



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

E.L.C NO. 151 OF 2017

GODFREY KIBUTHU NJORAPLAINTIFF

VS

HARRISON NJUGUNA KAHIGA.....DEFENDANT

JUDGMENT

1. The Plaintiff filed suit ELC 4 of 2017, Nyeri against the Defendant on 16/1/17. At the establishment of an ELC Court in Murang'a, this suit was transferred to Murang'a for hearing and determination. The Defendant on the other hand filed suit No 2 of 2017, Murang'a against the Plaintiff. On application of the parties, the two suits were consolidated and the lead file became ELC 4 of 2017 (now registered as 151 of 2017, Murang'a). The plaint and defence in 151 of 2017 was treated as the main suit while the plaint in ELC 2 of 2017 was treated as the Defendant's counterclaim. The defence and counterclaim in ELC No 2 of 2017 was treated as a reply to the counterclaim.

2. The Plaintiff sought the following orders against the Defendant;

- a. A declaration that the Plaintiff is entitled to exclusive and unimpeded right of possession and occupation of all that piece of land known as Land Title No LOC19/KIWAMBOGO/2515.
- b. A declaration that the Defendant whether by himself or his servants or agents or otherwise howsoever is wrongfully in occupation of the suit property and is accordingly a trespasser on the same.
- c. A declaration that the Defendant whether by himself or his servants or agents or otherwise howsoever is not entitled to remain on the suit property.
- d. A permanent injunction restraining the Defendant whether by himself or his servants or agents or otherwise howsoever from remaining on or continuing in occupation of the suit property.
- e. Vacant possession of the suit property.
- f. General damages for trespass.
- g. Costs of this suit together with interest thereon at such rate and for such period as this honourable Court may deem fit to grant.
- h. Any such other or further relief as this honourable Court may deem appropriate to award.

3. The Plaintiff avers that at all material times he is the registered owner of the suit land and is entitled to possession. He further avers that in 2003, the Defendant trespassed onto the suit land, which trespass and wrongful occupation has occasioned him loss and damage. He has pleaded loss and damage in para 9 in the plaint.

4. The Defendant denied the Plaintiff's claim. He stated that the original land LOC 19/KIWAMBOGO/500 (original land), measuring 10.2 acres belonged to their grandfather Njora Noru. In 1963 Herman Njora Kabui (Herman), the Plaintiff's brother to create LOC 19/KIWAMBOGO/500, consolidated the said land. The land became registered in the name of Herman in 1963 in trust for himself and the Defendant's father Kahiga Njora Noru who died in 1953. That the Plaintiff became registered as owner of the land in 1970 and assumed the same trusts. That subsequent subdivisions of the original land LOC.19/KIWAMBOGO/500 into 2515, 2516, and registered in the name of the Plaintiff were encumbered with customary trust. He asserted that his father left behind the Defendant and his two siblings Geoffrey Irungu Kahiga and Loise Muthoni Kahiga on the original land and have lived on the land all their lives and not in 2003 as pleaded by the Plaintiff. The Defendant states that he is in occupation of parcel No LOC.19/KIWAMBOGO/2516 not as a trespasser but on his own right with a beneficial interest based on trust.

5. Further, the Defendant denied loss and damages and averred that any claim brought on trespass 14 years after the alleged trespass took place would be time barred. In his counterclaim he sought the following reliefs;

- a. A declaration that the Defendant was registered as the proprietor of land parcel LOC19/KIWAMBOGO/500 still encumbered with a trust from the original registered owner Njora Kabui.
- b. A declaration that the Defendant still holds half of the parcel LOC19/KIWAMBOGO/2515 and 2516 and transfer of 5.1 acres to the plaintiffs as the legal representative of the estate of Kahiga Njora Noru.
- c. An order of dissolution of the existing trust on land parcels No LOC 19/KIWAMBOGO/2515 and 2516 and transfer of 5.1 acres to the Plaintiff as the legal representative of the estate of Kahiga Njora Noru.
- d. Costs of the suit

6. At the hearing, the Plaintiff testified and stated that his father was called Kabui Noru and his mother, Warwathia. The father of the Defendant, Kahiga Njora Noru was his stepbrother and therefore the Defendant is his nephew. Wanjiru Noru was the mother of Kahiga Njora Noru. He stated that the original land parcel 500 was registered in the name of Herman, his brother in 1963. That the land belonged to Kabui Noru who had 7 wives. He referred to a dispute between Kabui Noru and his brother Herman over the original land. In that dispute, the late Kabui Noru had shared his lands and excluded the house of Warwathia. Herman objected and the dispute was determined and the land was registered in the name of Herman to hold for the house of Warwathia.

