

IN THE COURT OF APPEAL

AT MALINDI

CORAM: MURGOR, LAIBUTA & NGENYE, JJ.A.)

CIVIL APPEAL NO. E027 OF 2023

BETWEEN

DAVID CHARO BAYA.....1ST APPELLANT

THOYA BAYA GUNGA.....2ND APPELLANT

ERASTUS KITSAO GUNGA.....3RD APPELLANT

PATRICK BAYA GUNGA.....4TH APPELLANT

***(Suing on their own behalf and as personal
representatives of the Estate of the Late***

KATANA GUNGA BAYA - Deceased)

AND

ROBERT KAINGU GUNGA.....RESPONDENT

***(An appeal from the Judgment and Order of the
Environment and Land Court at Malindi (M.A. Odeny, J.)
delivered on 7th June 2023***

in

Land Case No. 8 of 2021)

JUDGMENT OF THE COURT

The Appellants filed this suit against ***the Respondent,***

Robert Kaingu Gunga,

by way of a Plaint dated 3rd February 2021 seeking orders for:

a) A declaration that there is a customary trust created in theirs and their families' favour including the dependants of Katana Gunga Baya in Kilifi/Chilulu/269 (the suit property) which is registered in the name of Katana Gunga Mbaya (deceased) and the Respondent.

b) A declaration that the suit property is held in trust by Katana Gunga Baya (deceased) and the Respondent for the benefit of both the Respondent and their dependants.

c) Consequent to the grant of the prayers above, an order of subdivision of the suit property into four distinct portions along the customary boundary of the subject land.

d) That the Deputy Registrar be authorized where necessary to sign any documents required to ensure the transfers ordered by the court.

e) A permanent injunction against the Respondent by himself, his agents, and appointed attorneys from obtaining the original title from their custody, evicting, sub-dividing, selling or transferring the suit property.

f) Costs of the suit.

The Appellants, led by **David Charo Baya (PW1)**, stated that the suit was brought by the sons and representatives of the late Katana Gunga Baya, claiming an interest in the suit property situated in Kilifi County, and which is family land; that the suit property was originally owned by their grandfather, Gunga Baya, also known as Kosho, who was the patriarch of the Gunga family; that Gunga Baya died around 1966 having been survived by four wives, namely Kadzo, Sidi, Kanze, and Kadzo (the younger). He

stated that, according to custom, each wife was allocated a distinct portion of the land for cultivation and residence, and each of their households resided on the portions peacefully.

PW1 further testified that, upon the death of their father, the eldest son, Katana Gunga Baya (deceased), became the family head and took charge of the land, and that the first three wives (and their children) remained under Katana's leadership while the fourth wife and her son, Robert Kaingu Gunga (the Respondent), occupied the last portion, and that each family was well settled within the respective ancestral boundaries that had existed for decades.

PW1 stated that, during the land adjudication process in 1978, the suit property was registered in the joint names of Katana Gunga Baya (deceased) and the Respondent, Robert Kaingu Gunga; that the registration was not intended to confer exclusive ownership upon them, but that the two were to represent the entire family in accordance with customary arrangements. It was his contention that the registration created a customary trust over the parcel in theirs and their families' favour together with other dependants of the late Katana Gunga Baya.

PW1 stated that the Respondent had not paid any consideration or made any contribution toward the acquisition or

adjudication of the land, and that his inclusion on the title was solely in recognition of his lineage as part of the larger Gunga family; that, during the lifetime of the late Katana Gunga Baya, there was no dispute or attempt by the Respondent to partition or claim the entire

land, and that the problems only began after late Katana Gunga Baya's death in

2003 when the Respondent began asserting sole ownership and threatening to evict the other family members from their respective portions.

PW1 urged the court to declare the suit property as subject to a customary trust in favour of all family members; to order subdivision of the land along the existing customary boundaries, and to permanently restrain the Respondent from evicting or interfering with their occupation and use of the land.

