



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET**

**E & L. CASE NO. 47 OF 2016**

DANIEL K. CHERAISI.....1<sup>ST</sup> PLAINTIFF

REBECCA KOECH.....2<sup>ND</sup> PLAINTIFF

NICHOLAS KANDIE KOECH.....3<sup>RD</sup> PLAINTIFF

**VERSUS**

KIPKOECH KANGOGO.....1<sup>ST</sup> DEFENDANT

MUNDUI KIPKORIR KOECH.....2<sup>ND</sup> DEFENDANT

**JUDGMENT**

Daniel K. Cherai, Rebecca Koech and Nicholas Kandie Koech (*herein referred to as plaintiffs*) have come to court against Kipkoech Kangogo, Mundui Kipkorir Kipkoech (*herein after referred to as defendant*) claiming that 1<sup>st</sup> Defendant in cahoots with the 2<sup>nd</sup> Defendant have commenced subdividing and alienating that parcel of land known as **Kakamor/Rosoga/198**, the suit land herein, which constitutes the ancestral land of the 2<sup>nd</sup> plaintiff and all her children without their consent. The plaintiffs aver that they have an overriding interest on the suit land and the registration of the defendant is in trust and holds the same in trust for the 2<sup>nd</sup> plaintiff and her children, the 2<sup>nd</sup> and 3<sup>rd</sup> plaintiff herein and their siblings who are entitled to a share as a matter of right. That despite several efforts made by the plaintiffs to consult the 1<sup>st</sup> defendant about the consent pertaining the aforesaid land he had totally refused/neglected and/or ignored to comply the same.

Reasons wherefore the plaintiffs pray for Judgment in terms of;

- a) An order of inhibition be issued against 1<sup>st</sup> defendant stopping any registration, sell, alienation or transfer or any other dealing which may prejudice the plaintiffs' interests over Kakamor/Rosoga/198.**
- b) A declaration that the defendant holds in trust the suit land in favour of the plaintiffs.**
- c) Permanent injunction against defendant stopping any registration, sell alienation or transfer or any other dealing which may prejudice the plaintiffs' interests over Kakamor/Rosoga/198.**
- d) Costs of this suit and interest at court rates.**

The 1<sup>st</sup> and 2<sup>nd</sup> Defendants filed a joint statement of defence stating that the suit is incompetent for reasons that he plaintiffs have never had any occupation or possession rights over the suit land and that the 1<sup>st</sup> defendant is the legal proprietor of the suit land measuring approximately 10 acres with an indefeasible title while the 1<sup>st</sup> defendant has gifted the plaintiffs with 38 acres of land legally belonging to him. The defendant plead that no rights can arise as against a father or husband by the children and wife over a person's estate during his lifetime. He claims that the suit land is not ancestral land therefore the issue of intergeneration equity and trust does not arise. The defendants deny the existence of trust.

When the matter came up for hearing, **PWL, Daniel Kipkirui Cherai**, who lives at Rosoga near Emining, in Baringo a teacher by profession states that he is the son of Rebecca Koech and the 1<sup>st</sup> Defendant. They are 10 siblings in their mother's house. The parcel of land in dispute Kamaror/Rasoga/198 measuring 4.3 Ha is registered in the 1<sup>st</sup> Defendant's name. The same was obtained from the bigger parcel No. 19 after the death of his grandfather known as Kangogo Cherai. The land that belonged to the Mzee Kangogo Cherai and was subdivided and shared between

2. Kipkoech Kangogo
3. Japhet Kibet Kangogo
4. Christine Lemiso Simon

He produced the confirmation of grant and the green card for **Kakamor/Rosoga/19** and states that they have cautioned the land because the land was subdivided without their consent. Moreover, they claim that their father went to the land board without their knowledge. They placed a caution on the land but the same was removed mysteriously. They wrote a letter for parcel No. **Kakamor/Rosoga/103** to enable them get the land and register a caution but the caution was removed due to a letter dated 12.1.2015 by the Chief. His father went to Mogotio land board on 24.3.2015 and prayed for a consent in respect of **Kakamor/Rosoga/198** to be subdivide the land into 3 pieces and it was approved. The plaintiffs with their mother were not present. Their father wanted to sell the land without their mother's consent. According to Pw1, the 1<sup>st</sup> defendant intends to sell the land to Jeremia Kipkurui Sirma to whom he has already sold another parcel of land out of **Lembus Kabimoi/168** thus **Lembus Kambimoi/276**.

