed to the acquisition of the land, but, by virtue of her marriage into the family, she acquired a spousal claim to the land. Her son, the 1st respondent, was eventually expected to inherit some of this land upon the death of the deceased.***

***18…Section 30 of the Registered Land Act (now repealed), and now mirrored in section 28 of the Land Registration Act, was to the effect that spousal rights are an overriding interest to which a registered title is subject, even though it does not appear in the register. They are binding both on the registered owner and on the person who subsequently acquires an interest in the property. This Court in Mugo Muiru Investments Limited -vs- E.W.B. & 2 Others [2017] eKLR observed that a spouse had a beneficial interest in matrimonial property which her husband sold without the wife's consent***

***19. The Supreme Court in Shah & 7 Others -vs- Mombasa Bricks & Tiles Ltd & 5 Others (Petition No. 18 (E020) of 2022 [2023] KESC 106 (KLR) emphasized that a constructive trust arises when it would be inequitable for a legal owner to deny another party a beneficial interest. The trust protects the rightful interests of disadvantaged parties when legal owners abuse their position***

***20. We emphasize that the deceased knew he had a family of a wife and 8 children, yet he transferred the three titles (Kiambaa/Ruaka/3257, Kiambaa/Ruaka/3257, Kiambaa/ Ruaka/3258 and Kiambaa/Ruaka/3259) to the appellant who did not provide any consideration. We find that the action was intended to disinherit the family, the two respondents included, and that this was fraudulent. We find that the appellant's title to Kiambaa/Ruaka/3257, 3258 and 3259 was subject to the overriding interests by the respondents. 21.***

***21. The evidence is clear that the appellant was related to the deceased's family and he knew that, despite the matrimonial differences in the family, the family existed.***

39. Among the particulars of breach of trust contained at paragraph 9 of the plaint, the 1st appellant pleaded that the 1st respondent failed to obtain spousal consent before selling a portion of the suit propty. Upon cross examination of PW1, same testified that,'

***…I was not a party to the sale of the land. I did not give any consent to the transaction. I wouldn't have approved the transaction...' DW1 in his witness statement that was adopted as evidence in chief testified that,'…the plaintiffs have no basis to force me to give them land…'***

40. What I gather from the 1st Appellant's testimony was that the suit property was a matrimonial property and that at paragraph 10 of the plaint, the 1st appellant alleged that same has been in occupation of the suit property since her marriage to the 1st respondent. This was corroborated by the evidence of DW1 who confirmed that the 1st appellant put up structures on the suit property.

41. Finally, I wish to refer to a decision by **Okongo, J** [*as he was then*] in **Okoth v Okwach (Sued as a legal representative of the Estate of Jane Aoko Okwach - Deceased) & 2 others [2023] KEELC 19173 (KLR).** Again here, the facts of the instant appeal before me were similar where the registered owner had sub-divided and sold portions of the suit property to third parties despite settling his family on the land.

42. It was held that;

> *14. I am in agreement with the finding by the lower court that the suit property was a matrimonial property and that the same was held by the deceased in trust for himself and his two wives. As mentioned earlier, the deceased admitted in his defence that the suit property was a matrimonial property. I am also in agreement with the lower court that being a matrimonial property in which the 1st Respondent had a beneficial interest, the deceased could not deal with the suit property in a manner that was prejudicial to the interest of the 1st Respondent without her* ***consent****. I am further in agreement with the lower court that the* ***consent*** *of the 1st Respondent was not obtained prior to the subdivision of the suit property, and sale and transfer of a*

*portion thereof namely, Plot No. 1981 to the Appellant.* ***It is not contested that the act of dealing with the suit property without the consent of the 1st Respondent was unlawful****. The subdivision of the suit property into two portions, Plot No. 1980 and 1981 was unlawful. The transfer of Plot No. 1981 to the Appellant was similarly unlawful. Plot No. 1981 having been created and registered in the name of the deceased unlawfully, the sale and transfer thereof to the Appellant could not sanitize the tainted title. In* ***Wambui v. Mwangi & 3 others, (Civil Appeal 465 of 2019) [2021] KECA 144 (KLR)*** *the Court of Appeal stated as follows:*

*Sixth, the title was also tainted with nullity in that the court process on the basis of which the title to the suit property was anchored was subsequently declared null and void ab initio. The position in law as we have already highlighted above is that anything founded on nullity is also null and void and of no consequence. The title allegedly vested in the 3rd respondent and subsequently passed on to the appellant having stemmed from court proceedings that were subsequently declared null and void also stood vitiated by the same nullity and of no consequence. The Judge cannot therefore be faulted for stating the correct position in law in the manner done.*

*71. Seventh, section 80 of the Act is explicit that any title founded on irregularity, un-procedurally or a corrupt scheme stands vitiated. The title purportedly acquired by the 3rd respondent and subsequently passed on to the appellant having been demonstrably shown to have been tainted with fraud, deceit and nullity its the description of title*

*that has been acquired not only irregularly and un-procedurally but also through a corrupt scheme. The corrupt scheme herein arises from the facts informing the vitiated High Court proceedings which we find no need to rehash but adopt as already highlighted above.*