7. He informed the Court that later on, Herman sold the land to Muchina Wairegi in 1968 but he refunded the purchase monies in the sum of 900/- to the said Muchina Wairegi. He referred the Court to a letter in page 20 of the Plaintiff's bundle written by Kaplan & Stratton addressed to Herman to transfer the suit land to the purchaser. He states the Herman did not complete the transaction because he refunded the money to the purchaser. That Herman transferred the land to him in 1970 with the blessings of his grandfather Jeremiah Kimani.

8. That Herman held the land in trust for all his brothers. Further he informed the Court that in 1977 he again purchased the said land the second time from his 8 blood brothers. He produced minutes of a family meeting that was held on the 30/4/1977 at the house of Washington Noru Njora at Oljororok in 1977 wherein the land was shared out and there was an agreement that those willing would sell to the Plaintiff.

9. Thereafter he informed the Court that he held the land absolutely. He stated that he has given the Kahiga family two acres. That the one acre is in fulfilment of his mother Warwathia's wish at her deathbed which she directed that Pastor Ephantus be given one acre where he had planted tea. The second acre was added after his grandfather prevailed upon him to give the Kahiga's family an additional acre subject to purchase at the sum of Kshs 60,000/-. On that account, he proceeded to subdivide the suit land into two parcels LOC19/KIWAMBOGO/2515 measuring 8.2 acres and 2516 measuring 2.0 acres. The parcel LOC19/KIWAMBOGO/2516 is meant for the family of Kahiga but they have refused to give the name of the family member in which the title should be registered. That the family members of Kahiga live on LOC19/KIWAMBOGO/2516 but the Plaintiff has encroached on his portion which is LOC19/KIWAMBOGO/2515.

10. He testified further that the house of Wanjiru owned a 12-acre land at LOC9/Kiruri /84 but was sold to pay dowry for Washington. That the land is now registered in the name of Jeremiah Kanyari. That it was never registered in the name of Wanjiru nor any of the Kahiga's family.

11. In cross-examination, the Plaintiff stated that the Defendant's grandfather was called Njora Noru. He had two wives; Wanjiru and Warwathia. Wanjiru sired two sons with Njora Noru namely Washington Noru Njora (Washington) and Kahiga Njora Noru. Warwathia did not get any child with Njora Noru. That Washington, the first son of Wanjiru migrated to Nyahururu where he died.

12. On the other hand, Kahiga Njora Noru married Nancy Wanjiru with whom they sired three children; Harrison Njuguna Kahiga (Defendant), Loise Muthoni and Geoffrey Irungu Kahiga. Kahiga Njora Noru died in 1953 and after his death; Wanjiru bore 3 other children out of wedlock namely Ephantus Kahiga, Joseph Kabui Kahiga and Francis Kahiga.

13. After the death of Njora Noru, Warwathia was inherited by Njora Kabui with whom they sired 2 children; Herman, the Defendant and others. That Herman was named after Njora Noru the husband of Wanjiru and the brother of Kabui Njora.

14. Wanjiru on the other hand remarried to Njoroge of Githiga village.

15. That Nancy Wanjiru Kahiga was inherited by Washington Noru and lived together in Oljororok, Nyandarua but after a disagreement emerged, she settled at Wanjiru's (mother in law) home at Githiga. However, after the death of Njoroge, she and her mother in law Wanjiru Noru returned to the suit land and occupied the house of Warwathia who was by then in Nakuru seeking medical attention.

16. That at the time of consolidation and demarcation, the only surviving direct lineage of Njora Noru was his wife Wanjiru. When asked if the land registered in the name of Herman belonged to the house of Wanjiru, the witness answered in the negative. He however stated that the land belonged to his father Kabui, which he gave to the house of Warwathia, his mother. That Herman held the land in trust for his brothers, the sons of Warwathia and not the house of Wanjiru. Warwathia died in 1980.

17. He proceeded to inform the Court that Kabui had other lands at Loc 9 Kiruri, which were registered in the names of his other sons. He informed the Court that Wanjiru lived on the land and was buried there. Nancy Wanjiru the mother of the Defendant lived on the land since 1968 and was buried there in 2006. He explained that Geoffrey Irungu, Loice Muthoni and the Defendant settled on the land, parcel LOC19/KIWAMBOGO/500. They built houses, cultivated tea and other crops on the land and there was no resistance from any quarters stopping them from settling on the land. The witness even informed the Court that he showed Ephantus Kahiga where to plant tea on the

farm.

18. He explained that at the time of registering the land in the name of Herman to hold in trust for the house of Warwathia, Wanjiru's eldest son, Washington was alive. He argued that if the house of Wanjiru had any share in the land, it could have been registered in the name of Washington who was her eldest son. Instead, it was registered in the name of Herman the 3rd son of Warwathia because the land belonged to the house of Warwathia given by her second husband Kabui Noru.