Thoya Baya Gunga, PW2, corroborated the testimony of PW1. He confirmed that he was also a son of the late Katana Gunga Baya, and that the family had lived on the suit property since time immemorial. PW2 reiterated that the land originally belonged to their grandfather, Gunga Baya alias Kosho, who had four wives, and that each wife's household was allocated a separate portion of land which they occupied peacefully. He confirmed that the eldest son, the late Katana Gunga Baya, managed the affairs of the family and oversaw the use of the land after their father's death. He stated that, during land adjudication, the family agreed to have the title registered jointly in the names of late Katana Gunga Baya and Robert Kaingu Gunga purely for

convenience and representation of the wider family interests.

He stated that the family's expectation was that each household would retain its portion of land along the traditional demarcations, and that the

inclusion of the Respondent's name on the title did not confer any exclusive ownership upon him; and that the family viewed both the late Katana Gunga Baya and the Respondent as trustees holding the title on behalf of the family.

PW2 continued to state that, after the late Katana Gunga Baya's death, the Respondent began to disregard the customary arrangement, claiming exclusive ownership and threatening to disinherit the other family members. He maintained that the land is ancestral and that each family has always known and occupied its respective portion. In conclusion, PW2 prayed that the court preserves the family's rights by declaring the existence of a customary trust, directing subdivision of the suit property according to the existing family boundaries, and restraining the Respondent from dealing with the suit property to the detriment of the other beneficiaries.

In response, the Respondent, in opposition to the Appellants' claim, adopted his filed statement and supporting documents, and stated that the suit property was lawfully registered in his name and that of the late Katana Gunga Baya on 3rd August 1978 following conclusion of land adjudication in the area. He stated

that the registration was proper, regular, and free from any defect, and that there was no trust, customary or otherwise, created in favour of the Appellants; that the land originally belonged to his father, Gunga Baya, who had several wives, including his mother. Upon his father's death, the land was

inherited in accordance with the applicable customary laws, and he became the rightful beneficiary of the portion that had belonged to his mother's household.

He denied that the suit property was held in trust for the wider family or that their late father, Katana Gunga Baya, had any claim beyond his own household's portion. According to him, each family line had its distinct area of occupation, and none was entitled to claim ownership over the other's portion; that during adjudication, the inclusion of both his and the late Katana Gunga Baya's names on the title deed was simply because they were the recognized heads of their respective family branches. He maintained, however, that the land belonged wholly to him, as the Appellants' father had his own separate ancestral land elsewhere. He denied that any trust existed, arguing that the Appellants had failed to produce any documentary or credible evidence to substantiate their claim.

He testified that, after the death of the late Katana Gunga Baya, the Appellants began encroaching upon portions of the land that were not theirs, prompting disputes within the family; that the Appellants had refused to recognize his rights as a co-owner

of the suit property and had instead resorted to fabricating claims of the existence of a customary trust; that, since the land was adjudicated and registered in accordance with the law, any claim based on

traditional or customary arrangements was extinguished upon registration. He

referred to the principle that, once land is registered under the Registered Land Act (Cap 300, now repealed), the rights of the registered proprietor are absolute and indefeasible except in cases of fraud or misrepresentation — none of which, he maintained, had been demonstrated by the Appellants.

He therefore urged the Court to find that there was no customary trust, that the Appellants had no ownership interest in the suit property, and that the title deed in his name was valid and conclusive proof of ownership.

After considering the pleadings and hearing the parties as well as their written submissions, the learned trial Judge identified the main issue for determination as whether the Appellants proved that a customary trust over the suit property, registered in the joint names of the Respondent, Robert Kaingu Gunga and the late Katana Gunga Baya, existed for the benefit of the larger Gunga family.

After taking into account the parties' respective cases, the trial court held that, while it was not in dispute that the suit property was once family land before adjudication, the Appellants

had failed to demonstrate the intention or understanding of the parties at the time of registration that the Respondent and the late Katana Gunga Baya were to hold the land in trust for others. The court found that there was no evidence of any agreement, oral or written, establishing

a trust or showing that the Respondent was registered as a trustee; that the Appellants did not produce the adjudication records, minutes of the land committee, or any documentary proof to show that the land was meant to be held in common for the entire family; that the mere fact that the parties were related and that they had all lived on the land historically, the court held, was insufficient to prove a customary trust. The Judge further found that the Respondent's title was lawfully issued and protected under **Section 26** of the **Land Registration Act**.

