



**Gikonyo v Mwangi (Environment and Land Appeal E001 of 2023)
[2024] KEELC 221 (KLR) (25 January 2024) (Judgment)**

Neutral citation: [2024] KEELC 221 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT AND LAND APPEAL E001 OF 2023
LN GACHERU, J
JANUARY 25, 2024**

BETWEEN

LUCY NJERI GIKONYO APPELLANT

AND

AGNES WANJIRU MWANGI RESPONDENT

*(Being an Appeal against the entire judgement of Hon. Susan Mwangi
(S.R.M) made on 14/12/2022, in MURANG'A CMCC No. 48 of 2019)*

JUDGMENT

1. The instant Appeal emanates from the Judgment of the trial Court, (Hon S. Mwangi SRM), in Murang'a CMCC No. 48 of 2019, wherein the Appellant has filed the above stated suit against the Respondent vide a Plaint dated 12th February 2019. The Appellant had sought for various orders are;
 - i. A declaration that the Defendant (Respondent) husband held Loc 11/Gikandu/15, in trust of his younger brother;
 - ii. An order of dissolving the said trust and the Defendant be compelled to transfer 1.5 acres to Lucy Njeri Gikonyo;
 - iii. Costs of the suit and interest.
2. The trial Court in its Judgement of 14th December 2022, dismissed the Plaintiff's(Appellant's) suit and held that the Plaintiff had failed to prove her case on a balance of probabilities that the late Mwangi Waweru held the suit land in trust for his brothers. The Appellant was aggrieved by the said judgement



and she preferred this Appeal vide a Memorandum of Appeal dated 10th January 2023, and set out Six Grounds of Appeal. The Appellant sought for;

The lower Court judgement which dismissed the Appellant suit be overturned, and be substituted with an order allowing the Appellant suit with costs

- a. Costs of this appeal
- b. Any further relief the Court may deem fit and expedient to grant.

The grounds of Appeal are;

1. The learned magistrate misdirected herself in law and fact when she held that a younger brother could not be registered as a trustee on behalf of his siblings or that a second born child could be registered as a proprietor of land to hold in trust for his younger brother.
 2. The learned magistrate erred in law and in fact when she failed to rule that the fact that the Appellant children are residing on the suit property during the lifetime of the deceased was a clear recognition of the fact that the land was not absolutely his and was encumbered by a customary trust.
 3. The learned magistrate erred in law and in fact when she failed to hold that the fact the deceased proprietor had during his lifetime applied and obtained consent to subdivide the suit property was a clear and unequivocal manifestation that he was willing to transfer 1.5 acres of land to the Appellant husband who was his young brother.
 4. The learned magistrate erred in law and fact when she failed to rule that the Appellant was suing in her capacity as legal representative of the late David Gikonyo Njenga and not in her personal capacity.
 5. The learned magistrate erred in law and fact when she failed to rule that trust is an issue of fact and the facts as put before her irresistibly established there in fact existed a trust in favour of the Appellant deceased husband.
 6. That the judgement was against the weight of the evidence and the material placed before the trial Court.
3. The Appellant case at the trial was the land parcel No. Loc 11/ Gikandu/15, was registered the name of the late Mwangi Njenga Waweru, the Defendant's husband to hold it in trust for himself and his brother David Gikonyo Njenga, the Plaintiff husband. Further that in the year 2001, their husbands and the clan deliberated on how the land was to be subdivided and the Defendant husband had agreed that the said land would be sub divided so that he would transfer 1.5 acres to the Plaintiff husband (David Gikonyo Njenga). That the late Mwangi Njenga Waweru, applied and obtained consent to sub divide the land, but he died before the suit was sub divided. That vide Succession Cause No. 22 Of 2017, the Defendant obtained Letters of Administration to the estate of her husband and intend to disinherit the Plaintiff
 4. The Respondent herein as Defendant at the trial Court, filed her Defence dated 4th March 2019, and denied that the suit land Loc 11 /Gikandu/15, was held by her late husband to hold in trust for his brother the late David Gikonyo Njenga. She also denied that the elders decided the matter and if they did so, they never involved the Defendant(Respondent) and thus she was not bound by the said decision of the elders.