*72. In light of all the above, we reiterate that the Judge's reasoning as to why appellant's title to the suit property was vitiated was well founded both in fact and in law and is therefore unassailable."*

43. The Court further held that,

*The Appellant had contended that the lower court had no jurisdiction to determine whether or not the suit property was a matrimonial property. I find no merit in this argument. The authority cited by the Appellant does not also support his position on the issue. What was before the lower court was not a suit for the division of matrimonial property. The dispute revolved around the issue of whether the deceased could dispose of a matrimonial property without consent of the 1st Respondent who had a beneficial interest in the property.*

44. I associate myself with the holding of my brother Okongo, J [as he was then]. Though parties have not submitted on the issue of jurisdiction of the trial court to deal with the element of spousal consent by virtue of the suit property being deemed as a matrimonial property, it is my considered view that issue was on trust over and in respect of the suit property.

45. Before delving on Issue two of this judgment, it has been submitted by the respondents that the 2nd and 3rd respondents were bona fide purchasers for

value; and that same have been in occupation of the portions bought for a period over 12 years.

46. It is important to note that the 2nd and 3rd respondents have not sued the 1st respondent for refund of the purchase price nor adverse possession despite. For clarity, same have only alleged that the suit before the trial court was statute barred and that they had been in occupation for over 12 years. It is to be noted that the appellants are not the registered owners of the suit property hence the claim being alluded to by the 2nd and 3rd respondent which is adverse possession could not crystalize against the appellants. Moreover, it is trite law that the claim of trust has no limitation period hence the averment on limitation of time does not arise.

**47.** Be that as it may, it is critical that I address the issue of bona fide purchaser as submitted by the respondents particularly the 2nd and 3rd respondents. For clarity, I have found in the preceding paragraphs that the 1st respondent held the suit property in trust for the appellants. He had settled the appellants on the suit property upon marrying the 1st appellant.

**48.** It therefore follows that the appellants had acquired overriding interests over and in respect of the suit property. The 1st appellant's consent was thus critical before the suit property could be disposed of by the 1st respondent. He confirmed vide his evidence that the appellants are entitled to the suit property. He could only agree to this if the appellants were his family and that he was aware that they had acquired beneficial interest over the suit property.

**49.** DW2, who was also the 2nd respondent testified during cross examination that the 1st respondent had five (5) children. This was also confirmed by DW3 also the 3rd respondent during cross examination when he said that the 1st respondent has children. DW1 on the other hand testified during cross examination that;

> *'…**I sold the land when we had separated whereby all the defendants knew I was married with children. I and the 3rd plaintiff live on the remainder of the portion of the land. The 1st plaintiff had built a permanent house on the land. We have not divorced…'***

50. To me, the 2nd and 3rd respondents seemed to have known the family history of the 1st respondent. They seemed to have known that the 1st respondent had a spouse and children. In fact, he was residing with one of the children and that the house that had been constructed by the 1st appellant was on the land. Simply put, the 2nd and 3rd respondents had notice that the 1st respondent had settled his family on the land but proceeded to purchase portion of same without carrying out due diligence. They did not interrogate the history of the title they were interested on deeply despite the red flags that were visible on the ground and what came to their knowledge.

51. Could it be said they were innocent? I don't think so. In ***Mwangi James Njehia v. Janetta Wanjiku Mwangi another*** **[2021] eKLR**, the Court of Appeal stated as follows:

> *" 37. In Lawrence P. Mukiri Mungai, Attorney of Francis Muroki Mwaura v. Attorney General & 4 Others, Nairobi Civil Appeal No. 146 of 2014 this Court cited with approval the case of Katende v.*

*Haridar & Company Ltd (2008) 2 EA 173, where the Court of Appeal in Uganda held that: - "For the purposes of this appeal, it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly.*

*For a purchaser to successfully rely on the bona fide doctrine as was held in the case of Hannington Njuki v William Nyanzi High Court civil suit number 434 of 1996, he must prove that:*

*1. he holds a certificate of title;*

*2. he purchased the property in good faith;*

*3. he had no knowledge of the fraud;*

*4. he purchased for valuable consideration;*

*5. the vendors had apparent valid title;*

*6. he purchased without notice of any fraud; and*

*7. he was not party to the fraud."*

52. I have already found that from the evidence on record, the 2nd and 3rd respondents were aware of the appellants' interests over and in respect of the suit property.

53. However, same ignored the fact that the appellants had been placed in the suit property by virtue of being family members of the 1st respondent and/or that the suit property was a family land. Thus, same were not innocent purchasers but had all the intention to dispossess the appellants from the suit property by virtue of same not being the registered owners.

54. It is thus my humble view that the appellants demonstrated that the suit property was an ancestral land thus the 1st respondent held the suit property in trust for the appellants.