On the issue of possession and occupation, the court held that, although the Appellants were in occupation of certain portions of the land, such occupation, without evidence of a legal or equitable right, could not override the registered ownership of the Respondent. In conclusion, the trial court held that the Appellants had failed to prove the existence of a customary trust on a balance of probabilities, and that the Respondent's title was valid.

Aggrieved, the Appellants have filed an appeal to this Court on grounds that: the learned Judge was in error in dismissing the Appellants' suit with costs; in finding that the Appellants had

failed to prove an intention to create a customary trust or the creation of a customary trust; in failing to find that the evidence on the usage of the parcel of land was uncontroverted; in failing to

appreciate that the Respondent never purchased the suit property; and in failing to consider the Appellants' submissions.

Both parties filed written submissions and, when the appeal came for hearing, learned counsel **Mr. Mwangunya** appeared for the Appellants while there was no appearance for the Respondent, who had in any event filed written submissions.

In their written submissions, the Appellants contended that the learned Judge wrongly dismissed the entire suit despite clear evidence of family ownership and long occupation; that the adjudication payment was made by "Katana Gunga & Others," showing that the land was regarded as family property. The Appellants relied on the case of **Dominic Otieno Ogonyo & 2 Others**

vs Helida Akoth Walori [2022] eKLR for the proposition that, once an intention

is established, a court must find that a customary trust exists; that this evidence demonstrated the family's intention for the suit property to be held for the benefit of all family members; that the Respondent himself admitted under cross-examination that he only used $\frac{1}{4}$ acre while Katana Gunga used $\frac{3}{4}$ of the land, which

was proof that occupation followed family allocation.

The Appellants further faulted the trial judge for ignoring their unchallenged evidence of continuous occupation which created an overriding

interest not requiring registration. The Appellants further submitted that the land was not purchased by the Respondent, but was acquired through adjudication as community or family land; and that registration in the names of two persons did not extinguish the family's collective ownership.

The Appellants faulted the trial judge for ignoring their written submissions and evidence, particularly the adjudication receipt, which clearly identified the land as family-owned.

The Respondent opposed the appeal and supported the trial court's finding that no customary trust was ever created over the suit property, which was registered in the joint names of the Respondent and the late Katana Gunga Baya with each holding a defined one-half share as tenants in common, which demonstrated that the interests of the parties were distinct and legally prescribed, and that the Appellants, being children of one co-owner, were only entitled to their late father's half share and not to the Respondent's portion.

The Respondent submitted that there was no evidence showing that the land was ancestral or clan property, or that any

family agreement existed at the time of adjudication that indicated it was to be held in trust for the larger family. He asserted that the land was the personal property of their late father, and that

the registration of his sons as co-owners was the natural and lawful succession process, and not a trust.

The Respondent argued that the burden of proof lay with the Appellants to establish the existence and intention of a customary trust. To that end, he relied on the case of **Martha Thairora Gikandi vs Elizabeth Kananu & Another [2013] eKLR** for the proposition that one must prove that the suit property was ancestral or family land and that, during adjudication, one family member was designated to hold it for others, and to demonstrate that there was a clear nexus between the registered proprietor and the beneficiaries.

The case of **Peter Gitonga vs Francis Maingi M'ikiara (Meru HCCC No. 146 of 2000)** was cited for the proposition that it is incumbent upon courts to carefully examine the circumstances surrounding registration to determine if a trust was ever intended; that no such intention existed in this case as the Appellants failed to produce any evidence demonstrating an intention to create or recognize a trust at the time of land registration, and that, for this reason, a trust cannot be created where none was intended. He asserted that a customary trust

would ordinarily arise amongst siblings or members of the same generation, but not between a parent and children, unless explicitly created; that the Appellants' claim was motivated by the fact that they are a larger family and would receive

smaller portions due to their numbers; and that their claim that a “customary trust” existed was a smokescreen to enable them acquire a larger share of the suit property.