5. After the viva voce evidence before the trial Court, the Court held in favour of the Defendant (Respondent) by dismissing the Plaintiff (Appellant) suit for not having proved it on the required standard of balance of probabilities.
6. The instant Appeal was canvassed by way of written submissions.
7. The Appellant filed her submissions on 25th August 2023, through the Law Firm of Mwaniki Warima & Co Advocates and submitted that the Appeal is merited and should be allowed with costs.
8. The Appellant consolidated all the grounds of Appeal and submitted that the trial Court erred when it failed to find that Mwangi Njenga Waweru, held the land parcel No. Loc 11/ Gikandu/15, in trust for himself and his brother David Gikonyo Njenga and further erred in finding that the Appellant had not met the requirements of customary trust over the suit land. Reliance was placed on the case of Isaac M’Inanga Kiebia vs Isaya Theuri M’Lintari & Another(2015) eKLR, where the Supreme Court held as follows while rejecting the legal proposition that the registration of a person as proprietor of land extinguished all existing customary rights and claims under the law;-

“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 subjected 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 the through evidence, that part of the land, now registered, was always reserved for family or clan uses, such as burial, 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 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 trust subsists as to bind the registered proprietor.....

.... Each case has to be determined on its own merit and quality of evidence. It is not every claim of right to land that will qualify as a customary trust. In this regard, we agree with the High Court in *Kiarie v Kinuthia*, that what is essential is the nature of the holding of the land and the intention of the parties. if the said holding were for the benefit of the 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; 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” .

9. On whether the Respondent’s husband held the suit land in trust or not, the Appellant submitted that the said parcel of land belonged to Njenga Waweru, the father in law to the parties herein. She also submitted that the said parcel of land was registered in the name of Mwangi Njenga Waweru, as a trustee on his own behalf and on behalf of the Appellant’s husband and therefore, the said registration was fully for the benefit of his brother one David Gikonyo Njenga. It was also submitted that the said registration did not make the Respondent husband an absolute owner in his own right as his registration was encumbered by Customary trust. Reliance was placed on the case of *Kanyi vs Muthiora(1984) KLR 712 CA*, where the Court held that;



- “the registration of land in the name of a proprietor under the Registered [Land Act](#), did not extinguish rights under Kikuyu Customary law and neither did it relieve the proprietor of the duties or obligations as a trustee.”
10. The Court further stated that the trustee referred to in Section 28 of the [Land Registration Act](#) 2012, included a trustee under customary law.
 11. The Appellant Quoted Section 28 of the [Land Registration Act](#), which states: -

“unless the contrary is expressed in the register, all land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register-

(b) trusts including customary trusts”.
 12. The Appellant also submitted that her family entered into the suit land way back in the year 1989 and thereafter, they relocated to another parcel of land, being Loc 11/Mukangu/320, and she left her sons at the subject parcel of land. Therefore, the Appellant and her family have been on actual utilization of the specific portion of the suit land without the consent and permission from the Respondent or her husband. Further, that it has always been in the Respondent’s knowledge that the Appellant and his family have extensively developed that portion through construction of permanent homes, planting nappier grass and different types of trees on that portion of land.
 13. That the Appellant’s children have been residing on the subject land even during the lifetime of the Respondent’s husband. Therefore, this was a clear recognition that he knew that the subject land was not absolutely his and was encumbered by a Customary trust. The Appellant also submitted that her family has been in possession and utilization of 1.5 acres out of the suit parcel of land since the year 1989.
 14. It was further submitted that the trial Court erred in finding that the Appellant sued the Respondent in her capacity and not on behalf of the estate of her deceased’s husband who was entitled to 1.5 acres out of the suit land.
 15. The Appellant also submitted that the trial Court erred in failing to take the proper legal position in considering the evidence of the Appellant in finding that the Appellant had not established her suit on the required standard of balance of probabilities. That according to the Appellant’s evidence, there was proof that a Customary trust did exist on the registration of the Respondent’s husband as the proprietor of the suit property.
 16. It was also submitted that the Respondent’s husband applied and obtained consent to subdivide the suit land voluntarily as he knew that the said land did not belong to him solely, but he held the same on his own behalf and in trust of his younger siblings David Gikonyo Njenga. This showed that the said proprietor was willing to transfer 1.5 acres, of the suit land to his young brother who had not been given land by their father: - Njenga Waweru. That the fact that her family has been in occupation of 1.5 acres, out of the suit land is a key ingredient of proving customary trust. Reliance was placed on the case of *Kanyi v Muthiora* [1984] klr 712 and *Mbui Mukangu vs Gerald Mutwiri Mbui* CA NO. 281 of 2000.
 17. In conclusion, the Appellant submitted that the trial Court erred in failing to find that the Appellant met the requirements of a trustee and went on to dismiss the Appellants suit. She urged the Court to overturn the trial Court’s judgement and allow the Appellant’s appeal with costs.
 18. On her part, the Respondent filed her submissions through the Law Firm of Karuga Wandai & Co. Advocates, and submitted that the Respondents husband did not hold the suit land Loc 11/