On cross examination by the 1<sup>st</sup> Defendant he states that their father has given them land but there are no documents to support their rights. They cautioned the land because they wanted all to be allocated the said land. He claims to have a right over the land as the 1<sup>st</sup> defendant's child.

On cross examination by the 2<sup>nd</sup> defendant, he states that they are brothers with the 2<sup>nd</sup> defendant. They did not sue the 2<sup>nd</sup> defendant but he was enjoined because he supported their father to deny them title. Their father who is blind stays with the 2<sup>nd</sup> Defendant. He has no objection to the land being shared into three equal parts. They are occupying 38 acres of parcel no. 34 and they are seven in number. Parcel **No. Kakamor /Rosoga 198** is 4.3 Ha approximately 11 acres occupied by the 1<sup>st</sup> defendant and the 2<sup>nd</sup> defendant. Parcel No. **Kakamor/Rosoga/34** is registered in their father's name but occupied by the plaintiffs. Parcel No. **Kakamor/Rosoga/103** is subdivided to the sons of the 1<sup>st</sup> defendant. He states that the only son who does not have land is Mundui, the 2<sup>nd</sup> Defendant.

On re-examination, he states that his father had three wives. The **children of the second wife are:** -

1. Daniel Koech
2. Jackson Koech
3. Lilian Chevais
4. Richard Chevais
5. Kipkosgei Koech
6. Kipkurui Koech
7. Kandie Koech
8. Rose Koech
9. Purity Koech
10. Kipkemei Koech

**The children of 1st wife are:**

1. Daudi Koech
2. Alphonzo Songok
3. Stephen B. Koech
4. Koech
5. Nancy Koech
6. Mercy Koech
7. Lesken Koech
8. Raymond Koech

***The children of 3rd wife are: -***

1. Eunice Koech
2. Vincent Koech
3. Mundui Koech
4. Simon Koech
5. Chemai Koech
6. Cheptepken Koech
7. Edith Cheluget

This is a total of 25 children. The family of the first wife was given parcel No. 168 and have no dispute. The family of the second wife mother to Daniel Cheraisi were given parcel no. 34 and have no dispute on this parcel. The dispute is in respect to **Kakamor /Rosoga/198**. The third family were given **Kakamor /Rosoga 103** and the 1<sup>st</sup> defendant lives in **Kakamor /Rosoga 198** with the 2<sup>nd</sup> defendant.

***PW2 Rebecca Koech*** states that she lives at Emining within Baringo County in the Republic of Kenya and confirms that she is the 2<sup>nd</sup> wife of Kipkoech Kangogo. The land in dispute belonged to her grandfather[V1] in-law, the grandfather of Kipkoech Kangogo. The land was bequeathed to Kangogo Cheraisi, the father of 1<sup>st</sup> defendant. She has been grazing on the land for a long period of time. When Kangogo Cheraisi died, the land was distributed to 4 people. She has sued the 1<sup>st</sup> Defendant because he distributed the land without informing her. She has never been invited to the land control board. She has heard of Jeremiah Sirma who wanted to buy the land. According to the 2<sup>nd</sup> plaintiff, the 2<sup>nd</sup> defendant intends to assist the father to sell the land. On cross Examination by the 1<sup>st</sup> Defendant, she states that she lives on all the lands. She claims that the land is hers because of being a wife.

On cross examination by Mundui, she states that she sued him because he is conniving with the 1<sup>st</sup> defendant to sell the land. According to the 2<sup>nd</sup> plaintiff, there is nothing wrong on him being on the land but the land should be distributed among all his children. She wants all the children to be given a title of the suit land and not only the 2<sup>nd</sup> Defendant as he is not the only child. The 2<sup>nd</sup> Defendant states that the whole land should be brought together and distributed. That was the close of the plaintiffs' case.

The defence opened with the testimony of ***DW1 Mr. Kipkoech Kangogo***, who states that he is a farmer and used to be a member of the Appeals Committee' in Nakuru. He was given land in **Kakamor/Rosoga /34** by a white farmer in 1961. He married 3 wives on the land that was measuring 38 acres. He bought another 30 acres in the scheme and took his first wife to live there in Lembus Kambimoi. The third parcel of Land is number Kakamor/Rosoga/198 belonged to his father. He has given the plaintiffs 38 acres of land thus parcel no. **Kakamor/Rosoga/34** and land No. **Kakamor/Rosoga/198** is reserved for the other children and therefore the plaintiffs should not disturb him.