Having carefully considered the record of appeal, the submissions, the authorities cited and the applicable legal principles, this Court is mindful of its duty as the first appellate court as articulated by this Court in the case of **Peter**

M. Kariuki vs Attorney General [2014] eKLR which is to:

“...reconsider the evidence adduced before the trial court and re-evaluate it to draw our own independent conclusions, and to satisfy ourselves that the conclusions reached by the trial Judge are consistent with the evidence...”

see also Nairobi Bottlers Limited vs. Imbuga (Civil Appeal E661 of 2022) [2024] KECA 434 (KLR) where this Court held:

“Our mandate in a first appeal as donated by rule 31 of the Court of Appeal Rules, 2022 is to re-appraise the evidence and to draw inferences of fact; to retry the case. That mandate has been the subject of various judicial pronouncements in such cases as Nicholas Njeru vs. Attorney General & Others [2013] eKLR where it was stated: ‘[In] a first appeal, we are required to re-evaluate the evidence and arrive at our own independent findings and conclusions of the matter.’”

The central issue for determination in this appeal is whether

the Respondent held the title to the suit property in trust for the benefit of the Appellants.

According to the **Black's Law Dictionary, 9th Edition** a "trust" is defined

as:

"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)."

Black's Law Dictionary 6th Edition, page 1817

defines the concept of 'customary trust' as:

"1. The right, enforceable solely in equity, to the beneficial enjoyment of property to which another person holds the legal title; a property interest held by one person (the trustee) at the request of another (the settlor) for the benefit of a third party (the beneficiary). For a trust to be valid, it must involve specific property, reflect the settlor's intent, and be created for a lawful purpose.

.....

2. A fiduciary relationship regarding property and charging the person with title to the property with equitable duties to deal with it for another's benefit; the confidence placed in a trustee, together with the trustee's obligation toward the property and the beneficiary. A trust arises as a result of a manifestation of an intention to create it."

A trust is essentially a situation in which one person holds property on behalf of, or for the benefit of another. (**Hansbury &**

Maudsley, Modern Equity, 10th Edition, Chapter 4)

Section 25 of the **Land Registration Act** specifies that a registered proprietor enjoys absolute property ownership together with all rights and privileges

attaching to the land, but that such ownership is subject to: a) to the leases, charges and other encumbrances and to the conditions and restrictions, and b) to such liabilities, rights and interests as affect the same and are declared b if any, shown in the register; and overriding interests set out under **Section 28** of the Act

that do not require noting on the register, unless the contrary is expressed in the register. Trusts, including customary trusts, as well as the rights of persons in actual occupation are among the overriding interests listed in **Section 28**.

The law as to when a customary trust can be held to be inexistence is now settled. In the case of **Mbui Mukangu vs Gerald Mutwiri Mbui [2004] eKLR**, this Court (O’Kubasu, Githinji & Waki, JJ.A.) in embracing the concept of a customary trust, stated as follows:

“It cannot be argued too strongly that the proper view of the qualification or proviso to Section 28 is that trusts arising from customary law claims are not excluded in the proviso. Such claims may stem from possession and occupation of part of the registered land which strictly it (sic) may not be an overriding interest under Section 30(g), it nevertheless gives rise to a trust which is capable

of protection under the Act.”

After comprehensively analysing various judicial decisions on customary trusts in the case of ***Isack M'inanga Kiebia vs Isaaya Theuri M'lintari & Another [2018] eKLR***, the Supreme Court pronounced itself thus:

“Flowing from this analysis, we now declare that a customary trust, as long as the same can be proved to subsist, upon a first registration, is one of the trusts to which a registered proprietor, is subject under the proviso to Section 28 of the Registered Land Act. Under this legal regime, (now repealed), the content of such a trust can take several forms. For example, it may emerge through evidence, that part of the land, now registered, was always reserved for family or clan uses, such as burials, and other traditional rites. It could also be that other parts of the land, depending on the specific group or family setting, were reserved for various future uses, such as construction of houses and other amenities by youths graduating into manhood. The categories of a customary trust are therefore not closed. It is for the court to make a determination, on the basis of evidence, as to which category of such a trust subsists as to bind the registered proprietor. Each case has to be determined on its own merits and quality of evidence. It is not every claim of a right to land that will qualify as a customary trust. In this regard, we agree with the High Court in Kiarie v Kinuthia, that what is essential is the nature of the holding of the land and intention of the parties. If the said holding is for the benefit of other members of the family, then a customary trust would be presumed to have been created in favour of such other members, whether or not they are in possession or actual occupation of the land. Some of the elements that would qualify a claimant as a trustee are:

***1.The land in question was before registration,
family, clan or group land 2.The claimant belongs***

to such family, clan, or group

3. The relationship of the claimant to such family, clan or group is not so remote or tenuous as to make his/her claim idle or adventurous.