Gikandu/15, in trust for the Appellant's husband. That the Appellant did not produce evidence of purchase of the parcel of land at Mukangu. Further, that the Appellant did admit that she does not live on the suit land but lives on the Mukangu land. Further, that the Appellant's witness, PW2 testified that the Appellant lives in Mukangu on land parcel given to her deceased husband by his father. That the same position was confirmed by PW3, John Kamau Njoroge, who stated that the Respondent lives on the land parcel in Gikandu, given to her husband by their father and the Appellant lives in Mukangu, to the land given to her by the same father. She also submitted that the Appellant does not live on the suit property and her sons who live on the said parcel of land are not parties to this suit. It was her submissions that the Court cannot presume trust or create it and mere allegations cannot amount to trust.

19. It was the Respondent's further submissions that the trial Court was right in holding that the Appellant had not produced enough evidence to establish- a Customary trust in her favour. That the Appellant lives in Mukangu, and she should take her children there and give them their share as she cannot get two shares. That would be unfair and she urged the Court to dismiss the Appellant's Appeal with costs.
20. The above being the pleadings and the rival written submissions, this Court has carefully considered the same, the Memo and the Record of Appeal and finds as follows: -
21. This is a first Appeal and as provided by Section 65(b) of the *Civil Procedure Act*, this Court is allowed to determine the Appeal on both the law and facts.
22. According to the certificate of official search produced in Court by the Appellant, the suit property was first registered in the name of Mwangi Njenga Waweru, on 13th December, 1989. It was also not in doubt that Mwangi Njenga Waweru and David Gikonyo Njenga who were blood brothers are both deceased, and were the sons of Waweru Njenga. The Appellant is the wife to David Gikonyo Njenga and the Respondent is the wife to Mwangi Waweru Njenga, the registered proprietor of the suit land.
23. The Appellant had alleged that Mwangi Waweru Njenga, was registered as a proprietor to hold the said parcel of land on his behalf and on behalf of his brother David Gikonyo Njenga. The Respondent on the other hand has denied existence of a trust and averred that the suit land solely belonged to her husband, with no evidence of holding it in trust for his brother. The trial Court dismissed the Appellant's case and thus this Appeal.
24. The trial Court had the advantage of hearing the evidence of the parties herein. This Court has not had that benefit, and therefore this Court cannot interfere with the trial Courts discretion simply because this is an Appeal.
25. In the case of *Musa Cherutich Sirma v Independent Electoral & Boundaries Commission & 2 others* [2019] eKLR, the Supreme Court held as below; -

“in reiterating the above position, we affirm that we would only interfere with the Appellate Court's exercise of discretion if we reach the conclusion that in exercise of such discretion, the Appellate Court acted arbitrary or capriciously or ignored relevant facts or completely disregarded the principles of the governing law leading to an unjust order. Conversely, if we find that the discretion has been exercised reasonably and judiciously, then the fact that we would have arrived at a different conclusion than the Court of Appeal is not a reason to interfere with the Court's exercise of discretion”



Again, in the case of Mbogo & Another v Shah [1968] EA, p.15, the Court held as follow;

“An appellate Court will not interfere with the exercise of the trial Court’s discretion, unless it is satisfied that the Court in exercising its discretion misdirected itself in some matters and as a result, arrived at a decision that was erroneous, or unless it is manifest from the case as a whole that the Court has been clearly wrong in the exercise of judicial discretion and as a result, there has been injustice”,

26. Therefore, from the foregoing, the Appellant herein must sufficiently guide the Court within the above parameters in order for this Court to interfere with the trial Courts discretion.

27. The role of this Court as an appellate Court is provided for in Section 78 of the [Civil Procedure Act](#) which is to re-evaluate, re-assess and re-analyse the evidence as is contained in the Record of Appeal. This position has been held in many decided cases. See the case of Ephantus Mwangi and Another v Duncan Mwangi, Civil Appeal No. 77 of 1982[1982-1988] 1KAR 278, where the Court of Appeal held; -

“in the first appeal, the Court is obliged to consider the evidence, assess it and make appropriate conclusion about it, remembering that it has not seen or heard the witnesses, and making due allowances for this”. See the case of Selle v Associated Motor Boat Company Ltd [1968] EA 123,126 and Williamson Diamonds Ltd v Brown [1970] EA 1,12.16.