On cross examination by ***Mr. Kibii learned counsel for the plaintiffs***, he states that Rebecca Koech is his 2nd wife having married in 1966. He married her and stayed in plot No. **Kakamor/Rosoga 34**. He has lived with his all his wives in plot No. **Kakamor/Rosoga 34**. Land No. **Kakamor /Rosoga 198** was owned by his father as parcel No. **Kakamor/Rosoga 19**. She used to graze cows in the suit land during dry season. The second Defendant's mother is his 3<sup>rd</sup> wife. He gave all his wives parcels of land to settle. He moved the 2<sup>nd</sup> defendant's mother to the suit land after the death of his father. His 3<sup>rd</sup> wife is buried on the suit land.

***Dw2 Mundui Koech***, the 2<sup>nd</sup> Defendant testified that he is an officer of the Kenya Airforce. He is the last-born son of Kipkoech Kangogo. He was born on **Lembus Kambimoi /168** in 1983. He lived with his father until 1990. They lived in parcel No. **Kakamor/Rosoga 103** until 1993 when they moved to **Kakamor/Rosoga/19**. Their mother died and was buried on the land. Gideon Koech and Vincent Koech were relocated to **Kakamor /Rosoga 103**. He remained in Kakamor/Rosoga/19 with his younger sisters.

In 2006 his father called for a family meeting and told them that the children of the 1<sup>st</sup> wife were to occupy and utilize **Lembus/Kambimoi/168**. The children of the 2<sup>nd</sup> wife were to occupy and utilize **Kakamor/Rosoga/34**. Two children of the 3<sup>rd</sup> wife were to occupy and utilize Kambimoi Rasoga/103. The 2<sup>nd</sup> Defendant was to remain in Kakamor/Rosoga/19. They agreed to get a surveyor to ensure that each child gets a gift.

When **Kakamor/Rosoga/19** which was still in his grandfather's name was subdivided into four parcels of land his father was awarded Kakamor/Rosoga/198 as a beneficiary of the estate of the late Kangogo Cheraisi amongst his 3 siblings. Kipkoech Kangogo allocated land parcel number Kakamor/Rosoga/198 to the house of the mother of the 2<sup>nd</sup> Defendant. When they went to the land board, the 2<sup>nd</sup> house objected. His mother's house was given parcel number Kakamor/Rosoga/198 measuring about 11 acres. He had objected to sale of parcel number **Kakamor/Rosoga 103** to get school fees of his sister instead he paid the fees. According to the 2<sup>nd</sup> Defendant, if the entire parcels of land belonging to the 1<sup>st</sup> defendant are divided each child of the 1<sup>st</sup> Defendant will get five acres.

On cross examination by the counsel for plaintiffs, he states that their first mother was buried in parcel of land number **Kakamor/Rosoga 34**. The third house moved in Kakamor/Rosoga/19 before subdivision. The same was subdivided to create **Kakamor/Rosoga 198**. His father was to give him five acres after subdivision. He added that they went to the land control board to seek consent of the board to subdivide the

land without the consent of the 2<sup>nd</sup> plaintiff.

**DW3 is Abraham Kipnetich Cheraiisi**, a farmer by profession and who states that the land in dispute measures 10 acres. The land initially belonged to the 1<sup>st</sup> Defendant's father and was shared between his four sons. The 1<sup>st</sup> Defendant acquired 11 acres which became Kakamor/Rosoga/198. This land was occupied by the third family of the 1<sup>st</sup> Defendant. He states that Rebecca Koech when married, lived in Kipkoech Kangogos land No. **Kakamor/Rosoga 34** and used to graze her father-in-law's cows on **Kakamor/Rosoga 198**. He states that Rebecca Koech never lived on the land even one day.

DW4 is Kipkoech Cheruget states that Kipkoech Kangogo is a grandfather who took his children to school and therefore they should use their education to buy land. According to DW4, the 1<sup>st</sup> Defendant had three wives, two died and one survived. The other wives also had rights to the land. He states that according to Tugen customs an owner of land can decide how to share land to his children.

On cross examination by Kibii, he states that it is not a custom that the last born is given the home. It depends on his behavior. Mrs. Rebecca Koech lived next to the suit land but has never utilized[V2] it. The land was utilized by Kangogo Cheraiisi before Kangogo Kipkoech.