19. Finally, the witness informed the Court that in a meeting held on 30/4/1977 between the family of Njora Noru represented by Washington Noru and his family met to discuss the land dispute in respect to parcel LOC19/KIWAMBOGO/500. That he agreed to share the land where Washington got 2 acres and Venacio, the 1st son of Warwathia got 2 acres. The other boys of Njora were to get 1 acre each including the family of the Defendant. In total, Washington got 2 acres and Kahiga got one acre. That the family of Warwathia shared the rest of the land. He admitted that parcel 500 was family land. He stated that Washington represented the family of Wanjiru because by then Washington had inherited her. However, he informed the Court that there were no Land Control Board consent, transfers to support the purchase of the land from his siblings.

20. Peter Mwangi Kabui PW2 gave evidence and adopted his witness statement dated the 23/2/18. He stated that he is the stepbrother of the Plaintiff and a younger uncle of the Defendant and the oldest living son of Kabui Noru, the original owner of the suit land. He informed the Court that he was present in a public meeting at Tuthu village where Herman had lodged a claim on behalf of the family of Njora Noru against Kabui Noru in respect to the suit land. He stated that the meeting held that the land should be given to the house of Warwathia because Kabui Noru had sold 12 acres to pay dowry for Washington, the son of Wanjiru Njora. That thereafter Warwathia advised the Plaintiff that in order to end the dispute, he should get all the sons of Njora Noru to sell the land to him. In addition, that that is how the land was sold to the Plaintiff.

21. Further, he testified that Kabui Noru had 7 wives and he is the son of the 7th house. He gave his age as 75 years. He reiterated the family history and the relationships with each other. He stated that the suit land was registered in the name of Warwathia 3rd son, Herman because the land belonged to Kabui Noru, his father. He informed the Court that he did not know if Herman was named after Njora Noru, his grandfather. That at the time of registration of the land in the name of Herman there were other sons of both Warwathia and Wanjiru who were older than Herman. He informed the Court that his father's lands were consolidated in LOC 9 and not LOC 19.

22. He informed the Court that he was not raised at LOC 19 and therefore he may not know the details of the land. That he learnt the history of the land from his elder brother. That, Ephantus Kahiga has planted tea on the land though he does not know when. He informed the Court that the Defendant and the whole family of Nancy Kahiga live on the land. That they have been on the land since 1970s. That Nancy Kahiga was buried on the suit land. He further informed the Court in cross-examination that the suit land belonged to Kabui Noru.

23. Paul Kigaya Noru, PW3 stated that he is the son of the late Joseph Noru Kabui, the late brother of the Plaintiff. That the Defendant is his cousin. He informed the Court that he is well versed with the history of the land in dispute. That in 1968 when Herman sold the land without the authority of his brothers, it is the Plaintiff that refunded the monies to the buyer, Muchina Wairegi. That in 1977 the suit land was sold to the Plaintiff by his brothers. That the Defendant's grandmother namely Wanjiru did not have any share in the land. It belonged to Warwathia. Upon the death of Warwathia in 1980, the Plaintiff in a family meeting disclosed that he was asked by his mother to give Ephantus Kahiga one acre where he had planted tea bushes in the land. In addition, he was prevailed by Jeremia Kimani to sell another one acre to make it to two to the Kahiga family. This led to the subdivision of the land into two portions, for the Plaintiff and the other for the Defendant's family.

24. In Cross-examination, the witness stated that he is 71 years old. Kabui Noru was his grandfather and Warwathia was his grandmother. He told the Court that Herman was named after his grandfather's brother Njora Noru. Kabui Noru was alive in 1963 but the land was not registered in his name. Kabui Noru had his lands elsewhere. He stated that the land was registered in the name of Herman in trust for the house of Warwathia. Wanjiru's land had earlier been sold to pay dowry for Washington, her 1st son. He however informed the Court that he was not present when this is said to have taken place, as he was only a child of 15 years then. He explained that the family of Nancy Wanjiru Kahiga has been living on the land since 1970s. Some members have cultivated tea on the land.

25. James Kabui Kimani – PW4 stated that he is the nephew of the Plaintiff and the son of Zacharia Kamui Kabui. That the Defendant is his cousin. He recalled a meeting held in Nakuru at the home of Herman. That though the main agenda of the meeting was not the land issue, the same was discussed. In attendance were all the brothers of the Plaintiff including the father of the witness. He stated that the Plaintiff bought the share of the brothers in the said land and therefore holds it solely.

26. In Cross-examination, the witness informed the Court that he was born in 1966 and would not know the circumstances of the registration of the land.