28. The above position was also held in the case of Peter M. Kariuki vs Attorney General (2014) eKLR, where the Court held; -

“we have also as we are duty bound to do as a first appellate Court, to re-consider the evidence adduced before the trial Court and re-evaluate it and draw our own independent conclusions to satisfy ourselves that the conclusions reached by the trial judge are consistent with the evidence”

29. This Court will also give deference to the trial Court’s conclusion, since in doing so, it was exercising its discretion as provided for by [the Constitution](#) and the Statutes. In the case of Sonko vs County Assembly of Nairobi City& 11 other (Petition11(E008 of 2022), the Supreme Court held as follows; -

“A first appellate Court should accord deference to the trial Court’s conclusion of fact and only interfere with those conclusions if it appeared to it, either that the trial Court failed to take into account any relevant facts or circumstances or based the conclusions on no evidence at all, or misapprehended the evidence, or acted on wrong principles in reaching the conclusions”,

30. Being guided as above and considering the contents of the Record of Appeal and the rival written submissions, the Court finds the issues for determination are;

1. Whether the Appeal herein is merited or not?
2. Who should pay costs of the Appeal?
1. Whether the Appeal herein is merited or not?

PARA 31.

The Appellant herein raised six grounds of Appeal in her Memo of Appeal. This Court will consider all the grounds together.



32. As the Court considers the available evidence, it will take into account the findings in the case of Mwangi Wambugu [1984] KLR 453, where the Court held that an Appellate Court will not normally interfere with the finding of fact by the trial Court, unless such finding is based on no evidence or on a misapprehension of the evidence; or where the Court has clearly failed on some material point to take account of particular circumstances or probabilities material to an estimate of the evidence.
33. Basing the analysis of the available evidence on the above finding of the Court, did the trial Court rightly find that the Appellant did not prove existence of trust over the suit land?
34. The Court of Appeal in the case of Juletabi African adventure Limited & Another v Christopher Michael Lockley [2017] eKLR held;
- “it is settled that the onus lies on a party relying on the existence of a trust to prove it through evidence. that is because;
- “The law never implies, the Court never presumes, a trust, but 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”
35. On whether there was prove of customary trust or not, this Court will be guided by the Supreme Court findings in the case of Isack M’ Kiebia v Isaaya Theuri(supra), where the Court held that each case has to be determined on its own merits and quality of evidence.
36. The burden of proving that the suit property was registered in the name of Mwangi Waweru Njenga, to hold in trust for his brother David Gikonyo Njenga, laid with the Appellant herein.
37. It is trite that customary trust is proved by way of evidence. This was the holding in the case if Susan Mumbi Waititu v Mukuru Ndale & Others [2007] eKLR, where the Court held: -
- “as for trust, the Plaintiff must prove with cogent evidence that the suit premise was an ancestral land and thus family land”.
- Therefore, the Appellant needed to call evidence to prove that the suit land herein was registered in the name of Mwangi Njenga Waweru, to hold it in trust for his young brother, David Gikonyo Njenga. Further, the Appellant needed to prove that the said David Gikonyo Njenga, could have been registered as the proprietor too of the suit land, but for some intervening factors or circumstances, he could not be registered. (See the case of Isaack Kieba M’Inanga vs Isaaya M’Lintari & Another(supra), where the Court held;
- “the claimant could have been entitled to be registered, as an owner or other beneficiary of land, but for some intervening circumstances”
38. The existence of trust is a question of evidence and the person claiming it must prove the same. It is also clear that customary trust is an encumbrance on land. These are non-registrable rights which run with the land. They are overriding and subsist on the land.
39. In the case of Kanyi v Muthiora [1984] KLR 712, the Court stated;
- the registration of land in the name of the Appellant under the Registered *Land Act* (Cap 300), did not extinguish the Respondent’s right under Kikuyu Customary law and neither did it relieve the Appellant of her duties or obligations under section 28 of the said Act”



40. Further, the Court of Appeal in the case of *Mbui Mukangu v Gerald Mutwiri Mbui*; C.A No. 281 of 2000, held that; -

“customary trust is a concept of intergenerational equity where the land is held by one generation for the benefit of the succeeding generations. The Court also held that possession and occupation are key elements in determining the existence of customary trust.”