At the close of the defence case parties retired to go and prepare their submissions. The plaintiff submits that it is not in dispute that the 2<sup>nd</sup> plaintiff is the wife of the 1<sup>st</sup> Defendant whereas the 1<sup>st</sup> and 3<sup>rd</sup> Plaintiffs are the sons of the two. The 2<sup>nd</sup> Defendant is the son of the 1<sup>st</sup> Defendant and a step son to the 2<sup>nd</sup> plaintiff and step brother to the 1<sup>st</sup> and 3<sup>rd</sup> plaintiffs. The suit land was registered in the name of the 1<sup>st</sup> Defendant on 26.2.2014 and title deed issued on 5.3.2014. The plaintiffs submit that the 2<sup>nd</sup> plaintiff has an overriding interest in the suit land as the spouse of the 1<sup>st</sup> defendant and that the 1<sup>st</sup> Defendant holds the land in trust for his children. The plaintiffs further submitted that the action by the defendant to subdivide the land was contrary to the provision of **section 28, 93(2) of the Land Registration Act** and **Article 43 (3) of the constitution Kenya 2010**. It is argued that the 1<sup>st</sup> Defendant has been disposing off Matrimonial property and therefore should be restrained.

The 1<sup>st</sup> and 2<sup>nd</sup> Defendants submit that they occupy the disputed land Kakamor/Rosoga/198 and have developed the suit land by planting trees and putting up permanent houses and have been farming and grazing their cattle on the suit land. The 2<sup>nd</sup> Defendant has always known the suit land as his home. The 1<sup>st</sup> Defendant has the right to deal with his properties and distribute them to his children. The Defendants submit that spousal consent is not necessary where the owner of property intends to gift his children. The defendant further argues that there is no definition of ancestral land in the constitution and the land Acts. There is only provision for public land and community land. The suit land is private land by virtue of section 23 and 26 of Land Registration Act 2012. The absolute ownership is indefinable.

Having considered the pleadings, evidence on record and submissions, I do find that parcel Kakamor/Rosoga/198 measures approximately 4.3 Ha and was created out of Kakamor/Rosoga/19. The mother title was subdivided upon confirmation of grant and distributed to the four sons of Kangogo Arap Cheraiisi thus:

1. Kipkoech Kangogo
2. Daniel K. Cheraiisi
3. Nicholas K. Koech
4. Jackson K. Koech

Kipkoech Kangogo one of the sons of the late Kangogo Arap Cheraiisi was registered as proprietor of Kakamor/Rosoga/198 on the 26.2.2014 and the title deed was issued on 5.3.2014. On the 6.1.2015, a caution was placed on the registrar upon request by Daniel K. Cheraiisi, Nicholas K. Koech claiming beneficiary interest. On the 26.1.2015, the caution was removed as the cautioner did not respond on. However, this court later issued an injunction restraining any dealing by the proprietor.

It is not in dispute that the 1<sup>st</sup> Defendant is the husband to the 2<sup>nd</sup> plaintiff and father to the 1<sup>st</sup> Plaintiff, 3<sup>rd</sup> plaintiff and 2<sup>nd</sup> Defendant. The 1<sup>st</sup> Defendant is a polygamous man who acquired several properties for his wives and many children. He married 3 wives in his life time and two of them have died. The 1<sup>st</sup> wife is the mother of Daudi Koech, Alphine Songok and 7 others. This house was initially settled on Kakamor/Rosoga/34 measuring 38 acres with the other houses but the other houses were later relocated to Lembus/Kambimoi/168 measuring 30 acres. The 2<sup>nd</sup> wife is the 2<sup>nd</sup> plaintiff who remained on Kakamor/Rosoga/34 measuring 38 acres. The 3<sup>rd</sup> wife who is the mother of the 2<sup>nd</sup> Defendant was relocated to Kakamor/Rosoga/198 measuring 10 acres while her other sons were settled on **Kakamor/Rosoga 103**. The 1<sup>st</sup> Defendant is the registered owner of the land reference number Kakamor/Rosoga/34 and Kakamor/Rosoga 198.

Section 24 of the Land Registration provides **Section 24 (a) of Land Registration (Act No. 3 of 2012)** provides that:

**“The Registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”**

The registration of the 1<sup>st</sup> defendant as proprietor of the suit land, gives him absolute proprietorship for the parcel. Such absolute proprietorship can only be subject to certain rights and privileges as are known to law. That is why Section 25 of the Act provides as follows;

**S. 25 (i) “The right of a Proprietor, whether acquired on first registration or subsequently for valuable consideration or by order of court, shall not be liable to be defeated except as provided by this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, subject:**

**(a) to leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and**

**(b) to such liabilities, rights and interests as affect the same and are declared by Section 28 not to require noting on the register, unless the contrary is expressed in the register.**

The 1<sup>st</sup> defendant has produced the titles deeds and extracts of the register as evidence of ownership and in terms of Section 26 (1) of the Act thus: -

**“The Certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer, or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner subject to the encumbrances, easements, restrictions and conditions contained and endorsed in the certificate, and the title of that proprietor shall not be subject to challenge except –**

**a. On the ground of fraud or miss-representation to which the person is proved to be a party to;**

**b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”**

The suit herein is not a challenge to title but a declaration of existence of overriding interest and customary trust rights.