**ISSUE Number Two [2].**

***Whether the Learned Trial Magistrate misapprehended and misapplied the law as pertains to customary trust or otherwise.***

55. The learned trial magistrate held that the appellants should have demonstrated that the suit property was acquired and held by the 1st respondent and other fore fathers for the benefit of their generational family. The trial magistrate held,'…**the records at the land's office traces the land to 1994. There is no fore history or records of other family ancestors who held and passed down the original title…'**

56. While placing reliance on the supreme court case of **Kiebia v M'lintari & another [2018] KESC 22 (KLR),** the learned trial magistrate clearly, misconstrued the *ratio decidendi* in the said case.

57. It appears that according to the learned trial magistrate, for a party to demonstrate customary trust, one would have to find the root of the tile in a family tree and perhaps some fore fathers and ancestors which is not the case. The appellant had to demonstrate the five ingredients as explicated in the Supreme Court decision. The approach taken by the learned trial magistrate was not only unwarranted, but I must say, strange and unknown in law. It constituted a grave misapprehension; and misconception of the decision of the Apex Court.

58. In the suit before the trial court, the appellants were duty bound to lead evidence that the suit property is an ancestral land. The Appellants demonstrated that the suit property was originally owned by the 1st appellant's father-in-law; and grandfather to the 2nd to the 4th appellants. And that during the transfer, the 1st appellant and 1st respondent had been married with two children. As per P EXH 2, also the birth certificates, it appears that the 2nd-4th appellants had been born during the transfer I.e 1994. The 1st respondent confirmed that he built a house on the suit property and that he had children with the 1st appellant. He also confirmed that they had been married prior to the transfer of the suit property from his father.

59. PW1 testified that,'***…I built the houses on the land though I live away…'*** This was also confirmed by the 1st respondent who never stopped or complained that the 1st appellant from utilizing the suit property. The learned trial magistrate thus made his findings on the wrong interpretation of the law.

60. Another issue that is worth mentioning is that the learned trial magistrate made a finding that the suit property was [sic] a gift to the 1st respondent pursuant to the records. For coherence, it is only the appellants that produced the register of the suit property also P EXH 1. The said document only alluded to the fact that there was a consideration of Kshs 10,000/= at entry Number 2.

61. It is not clear as who was making the transaction, but what is does demonstrate is that the transfer was not by way of gift as held by the learned trial magistrate. On the other hand, the respondent did not place any

document alluding to a transaction by way of a gift. The Learned Trial Magistrate failed to appreciate the evidence that was tendered.

62. The other critical aspect that was appraised by the trial magistrate relates to the elements underpinning proof of customary trust. The trial court heavily borrowed from the Supreme Court **Kieba vs Lintari & anor[supra]** but failed to apply it on the case before him**.**

63. I have reviewed the judgment of the trial magistrate. Suffice it to state that the Judgment considered extraneous issues; and was based on error[s] of principle.

64. Additionally, I find and hold that the conclusion and findings which were arrived at by the trial magistrate were not anchored by the evidence on record. The findings are not only perverse; but at variance and/or inconsistent with the totality of the evidence.

65. *In a nutshell*, I conclude that the findings of the trial court are not well grounded. They are hereby varied and/or set aside.

66. Before I pen off, I wish to comment on an issue raised by the respondents that the appellants never raised the issue of lack of Land Control Board Consent in the trial court. For clarity, same was addressed in the witness

statement by the 1st appellant and further in the submissions dated 9.2.2024 hence same is not a novice issue being raised at appellate stage.

67. Be that as it may, having found that the 2nd and 3rd respondents were not bona fide purchasers for value, whatever transaction that emanated from the said sale was null and void as observed elsewhere hereinbefore.

**Final orders**

37. Flowing from the analysis contained elsewhere herein before, the final orders of the court are:

***i. The Judgment of the Learned Trial Magistrate dated 24.4.2024 and the consequential decree arising therefrom are hereby set aside.***

***ii. The Appeal be and is hereby allowed as hereunder:***

***a) A declaration is hereby issued that the 1st Respondent holds LR. No. Kiirua/ Ruiri/ 2083 in trust for and on behalf of the appellants herein.***

***b) The Land Registrar Meru Central is hereby ordered to register the trust herein in the register of LR. No. Kiirua/ Ruiri/ 2083***

***c) The purported sale of portions of LR. No. Kiirua/ Ruiri/ 2083 measuring 1 ½ acres to the 2nd and 3rd Respondents is hereby declared null and void hence same were illegal transactions.***

***d) An order of permanent injunction is hereby issued against the Respondents, their agents, servants and/or employees from selling, evicting, entering, charging, leasing and/or in any way interfering with the suit property.***

***e) The prayer for an Order of Inhibition is declined.***

iii. ***The Costs of the Appeal and the suit vide MERU CMCELC NO. E038 OF 2022 is hereby awarded to the appellants***.

38. It is so ordered.

**DATED, SIGNED AND DELIVERED AT MERU THIS 24TH DAY OF MARCH, 2026.**

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

**JUDGE**

In the presence of-:

. Court Assistant: Naserian.

Ms Beet holding brief for Mr. Kiogora Arithi for the Appellants.

Mr. Gikunda Anampiu for the Respondents.