41. In the present case, the parties herein share a common father in law: - Njenga Waweru. It was alleged that the said Njenga Waweru was the owner of the suit land, which land was later registered in the name of Mwangi Njenga Waweru, to hold it in trust for himself and his young brother David Gikonyo Njenga, the husband to the Appellant herein. It was the evidence of the Appellant and her witnesses that the said registration was done during the land demarcation and consolidation. However, the Respondent alleged that her husband; - Mwangi Njenga Waweru, was registered as a sole proprietor and did not hold the land in trust for his young brother or anybody else. The trial Court concurred with the Respondent’s allegations and further held that a second born, Mwangi Njenga Waweru, could certainly not be registered as a trustee in a family land.

42. It is evident that once Mwangi Njenga Waweru, became the registered owner of the suit land, he became the absolute proprietor of the same with all the rights and privileges appurtenant thereto as provided by Section 27 of the Registered *Land Act*, cap 300(now repealed), under which regime the suit land was registered on.

43. As a registered owner, the said land vested upon the said Mwangi Njenga Waweru(deceased), as an absolute owner with all the rights and such rights can only be defeated by the provisions of the law. (See Section 28 of Cap 300 now repealed) which section is mirrored in Section 25 of the *Land Registration Act* 2012.

44. However, Section 30(g) of the said Registered *Land Act*, Cap 300(repealed) provides that the said rights are subject to overriding interest. It provides as follows: -

“unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interest as may for the time being subsists and affect the same without them being noted in the register; -

(a)

(g) the rights of a person in possession or actual occupation of land to which he is entitled in right only of such possession or occupation, save where inquiry is made of such person and the rights are not disclosed”.

45. This provision of law is also repeated in Section 28 of *Land Registration Act* 2012 and specifically 28(b) identifies trust including Customary trust, as an overriding interest.

46. There is no doubt that Mwangi Njenga Waweru, is the registered owner of the suit land and as provided by section 27, of Cap 300(repealed), he is the absolute proprietor. However, his rights can be defeated by the provision of the Act (Cap 300) and Section 30(g) of Cap 300(repealed), and/or Section 28 of the *Land Registration Act* (2012), which states that overriding interest are rights which attach to land and can cause the rights of a registered owner to be defeated – Customary trust is one of such rights.

47. Considering the holding of the Supreme Court in the case of *Isaack Kieba*(supra), that in a case of customary trust, each case has to be determined on its merits and quality of evidence and the elements to be considered, this Court will re-evaluate and re-analyse the available evidence and then comes to



its on conclusion on whether the trial Court arrived at wrong conclusion as per allegations made by the Appellant herein.

48. The Appellant herein Lucy Njeri Gikonyo, had testified that the suit land though registered in the name of Mwangi Njenga Waweru, was registered so, but the said Mwangi was to hold this land in trust for his brother Gikonyo. The trial Court held otherwise and stated that, Mwangi Njenga as a second born, and he could not have held the land in trust for their last born brother the late David Gikonyo.

49. The trial Court had rightly held that Customary trust is normally a question of fact and has to be proved by way of evidence. The trial Court also rightly referred to the cases of Gichuki vs Gichuki[1982] KLR 285, and Mbothu & others v Waitimu & 11 others[1986] KLR 171, where the Court held;-

“ the law never implies; the Court never presumes a trust, but in case of absolute necessity. The Court 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”.

50. It is also evident that the said Mwangi Njenga Waweru, was the first registered owner, but that registration did not extinguish the rights under Kikuyu Customary Law, and Customary trust is one of such right (see the case of Kanyi v Muthiora supra).

51. Given that prove of Customary trust is through calling of evidence, the Court has analysed the available evidence and it is evident that the witnesses did confirm that the Appellant has been utilising a portion of the suitland.

52. The Appellant also testified that one of her sons was buried on the suit land. Further that Mwangi Njenga had indeed attempted to subdivide the land and into two portions of 1 and 2.5 acres, but he died before completion of the process. The Court too has seen the minutes that were recorded before the elders. Indeed, it was agreed that the land parcels belonging to Njenga Waweru, the father to the husbands of the parties herein was 7.5 acres and each of the sons was entitled to 2.5 acres. There was no doubt that the land in Mukangu was registered in the name of the elder son Gathangu. The second portion of land in Gikandu was registered in the name of Mwangi Njenga The Appellant alleged that both brothers were registered so, but with each holding a portion in trust for their young brother David Gikonyo. The Respondent did not dispute that the late Gathungu was holding the land at Mukangu in trust for David Gikonyo, but did object that her husband held the Gikandu land in trust for himself and Gikonyo.