**Section 28 of the land registration Act 2012** provides for spousal rights over matrimonial property as an overriding interest whereas **section 2 of the interpretation part of The Matrimonial Property Act 2013** defines a matrimonial home as any property that is owned by or leased by one or both spouses and occupied or utilized by the spouses as their family home and includes any attached property.

**Section 6 of the said Act defines matrimonial property as;**

(a) The matrimonial home or homes.

(b) House hold goods or effects in the matrimonial home or homes.

(c) Any other immovable or movable property jointly owned and acquired during the subsistence of the marriage.

It is not in dispute in this case the 1<sup>st</sup> Defendant married 3 wives but two wives died before and were buried on their respectively allocated lands. However, this court finds that the 1<sup>st</sup> and 3<sup>rd</sup> wives though deceased, in their life time, had beneficial interest in the properties allocated to them by their husband where they built their homes and lived with their children. Each of the three wives was allocated a distinct parcel of land and therefore my view is that each of the three wives had a beneficial interest recognized by section 30 of the repealed Registered Land Act Cap. 300 Law of Kenya having been in possession of the various parcels of land and having improved the same and built their homes as wives of the 1<sup>st</sup> Defendant. I do observe that 1<sup>st</sup> Defendant bought land and settled his 1<sup>st</sup> and 2<sup>nd</sup> wives, and settled his 3<sup>rd</sup> wife on the land referred to by the plaintiffs as the ancestral land. The plaintiffs have no home on the suitland and have never utilized nor improved the same and therefore there is no spousal interest on the said land by the 2<sup>nd</sup> plaintiff.

The 2<sup>nd</sup> plaintiff having been allocated 38 acres by the 1<sup>st</sup> Defendant in respect of Kakamor/Rosoga/34 where she has put up a home, she can't claim to have an overriding interest in Kakamor/Rosoga/198 that was allocated to her co-wife

The 3<sup>rd</sup> wife to the 1<sup>st</sup> defendant, having lived, passed on and buried on the suit land allocated to her by her husband had all beneficial rights on the said parcel of land and had she lived the Defendant would not have required the consent of the 2<sup>nd</sup> plaintiff to transfer the land to the children of the 3<sup>rd</sup> wife and therefore even in her death the 2<sup>nd</sup> defendant does not require such spousal consent.

**The provisions of sections 27 and 28 of the Registered Land Act Cap. 300, Laws of Kenya (repealed) stated that the rights of a registered proprietor of land registered under the Act were absolute and indefeasible and were only subject to rights and encumbrances noted on the register or overriding interests which were set out in section 30 of the Act.**

**The aspect as to whether the customary law rights, if they exist at all, are overriding rights or interests recognizable under section 30 of the RLA was considered in the two reported cases of Obiero -vs- Opiyo & others [1972] EA 227 and Esiroyo -vs- Esiroyo & another [1973] EA 388, and in both cases, it was held that they are not.**

**The Court in both cases came to that conclusion because of the clear language of section 30 of the Registered Land Act.**

**The 1<sup>st</sup> defendant as the registered owner of the suit property is still alive and has the power to decide how to distribute his property and cannot be compelled by the court to do so in a particular manner or at all.** In Mbui Mukangu v Gerald Mutwiri Mbui [2004] Eklr, O'kubasu, Githinji & Waki, JJ.A. observed that:-

**“We have no quarrel with the ratio decided in the two cases (*Obiero v Opiyo 7 others* 1972 EA 227 and (*Esiroyo vs- Esiroyo*) as indeed they accord with clear language of the relevant sections of the law. The court in the Muriuki Murigi case was right in reiterating that rights under Customary law are subjected to rights under written law and are excluded under the clear language of sections 27 and 28. The statement of law in Esiroyo’s case has also received approval of this Court before, that Customary law rights in land are extinguished upon registration of that land under the Registered Land Act. The very purpose of subjecting land, hitherto held under customary tenure, to the process of land consolidation under the Land Consolidation Act or the Land Adjudication Act and subsequently registering it under the Registered Land Act is ipso facto to change the land tenure system. The assumption is that all rights and interests of persons in the land subjected to such new system would have been ascertained and recorded before registration.”**