27. The Defendant led evidence and stated he is the legal representative of Kahiga Njora Noru deceased and his father. His father died in 1953 before the land consolidation and demarcation. He married Nancy Wanjiru Kahiga and sired 3 children and thereafter she bore 3 other children after his death. That his grandfather Njora Noru had two wives; Warwathia who was childless and Wanjiru who had two sons, Washington and Kahiga Njora Noru. Upon the demise of Njora Noru, Kabui Noru, his elder brother, inherited Warwathia. Herman, the Plaintiff's brother consolidated the family land, which was registered, in his name in 1963 to hold in trust for the two houses of the grandfather. That Herman was named after Njora Noru, the 1st Husband of Warwathia. During the subsistence of the trust, Herman transferred the suit land to the Plaintiff in 1970. In 2001, the Plaintiff subdivided the suit land into two portions; LOC19/KIWAMBOGO/2515 and 2516 measuring 8.2 acres and 2.0 acres. That the Plaintiff received property that was encumbered with trust in favour of the house of Wanjiru. Further that the said transfer and subdivision was meant to defeat the trust subsisting on the suit land in respect to the house of Wanjiru. He stated that he and his siblings have lived on the land their whole lives.

28. He explained to the Court that at the time of consolidation of the land, Kahiga was long dead in 1953 and Washington, his brother had relocated to the Rift valley. Wanjiru was present but did not have the relevant documents for consolidation and therefore fell on Herman who

was named after her husband to consolidate the land and register in his name in trust for his grandfather's two houses. That it was around the same time that a dispute erupted between Kabui and Herman in respect to the suit land as Kabui wanted to take the land that belonged to Njora Noru. That it is Wanjiru who referred the matter to the village committee and not Herman. The village committee determined that the land belonged to Njora Noru and not Kabui Noru.

29. Further, he informed the Court that he is 63 years and has lived on the land since childhood. He has constructed his semi-permanent houses where he lives with his family. Other members of the Kahiga family who live on the land are Ephantus, Joseph, Francis, and their families. He stated that he was not present in the family meeting in 1977. He stated that both his grandmother and mother lived and were buried on the suit land.

30. He informed the Court that he is claiming ½ share of the land on behalf of the house of Wanjiru. That the 2 acres offered to him by the Plaintiff is not enough. He explained that at time the land was consolidated Washington was in Rift Valley. He stated that he shifted his house to where it is now because the Plaintiff was encroaching on to his house. He denied that any survey has been done on the ground; that if it was done it was on paper. Therefore, there are no beacons nor fences between the two parcels of lands. He stated that he was not aware that Washington inherited his mother Nancy Wanjiru. He could not tell whether Ephantus Kahiga was the son of Washington. He denied that Washington represented the Kahiga family at the meeting held in 1977. That they were not consulted in the decision taken in that meeting. He denied encroaching on parcel LOC19/KIWAMBOGO/2515. He insisted that they have all settled on one part of the land. He stated that Noru Munene referred to in the minutes refers to Washington.

31. Ephantus Mwangi Kahiga informed the Court that he is a pastor at Full Gospel Churches at Kanyenyaini. That the Defendant is his brother and the Plaintiff is his uncle. That he lives on the suit land since 1965 where he has built a semi-permanent house. He stated that he was not present during the family meeting of 1977. He did not sent any representative either. He informed the Court that he was not aware if Washington Noru inherited his mother Wanjiru. He stated that he did not know who his father is and asserted that it is a question that can only be answered by his late mother. That his mother died in 2006 and did not confide in him whether Washington Noru was his biological father.

32. DW3- Joseph Kabui Kahinga stated that he too lives on the suit land with his family. That Wanjiru was buried on the suit land. He informed the Court that the suit land is not subdivided on the ground.

33. The Plaintiff submitted that the suit land belonged to Kabui Noru and gave it to Herman to hold in trust for the house of Warwathia whom he had inherited after the death of his brother Njora Noru. He therefore held the land in trust for the house of Warwathia and not Wanjiru. That even if Herman held the land in trust for the houses was Warwathia and Wanjiru, the said trust was defeated by the doctrine of bonafide purchaser. He cited the book of Penner Jr, The law of trusts, 7th Edition OUP(New York, 2010 at page 30-31 which states as follows;

“.....the beneficiary's right is proprietary, he can where possible follow the trust property into the hands of a person to whom the trustee wrongfully transferred it.....he can assert his equitable title in the property against a subsequent holder of the legal title to the propertyBut this shifting stopped at the door of the bonafide purchaser of a legal interest in the trust property without notice, whether actual, constructive or imputed, of the trust, a person sometimes called 'equity's darling' P.30.

“.....this purchaser takes the property with good title free of any trust obligation and the beneficiary loses his equitable title in the trust property. The beneficiary's equitable title is extinguished with the result that he cannot demand the property back from the bonafide purchaser, nor can he demand that the bonafide purchaser act like a trustee and deliver his benefits under the trust as if it still applied to that property.” P.31.