4. The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances.

5. The claim is directed against the registered proprietor who is a member of the family, clan or group.”

As regards the legal position on customary trusts after the repeal of the Registered Land Act, the Supreme Court held that:

“58. What are we to make of these changes? Several interpretations are plausible. It is now clear that customary trusts, as well as all other trusts, are overriding interests. These trusts, being overriding interests, are not required to be noted in the register. However, by retaining the proviso to Section 28 of the Registered Land Act (now repealed), in Section 25 of the Land Registration Act, it can be logically assumed that certain trusts can still be noted in the register. Once so noted, such trusts, not being overriding interests, would bind the registered proprietor in terms noted on the register. The rights of a person in possession or actual occupation of land, as previously envisaged under Section 30 (g) of the Registered Land Act, have now been subsumed in the “customary trusts” under Section 25 (b) of the Land Registration Act. Thus under the latter Section, a person can prove the existence of a specific category of a customary trust, one of which can arise, although not exclusively, from the fact of rightful possession or actual occupation of the land...”

This position was recently reiterated by this Court in the cases of **Roche vs**

Roche & another [2025] KECA 1637
(KLR); Mbasu vs **Mbasu &**
another

[2025] KECA 1420 (KLR); and **Maingi vs Maingi**
& 3 others [2025] KECA
1436 (KLR).

The burden of proving a customary trust falls on the party

that alleges the existence of a trust as reaffirmed in the case of_

Mbui Mukangu vs Gerald Mutwiri

Mbui [2004] eKLR.

Applying these laid down principles to the instant case, the Appellants argued that the land was originally owned by Gunga Baya (alias Kosho), their grandfather, and that, upon adjudication, it was registered in the joint names of

his two sons — the late Katana Gunga Baya (their father) and Robert Kaingu Gunga (the Respondent) — with the intention that they would hold it for the extended family. They produced an adjudication payment receipt and relied on continuous family occupation as proof of the existence of a trust.

The Respondent contended that, during adjudication, the two brothers agreed to hold separate shares, and that there was no evidence that any family arrangement existed to the contrary. The Appellants did not tender adjudication records, minutes, or witnesses confirming any trust arrangement.

While the evidence on record proves that the Appellants and the Respondent are related, and that the suit property belonged to their grandfather, they did not prove that, during adjudication, there was an intention to create a trust. The record of appeal shows that the deceased and the Respondent were registered as tenants in common with each brother holding a defined half share. As correctly observed by the trial court, the registration structure denoted distinct legal ownership, and not a fiduciary holding.

In the case of **Peter Ndungu Njenga vs Sophia Watiri Ndungu [2000] eKLR,**

this Court stated:

“A trust can never be implied by the court unless there was an intention to create one in the first place. The court may presume a trust only in cases of absolute necessity, and such presumption must be based on clear intention.”

In the case of ***Maingi vs Maingi & 3 others (supra)***, this Court held that a

claimant must prove not only long occupation, but also that such occupation stemmed from a family arrangement or intention by the registered owner to hold for others.

Similarly, in the case of ***Juletabi African Adventure Limited & Another vs***

Christopher Michael Lockley [2017] eKLR, it was held that the onus lies on a party

relying on the existence of a trust to prove through evidence that it exists. This is because:

“The law never implies, the Court never presumes, a trust, but 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.”

Here, the land register itself recorded both parties as proprietors “in common, each holding one half share.”

Section 91 of the **Land Registration Act** provides for co-tenancies of land, leases or charges. One such co-tenancy is a tenancy in common. **Section 91(5)**

further specifies that, if any land, lease or charge is owned in

common, each tenant shall be entitled to an undivided share in the whole and on the death of a tenant, the deceased's share shall be treated as part of their estate.