53. If the three brothers are blood brothers, and two of them are registered as proprietors during land demarcation, it could not have been the intention of their father Njenga Waweru not to give any land to his young son Gikonyo. The intention herein was for the two elder brothers to be registered as such, but to hold a portion of it in trust for their young brother Gikonyo. (See the case of Githiba v Githiba (2001)eKLR, where the Court held;

“The muramati acts as trustee of the property of minor heirs, until they attain majority, when their shares are distributed to them. Majority, for the purpose of inheritance, is the attainment of marriageable age. As trustee of the property of the minor heirs, the muramati may sell, lease, pledge, invest or otherwise deal with the land, livestock or other moveable property of the minor. Those powers may, however, be exercised only if they are necessary or beneficial to the minor, eg for payment of hospital fees or for his education.”



54. The trial Court held that Mwangi Njenga, as a second born could not have held the land in trust for only their last-born brother. However, it is evident that each of the brothers were to give a portion of land to Gikonyo, who was not registered on any land. After the subdivision, each of the brother was to get 2.5acres. That was indeed the intention of the brothers when they visited the Kiharu Land Control Board for subdivision, but unfortunately, they passed on before finalising the process.
55. This Court finds that the suit land herein was a family land and the Appellant's husband David Gikonyo Njenga, belonged to that family. The said Gikonyo could have been registered as the owner, but being the younger one, the land was registered in the name of their second born, to hold it in trust for himself and his young brother Gikonyo. The Appellant's claim was directed against the Respondent herein, who is the Administrator of the estate Mwangi Njenga Waweru, the registered owner of the suit property.
56. The trial Court had further held that the chief nor the elders had no right whatsoever to direct that the suit be subdivided by the deceased for the late brother Gikonyo, or even the son Kenneth being buried on the said land and that amounted to encroachment. With due respect, this Court disagrees with the said findings and holding. The said elders are the ones on the ground and they know the true position. There was no evidence that the agreement produced in Court by the Appellant was obtained through duress or was a fraudulent document.
57. This Court finds and hold that the available evidence before the trial Court pointed out to existence of a Customary trust, which was not extinguished even when the suit land got registered in the name of Mwangi Njenga Waweru, the husband to the Respondent herein. The Suitland Loc 11/ Gikandu/15, initially belonged to Njenga Waweru, the father to Mwangi Njenga Waweru, and David Gikonyo Njenga(both deceased), who are husbands to the parties herein. Mwangi Njenga Waweru, was supposed to hold the said land in trust for his young brother, David Gikonyo Njenga, and that is why he did not object in his life time to the family of Gikonyo living on the said land. Further, he knew that he did not hold the land absolutely and thus the reasons why he had attempted to subdivide the said land by obtaining consent from Kiharu Land ControlBoard to subdivide.
58. For the above reasons, this Court finds that the trial Court erred both in law and fact when it held that a second born in a family could not hold land in trust for their last-born brother- the late Gikonyo Njenga. The said Court also erred in law and fact when it held that the chief and the elders had no right to direct that the suit land be subdivided. In holding as above, the trial Court arrived at a wrong finding that the Appellant(Plaintiff) failed to prove her case on a balance of probabilities that the late Mwangi Njenga Waweru, was holding the suit land Loc 11/ Gikandu/15, in trust for any of his brothers.
59. Consequently, as an Appellate Court, this Court allows the Appeal herein and proceeds to overturn the trial Court's judgement entered on 14th December 2022, and substitute it with the orders that: -
- a. A declaration be and is hereby made that the Respondent's husband, the late Mwangi Njenga Waweru, held land parcel No. LOC 11/Gikandu/15, in trust for himself and his young brother, the late David Gikonyo Njenga.
 - b. An order be and is issued dissolving the said trust and the Respondent as the administrator of the estate of Mwangi Njenga Waweru, should transfer 1.5acres out of the suit land to the Appellant herein, Lucy Njeri Gikonyo, and/or to the administrator of the estate of David Gikonyo Njenga.
 - c. The Appellant is entitled to costs of this Appeal and the lower Court costs.
- The Appeal is allowed as above.



It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 25TH DAY OF
JANUARY,2024.**

L. GACHERU

JUDGE.

Delivered online in the presence of;

M/s Waititu for the Appellant

Absent - for Respondent

Joel Njonjo - Court Assistant

L. GACHERU

JUDGE

25/1/2024