However, in *Alan Kiama v Ndia Mathunya & Others* C.A. 42/1978, the Court of Appeal doubted that Customary law rights were excluded from section 30 of the Act as overriding interests. Madan JA referred to section 30(g) and stated:

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

**Over-riding interests which so exist or are so created are entitled to protection because they are equitable rights even if they have a customary law flavour or the concomitant aspect of cultivation, which is not listed in section 30. Equity always protects the just rights of the oppressed. Equity always prevents an injustice being perpetrated. Equity sanctifies the administration of justice. Cultivation of land is incidental and an appurtenance of an over-riding interest in right only of possession or actual occupation. There is nothing repugnant about the economic exploitation of land. That is what land is for.”**

Potter JA in part stated:

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

But in 1984, Kneller J.A joined Chesoni and Nyarangi Ag. JJ.A and held in *Kanyi v Muthiora* [1984] KLR 712 that:

**“The Respondent had rights against the appellant stemming from possession and occupation of part of the land, which amounted to overriding interest not required to be noted on the register and the appellants proprietorship was subject to it, section 30(g).”**

There the Respondent was enforcing the rights of an unmarried daughter under Kikuyu Customary law against her stepmother who had been registered as the absolute owner of the land after the death of her husband, the father of the respondent. As regards claims based on Customary law the same Court held:

**“The registration of the land in the name of the appellant under the Registered Land Act (Cap 300) did not extinguish the respondent’s rights under Kikuyu Customary law and neither did it relieve the appellant of her duties or obligations under section 28 as trustee. .... The Trustee referred to in section 28 of the Act could not be fairly interpreted and applied to exclude a trustee under Customary law, if the Act had intended to exclude Customary law rights it would have been clearly so stated.”**

Khamoni J. in *Gathiba v Gathiba*, Nairobi HCCC 1647/84 (decided in January 2001 and reported in [2001] 2 EA 342) at Pg 368 stated:

**“The position as I see it is therefore as follows: Correctly and properly, the registration of land under the Registered Land Act extinguishes customary land rights and rights under customary law are not overriding interest under section 30 of the Registered Land Act. But since the same registration recognizes trusts in general terms as is done in the proviso to section 28 and section 126 (1) of the Registered Land Act without specifically excluding trusts originating from customary law and since African Customary Laws in Kenya, generally, have the concept or notion of a trust inherent in them where a person holding a piece of land in a fiduciary capacity under any of the customary laws has the piece of land registered in his name under the Registered Land Act with the relevant instrument of an acquisition, either describing him or not describing him by the fiduciary capacity, that registration signifies recognition, by the Registered Land Act of the consequent trust with the legal effect of transforming the trust from customary law to the provisions of the Registered Land Act because, according to the proviso to section 28 of the Registered Land Act such registration does not “relieve a proprietor from any duty or obligation to which he is subject as a trustee”.**

The 1<sup>st</sup> and 3<sup>rd</sup> plaintiff claim customary trust in the property whereas the 2<sup>nd</sup> plaintiff claims under Section 28 of the Land Registration Act no 3 of 2012 that provides for overriding interests such as spousal rights over matrimonial property and trusts including customary trusts.

The notion of the plaintiffs having customary law rights in the suit property and the defendant holding the land in trust for the plaintiffs does not arise as the plaintiffs neither utilized nor possessed the Suitland. The 1<sup>st</sup> Defendant settled the 3<sup>rd</sup> wife on the Suitland and has allocated all his other wives and their houses the various properties. The 1<sup>st</sup> defendant has distributed to all his sons land except the 2<sup>nd</sup> defendant whom he claims to be entitled to 5 acres of the Suitland. Section 28 of the Land Registration Act 2012 was meant to protect spouses from being disinherited by the other spouse by disposition of the matrimonial property and to protect from any form of charge or mortgage without consent. However, this is not a case of being disinherited as the 1<sup>st</sup> Defendant has made provision for all his family members and intends to distribute the property to other family members not provided for.

The upshot of the above is that the suit is found without merit and is dismissed with costs.

**Dated and delivered at Eldoret this 12<sup>th</sup> day of April, 2018.**

**A. OMBWAYO**

**JUDGE**

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[\[V1\]](#)

[\[V2\]](#)