On the concept of tenancy in common, **Sir Robert Megarry and Sir William Wade**, in ***The Law of Real Property* (Sweet & Maxwell, 8th Edition, pp. 496-503)**, states that:

“...In a tenancy in common, the two or more holders hold the property in equal undivided shares. Each tenant has a distinct share in the property which has not yet been divided among the co-tenants. In other words, they have separate interests only that it remains undivided and they hold the interest together. The largest factor that distinguishes a joint tenancy from a tenancy in common is the absence of the doctrine of survivorship in the latter. The share of one tenant is not affected by the death of one of the co-owners. The share of the deceased, devolves not to the other co-owner, but to the estate of the deceased co-owner. Although the four unities required for a joint-tenancy may be present, only one, the unity of possession is essential.”

See **Karitu vs Mwihiike Farmers Company Limited & 3 others [2025] KECA 1127 (KLR)**.

In the case of **Kurshed Begum Mirza vs Jackson Kaibunga [2017] eKLR**, this

Court describe a tenancy in common as follows:

“By definition, a tenancy in common is a tenancy by two or more persons, in equal or unequal undivided shares, with each person having the right to possess the whole property but no right of survivorship. The central characteristic of a tenancy

in common is that each tenant is deemed to own by himself, a physically undivided part of the entire parcel..."

When the nature of the land registration of the suit property is considered, it cannot be doubted that the description that the late Katana Gunga Baya and the Respondent were proprietors in common ousted the Appellants assertion

that there was an intention to create a trust, and that the Respondent was holding the land on trust for them. The nature of the registration clearly showed that, at the time of adjudication, the parties had no intention to create a trust but, rather, to hold the land as co-proprietors in common. As a consequence, just as did the learned Judge, we find that the Appellants failed to prove that there was an intention to create a trust at the time of registration.

As regards the Appellants' reliance on the receipt for payment of land adjudication fees, that fact alone did not, in law, establish an intention to create a trust. Payment of adjudication fees by one family member, or even jointly by several family members, may be consistent with the land being regarded as family land at the time, but is not conclusive evidence of the existence of a trust. What is required is evidence showing that, at the time of registration, the parties intended that the registered proprietors would hold the land, not for themselves absolutely, but for the benefit of a wider family or group. In the absence of adjudication records, minutes of the adjudication committee, or credible evidence of a family agreement pointing to such

intention, a receipt for adjudication fees cannot, on its own, found a trust. As held by this Court in the case of **Muthuita vs Muthuita [1982-88] 1 KLR 42**, customary law trust is proved by adducing evidence on the history or root of the suit property and the relevant customary law on which the trust is founded and to which the claimants

subscribe. A trust can never be implied by the court unless the intention to create a trust in the first place is clear.

The Appellants further contended that the learned Judge failed to appreciate their evidence in which they had demonstrated family occupation and collective use of the land. We disagree with this assertion. This is because, it is evident from a consideration of the Judgment that the learned Judge reviewed the evidence of all the witnesses and correctly found that the Appellants had not discharged their burden of proof.

For instance, the trial Judge evaluated the evidence of the Appellants' primary witness, David Charo Baya (PW1), who largely recounted the family's occupation of the land, but did not provide any proof of a mutual intention during the land adjudication process and subsequent registration that would transform the legal ownership into a fiduciary one, while the Respondent's evidence clearly showed that as the co-owners of the suit property, they deliberately agreed to share the land equally.

Our reevaluation of the evidence likewise discloses that the Appellants' evidence provided no basis on which the trial court

could rely to find that a trust was intended; that, instead, the evidence the Respondent pointed to the

deliberate registration of the suit property in equal shares in the names of the late Katana Gunga Baya and the Respondent.

Accordingly, we find that the learned Judge was right in concluding that the Appellants did not prove the existence of a trust. The appeal has no merit and is hereby dismissed with costs to the Respondent.

It is so ordered.

Dated and delivered at Mombasa this 15th day of May, 2026.

A. K. MURGOR

.....
**..... JUDGE
OF APPEAL**

DR. K. I. LAIBUTA CARb, FCIArb.

.....
JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

.....
**. JUDGE OF
APPEAL**

*I certify that this
is the true copy
of the original*

signed
DEPUTY
REGISTRAR