34. Whilst maintaining that the Plaintiff has discharged his burden of proof in the case, he urged the Court to hold in favour of the Plaintiff.

35. The Defendant submitted that the suit land was registered in the name of the Njora Kabui also known as Herman in 1963 upon demarcation and consolidation. In 1970, Herman transferred it to the Plaintiff. The Defendant reiterated and outlines the Noru family tree in form of an elaborate diagram. He submitted that during consolidation, the 1st son of Wanjiru, Washington had relocated to Nyahururu where he had settled. Njora Noru's 2nd son Kahiga Njora Noru was dead by 1953. In the meantime, his brother Kabui Noru had inherited Njora Noru's 2nd wife. The only person in the lineage of Njora Noru present at that time was his 1st Wife Wanjiru Njora. Njora Kabui aka Herman sired by Warwathia was named after Wanjiru's husband Njora Noru in accordance with Kikuyu customs of naming children. He submitted that it was Wanjiru who caused the land to be consolidated and registered in the name of Herman Njora Kabui of Warwathia and Kabui Noru on grounds that he was the son named after her husband. That the land was therefore registered in the name of Herman as a trustee of Njora Noru's family comprising of two houses; that of Warwathia and Wanjiru. That it was Herman who was the closest male offspring associated with the family of Njora now that her son Washington was in Nyahururu and the 2nd son Kahiga had passed away in 1953. That the Defendant therefore is seeking the share of his deceased father's estate that flowed from the house of Wanjiru, his grandmother.

36. He further submitted that the family members of Kahiga Njora have lived on the land since their childhood and have no other place to go. He further stated that Herman transferred the suit land to the Plaintiff in 1970. That though the Plaintiff claimed that the Land was transferred to him pursuant to a sale, he failed to produce a sale agreement between him and Herman, application for land control board consent nor Land Control Board consent.

37. Further, the Defendant submitted that thought the suit land has been subdivided into LOC19/KIWAMBOGO/2515 and 2516; the Plaintiff is claiming LOC19/KIWAMBOGO/2515 and is silent on LOC19/KIWAMBOGO/2516. The Defendant questioned why the Plaintiff is ready to cede 2 acres if indeed he purchased the suit land. That at the family meeting held in 1977 the Plaintiff acknowledged that the suit land was family land and hence the attempted distribution of the same amongst family members. That this mutual family agreement water down the assertion by the Plaintiff that he bought the suit land from his brothers. He opines that the transfer of the suit land from Herman to the Plaintiff in 1970 was purely to defeat the existing trust and deny the Defendant and his family their rightful entitlement out of the trust land.

38. The Defendant submitted that as to whether the land was trust land, the law is settled. He relied on section 30(g) of the repealed Registered Land Act, and section 28(b) of the Land Registration Act which provide that registered land is subject to overriding interest which subsist on the land without being noted on the register. The Defendant has relied on several decided case law, which I have read and considered.

39. Having considered the pleadings, the evidence of the parties, all the materials placed before the Court, the submissions and case law where supplied the following issues fall for determination;

- a. Whether the Plaintiff is a bonafide purchaser of the suit land parcel LOC19/KIWAMBOGO/500.
- b. Whether the Plaintiff held the suit land in trust for the house of Wanjiru.
- c. Whether the Defendant has trespassed onto the suit land parcel LOC19/KIWAMBOGO/2515.
- d. What orders should the Court grant in the circumstances.
- e. Costs of the suit.

40. It is worth giving a preview of the background of the case. It is acknowledged that the parties are related. The Plaintiff and the Defendant share a common ancestry derived from their mother and grandmother respectively. Njora Noru was the younger brother of Kabui Noru. Njora Noru married Wanjiru and Warwathia as 1st and 2nd wives respectively. Wanjiru bore two sons; Washington Njora Noru and Kahiga Njora Noru. Warwathia did not bear any children with Njora Noru. After the death of their husband Njora Noru, each of the widows went their separate ways; Kabui Noru, Njora Norus' elder brother, inherited Warwathia and together she bore 8 children, one of which is the Plaintiff (the last-born).

41. Kabui Noru had 7 wives and several children. One of the 7 wives was Warwathia whom he inherited from Njora Noru, his younger brother.

42. Wanjiru too remarried a man namely Njoroge from Githiga village.

43. The 1st son of Wanjiru, Washington moved to Nyahururu and settled there never to come back to Kiwambogo.

44. The 2nd son Kahiga Njora Noru, married to Nancy Wanjiru Kahiga got 3 children namely Harrison Njuguna Kahiga, Geoffrey Irungu Kahiga and Loise Muthoni Kahiga. He died in 1953.

45. It is said that Wanjiru later bore three more children out of wedlock namely Epahantus Kahiga, Joseph Kabui Kahiga and Francis Gacivi Kahiga, making a total of 6 children. It is also said that Nancy Wanjiru was inherited by her brother in law, Washington Noru. This has been disputed by the Defendants. See the testimony of the DW2. After some disagreement with Washington, it is claimed that Nancy Wanjiru came back to Kiwambogo and settled on the suit land with her children. She was buried on the suit land.

46. It is in evidence that Wanjiru Noru too returned to Kiwambogo upon the death of her second husband Njoroge of Githiga Village, settled on the suit land, and was buried there in 2006.

47. It is commonly acknowledged that the suit land was first registered in the name of Njora Noru aka Herman Njora Noru on the 29/5/1963 and a title issued to him. The registration area was opened on the 25/5/1963 upon completion of demarcation of lands in the area. According to the Plaintiff, the land belonged to his father Kabui Noru and was registered in the name of his brother Herman on behalf of the house of Warwathia. Both parties refer to a dispute between Herman and his father Kabui over the suit land. The Plaintiff informed the Court that there was a dispute, which was settled by the village land committee, and the land was given to Warwathia. It is alleged that Kabui wanted to take the land that belonged to the Njora family.

48. According to the Plaintiff, Kabui his father sold Wanjiru's land to pay dowry for Washington.

49. According to the Defendant, the suit land belonged to Njora Noru and the same became registered in the name of Herman to hold in trust for the two houses of Warwathia and Wanjiru, the two households of Njora Noru.

Whether the Plaintiff is a bonafide purchaser of the suit land parcel LOC19/KIWAMBOGO/500

50. The Plaintiff led evidence that the suit land belonged to his father Kabui Noru. That he gave the land to Warwathia and became registered in the name of Herman Njora Noru on behalf of the house of Warwathia during consolidation and demarcation in 1963. That later Herman attempted to sell the land secretly and arbitrarily to Muchina Wairegi in 1968. That when he learnt of the sale, he rescued the land by refunding 900/= being the purchase price to Muchina Wairegi. He referred to the letter of 1968 addressed to Herman by the law firm of Kaplan and Stratton demanding that he transfers the land to Muchina. He claims that this is the reason why Herman Njora transferred the land to him in 1970. The Plaintiff however did not present any agreement for sale, evidence of payment of the claimed purchase refunds, land control board consent to support the said refunds and purchase of the suit land from Herman. The entries on the title denote that the suit land was transferred to the Plaintiff on the 3/12/70 and the title issued in the name of the Plaintiff on the 27/12/70. The nature of transfer is not disclosed. If the Plaintiff indeed purchased the suit land, it should have been indicated as such and more still the purchase price, nature of consideration would have been disclosed on the green card. Evidence does not support the claim of the Plaintiff that he acquired the land under purchase from his brother Herman and/or Muchina Wairegi at all.

51. Fast forward, the Plaintiff stated that in 1977 he again bought the land for the second time, this time from his blood brothers in a meeting held on the 30/4/1977 at Washington Noru's home at Nyahururu. The meeting agreed to share the land to the brothers of the Plaintiff, including Washington and a representative from the Kahiga Njora Noru's family. That the brothers also all agreed to sell their entitlement to the Plaintiff thus becoming an absolute owner of the suit land.

52. I have examined the English translation of the agreement and note that the land in reference is parcel LOC19/KIWAMBOGO/500 Kiwambogo. The agreement is headed Washington Noru and Geoffrey Kubuthu Njora. the document opens with the words "according to the issue of land at Ikeuni we the family of Njora, who had two wives, Wanjiru and Warwathia and that the said land parcel had a case by Njora to our father Kabui, this land was shared as follows; Venauzio Kimani, 2 acres; Washington Noru- 2 acres; the other boys of Njora will get 1 acre each; whoever wishes to sell to Kibuthu will sell for 40 gaots (Kshs 800/)." "

53. Njora referred to above is Herman. PW2 led evidence that Kabui wanted to take the land that belonged to Njora Noru and his son Herman filed a dispute with the village committee that settled the land belongs to Warwathia, having emanated from Njora Noru. It is clear that there is a nexus between the evidence of PW2 and the opening statement of PEX No 11(b) referred to above. The family is referring to themselves as we the family of Njora who had 2 wives namely Warwathia and Wanjiru. The reference here is to the family of Njora Noru deceased and not Kabui Noru. The land is being purportedly shared between the children of Warwathia and Wanjiru. I shall come back to this document at a later stage. They congregated as the sons of warwathia and Wanjiru and refer to themselves as Njora's boys land was family land belonged to Njora. The land was being shared between the two houses. There is no mention of Kabui.

54. The Plaintiff claims that all the brothers including Washington and that of Kahiga's family agreed to sell their shares to him. That may be so. However, the Plaintiff failed to show any documents to support a sale of the respective shares of land by his brothers, Washington and Kahiga family to him. This would have been in form of an agreement of sale, transfer of land, Land Control Board consent and acknowledgement of the purchase price. The Defendant has refuted claims that his family was represented by Washington Noru who is alleged to have inherited their mother Nancy Wanjiru and live with her at the time. The Court was not shown evidence to show that indeed the said Washington represented the family of Kahiga.

55. The Plaintiff states that he is a bonafide purchaser of land and therefore holds it solely.

56. In the case of **Samuel Kamere Vs Land Registrar (2015) ECLR** the Court of Appeal held that;

“ in order to be considered a bonafide purchaser for value, a person must prove that he had acquired a valid and legal title, secondly that he carried out the necessary due diligence to determine the lawful owner from whom he acquired legitimate title and thirdly that he paid valuable consideration for the purchase of the suit property.”

57. Guided by the above precedent, there is no evidence that the Plaintiff has proved that he indeed purchased the suit and from Muchina Wairegi and/or his brothers. The Plaintiff did not discharge the burden of proof by disclosing sale agreements, transfer of Land Control Board consent, evidence of payment interalia. It is not clear how the Plaintiff became registered as owner of the suit land.

58. The Court is constrained to hold the Plaintiff as a bonafide purchaser of the suit land.

Whether the Plaintiff held the suit land in trust for the house of Wanjiru.

59. Section 23, 24 & 26 of Land Registration Act provides that a registered proprietor with title issued by the land registrar has prima facie evidence of title and such person is deemed as the absolute owner with all rights and privileges appurtenant thereto. The documents availed to this Court confirm that the Defendant is the registered owner of the suit property.

60. Section 28 of the repealed Act , Cap 300 provided that “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 liable by the proprietor together with all privileges and appurtenances belonging thereto free from all other interests and claims whatsoever but subject to-

a. To leases, charges and other encumbrances and to the conditions and restrictions, if any shown in the register; and

b. Unless the contrary is expressed in the register to such liabilities, rights and interests as affect the same and are declared by section 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 a subject as a trustee.

61. The concept of customary trust is one of the ways of acquiring land in Kenya. Customary trust is recognized in the law and is provided for under section 28(b) of the Land Registration Act as an overriding interest, which bind land. Unless the contrary is expressed in the register, all registered land is subject to overriding interests as may for the time being subsist and affected without their being noted on the register. The repealed Registered Land Act at section 30 (g) provided for customary trust as an overriding interest. The law further provides under section 25(20 that noting in this Act shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.

62. In the case of **Isack M'Inanga Kieba Vs Isaaya Theuri M'Lintari & Isack Ntongai M'Lintari SCOK Petition 10 of 2015** the apex Court held as follows;

“Each case has to be determined on its own merits and quality of evidence. It is not every claim of a right to land that will qualify as a customary trust. In this regard, we agree with the High Court in *Kiarie v. Kinuthia*, that what is essential is the nature of the holding of the land and intention of the parties. If the said holding were 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: the land in question was before registration, family, clan or group land; the claimant belongs to such family, clan, or group; the relationship of the claimant to such family, clan or group is not so remote or tenuous as to make his/her claim idle or adventurous; the claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances; the claim is directed against the registered proprietor who is a member of the family, clan or group”. (Emphasis mine).

63. Going by the *SCOCK* case above the following are critical to prove of the existence of a trust ;

- a. The land in question was before registration, family, clan or group Land.
- b. The claimant belongs to such family, clan, or group.
- c. 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.
- d. The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances.
- e. The claim is directed against the registered proprietor who is a member of the family, clan or group.”

64. In the case at hand, it is commonly accepted that the Defendant and his siblings have had long stay and possession on the suit land since their childhood to date. They led evidence that they have constructed houses and settled with their families. The Plaintiff acknowledged that one of them namely Ephantus Kahiga has even planted tea on the suit land. Wanjiru the grandmother as well as Wanjiru the mother of the Defendant lived and settled on the land and both were buried on the land at different times. The Plaintiff has not explained the circumstances how he has accommodated them on the suit land for that long if he owns the land absolutely.

65. The Court has looked at the conduct of the parties in this case and one of such conduct is expressed in the meeting held on the 30/4/1977. The parties in that meeting described themselves as the family of Njora Noru. It is clear that the land being shared belonged to Njora Noru. The land was being shared amongst the families of Warwathia and Wanjiru as shown by the inclusion of Washington Kahiga’s family. There is no mention of Kabui. If indeed the land that the Plaintiff held as at 1970 belonged to him, why was he sharing the said land? There is no other plausible reason other than to conclude that the land was ancestral land and it referred to land of Nora Noru.

66. The Plaintiff informed the Court that the land that belonged to Wanjiru was sold to pay for dowry for Washington. If that was the case why did the family of Kahiga, the descendants of Wanjiru live on the land? The Court considers the claim by the Plaintiff that Wanjiru’s land was at LOC19/KIRURI / 84 unsupported.

67. Conversely, any evidence does not support the Plaintiff claim that the suit land belonged to Kabui. On his own admission, he informed the Court in his evidence that Kabui Noru owned his lands, which were at LOC 9 KIRURI scheme which lands, were registered in the names of his sons. This dispels his claim that the suit land belonged to his father Kabui Noru. This land must have belonged to Njora Noru. There is evidence that the said Kabui attempted to take away the land but Herman resisted his moves and lodged a dispute with the village Committee that settled that the land belonged to Warwathia. PW2 testified that Warwathia advised the Plaintiff that in order to bring the dispute to an end, he should get all the sons of Njora Noru to sell the land to him. In addition, that that is how the land was sold to the Plaintiff.

68. Customary trust therefore are rights that attach to the land and move or subsist on the land. In the case of **Peter Gitonga Vs Francis Maingi M’ikiara Meru HC.CC NO. 146 OF 2000-** it was stated that:-

“A “trust” can be created under customary law and the circumstances surrounding registration must be looked at to determine the purpose of the registration. This was what led Muli J. to say this; “Registration of titles are a creation of law and one must look into the considerations surrounding the registration of titles to determine whether a trust was envisaged?”. (Emphasis is mine).

69. In this case, the Plaintiff claimed that the land was consolidated and registered in the name of Herman because the land was Kabui’s. The Defendant and his witnesses led evidence that the said Herman was named after the husband of Wanjiru. This was not reverted by the Plaintiff. During consolidation of the land in 1963, evidence was led that Wanjiru had come back home and since she did not have any documents for registration and with her 1st son migrated to Nyahururu and the 2nd son Kahiga having died in 1953, it fell on the male offspring who was available Herman Njora Noru to consolidate and resitter the land in his name on behalf of the Njora Noru family. This is consistent with the Kikuyu Customs where the son could be named after a male relative and a male on behalf of the family held land.

70. It therefore follows that the land was registered in the name of Herman to hold in trust for the family of Njora Noru comprised of the house of Warwathia and Wanjiru. Before he discharged the trusts, the said Herman transferred the said land to the Plaintiff under unclear circumstances. The Plaintiff therefore received land that was encumbered by customary trust. His claim that he acquired the land through purchase is unsupported. Even it is taken that he purchased the land; he would not have received land free from the disclosed encumbrances. The Plaintiff’s claim that he shared the land between his brothers and those of the house of Wanjiru defeats his claim of a bonafide purchaser for value.

71. The Court concludes that the land parcel LOC19/KIWAMBOGO/500 was registered in the name of Herman and thereafter it was

encumbered with customary trust in favour of the houses of Warwathia and Wanjiru. The registration, transfer and the subdivision of the land into two portions are encumbered with the trust. The Plaintiff therefore holds the two parcels as a trustee.

Whether the Defendant has trespassed onto the suit land parcel 2515?

72. Having held that the Plaintiff in trust, there held the land cannot be found a claim of trespass on parcel LOC19/KIWAMBOGO/2515. The Defendant led evidence that there are no beacons or boundaries on the ground of the suit land. According to him, no survey has been carried on the ground and that the survey and subdivision was carried out on paper. That the Plaintiff occupies the land and the Defendant s and his family members occupy one part of the land, which he could not tell if it is on parcel LOC19/KIWAMBOGO/2515.

73. This issue is determined in the negative.

What orders should the Court grant in the circumstances?

74. From the proceeding paras, the Plaintiff's case fails and the Defendant's counterclaim succeeds.

75. In the upshot the Court makes the following orders;

- a. The titles LOC19/KIWAMBOGO/2515 and 2516 are cancelled and the land reverts to parcel LOC19/KIWAMBOGO/500.
- b. The Land Registrar is ordered to make the necessary entry in the registers to effect (a) above.
- c. It is declared that the Plaintiff was registered as the proprietor of parcel LOC19/KIWAMBOGO/500, which is encumbered with customary trust to the extent of 5.1 acres each in favour of the families of Wanjiru and Warwathia.
- d. The said trust is hereby dissolved and the Plaintiff is ordered to subdivide the land and transfer 5.1 acres to the Defendant to hold in trust for the family lineage of Wanjiru.
- e. The Plaintiff shall meet the costs of the suit

Orders accordingly

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 22ND DAY OF JULY 2019

J.G. KEMEI

JUDGE

Delivered in open Court in the presence of:

Kimakia for the Plaintiff

T M Njoroge HB for Mwangi Ben for the Defendant

Irene and Njeri, Court Assistants