



**Macharia & another v Oscar (Environment & Land Case E007 of 2023)  
[2024] KEELC 245 (KLR) (25 January 2024) (Judgment)**

Neutral citation: [2024] KEELC 245 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MURANGA  
ENVIRONMENT & LAND CASE E007 OF 2023  
LN GACHERU, J  
JANUARY 25, 2024**

**BETWEEN**

**EDWARD MACHARIA ..... 1<sup>ST</sup> PLAINTIFF**

**ANTONY MACHARIA ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**JOHN MWANGI OSCAR ..... DEFENDANT**

**JUDGMENT**

1. By a Plaint dated 6<sup>th</sup> February, 2023, the Plaintiffs brought the suit against the Defendant and sought for orders that; -
  - a. A declaration that the Defendant is holding land parcel LOC.20/GITHURI/67 in trust of himself and that of Edward Macharia, Anthony Macharia and Patrick Macharia.
  - b. An order directing the Land Registrar Murang'a to include the names of Edward Macharia, Anthony Macharia and Patrick Macharia as tenants in common.
  - c. An order directing the defendant to initiate subdivision process of the land Parcel Loc.20/Githuri/67 by executing all the necessary documents within sixty days from the date of determination of this suit subject to payment of the requisite fees by all parties involved.
  - d. General damages.
  - e. Costs.
2. In the Plaint, the Plaintiffs averred that on or around 1960, the suit property was bought by the parties' grandfather, Macharia Gicheru, now deceased. They further aver that the said grandfather died, leaving the said property to his wife, Milkah Wairimu Macharia, also deceased. The Plaintiffs further averred



that before the grandfather died, he put his son, Ephantus Manyaki, now deceased, and his wife, Jane Wambui in occupation, and that his wife and children are still in occupation of the suit property.

3. The Plaintiffs aver that Milkah Wairimu Macharia, who inherited the suit property from her husband, before her death convened a clan meeting in which it was agreed that the suit property was to be inherited by all grandsons named after her late husband. These are:
  1. John Mwangi Oscar- the Defendant;
  2. Edward Macharia- the 1<sup>st</sup> Plaintiff;
  3. Antony Macharia- the 2<sup>nd</sup> Plaintiff; and
  4. Patrick Macharia.
4. The Plaintiffs also averred that this was not objected, as the family had another land where all members had shares including the Defendant. They stated that the register of the suit property was opened in 1970, when all the other grandsons were minors save for the Defendant herein who registered his name as a trustee to the others.
5. It is the averments of the Plaintiffs that the Defendant has refused to transfer the subject land to the three other grandsons, despite several pleas by the Plaintiffs and the clan to subdivide and transfer the subject property to its rightful heirs. They averred that the matter has been heard in the Chief's Office Kimathi Location, D.O.S Office Murang'a and was determined in the Land Disputes Tribunal at Murang'a. The Plaintiffs also averred that they had sued the Defendant in Civil Suit ELC Number 170 of 2005 at Milimani, Nairobi, but withdrew on the promise of the Defendant that he would transfer the respective portions to the Plaintiffs. They further averred that the Defendant declined to do so, necessitating this suit.
6. Through an Affidavit dated 21<sup>st</sup> February 2023, the Plaintiffs sought restriction orders against any dealings on the suit property pending the hearing and determination of this suit as the Defendant was purporting to dispose off the said property.
7. The Defendant filed a Memorandum of Appearance on 6<sup>th</sup> March 2023 through the law Firm of Irungu Mwangi Ng'ang'a T.T & Co Advocates. The Defendant subsequently filed their Statement of Defence and Replying Affidavit dated 7<sup>th</sup> March 2023. In the Statement of Defence, the Defendant averred that the Plaintiffs were not born at the time their grandfather passed on, and there was no way they could have jointly bought the suit property with him.
8. The Defendant admits that Ephantus Manyeki Macharia has been in possession of the suit property, but avers that it was by his permission, and that he allowed him to construct the house thereon on the verbal agreement that he would excise for him an equal portion of the land in his parcel number LOC 20. /GITHURI/73, which was to enable him be closer to the main road. The Defendant avers that deceased's wife reneged on the Agreement after her husband's death, causing the Defendant to issue her a Notice to Vacate.
9. The Defendant avers that after the Notice, the said widow used her son Patrick Macharia, and the Plaintiffs herein to file the suit ELC Number 170 of 2005, which was withdrawn as they failed to prosecute it. The Defendant states that he allowed the widow to continue living there out of sheer respect for her as a mother. He denied there being a clan meeting by their deceased grandmother. He avers that he was the first proprietor of the land after their deceased grandmother gifted it to him and the same was not given to the Plaintiffs as gift inter vivos with equal shares with the Defendant. He



avers that their deceased grandmother submitted his name to the Registrar, just like she did with the fathers of the respective Plaintiffs when they were being allocated land.

10. In the Replying Affidavit, the Defendant stated that he is the registered owner of the suit land, and he has every right to the same to deal with it as the law allows. He stated that a clan, a Chief or a District Officer cannot give a trust to the Plaintiffs which they do not have. He further stated that the land was gifted to him at a tender age, because he was living with the grandmother and acted as his errand boy, and his mother began the tilling of the virgin land and his grandmother was rewarding her for her industry. He also stated that if the intention was to create a trust, it would have been registered so in the title, and the Title would have been registered under her older sons who would have taken such responsibility.
11. On 13<sup>th</sup> March 2023, by consent of the Advocates, the parties agreed to maintain the status quo with regards to the application. Being that the land should not be subdivided and/or changed or alienated until the suit is heard and determined.

### **Plaintiffs' Case**

12. PW 1 Edward Macharia adopted his statement as evidence in Court. He stated that he is the 1<sup>st</sup> Plaintiff in this matter and the Defendant herein is his cousin. He also stated that the meeting with the deceased grandmother happened, and that the land belonged to their grandfather who had four (4) Sons. That their grandfather had given his ancestral land to his sons, the father of the Defendant included. He further stated that he was young, about 4 years old, when the property was being distributed, and his father, who he lives with, told him what transpired. He further stated that the grandmother told the Defendant's father to give him the land, but his father refused.
13. PW 1 testified that the Defendant kept the documents of the suit property since the death of his grandfather. He confirms that the Defendant was the registered proprietor of the suit land, and that his grandmother suggested that it be registered under his name to hold it in trust for all the Macharia family. He testified that he did not know the status of the title, but that it did not bear his name.
14. PW 2 Anthony Macharia adopted his written statement dated 6<sup>th</sup> February 2023, as evidence before the Court. He stated that the grandmother had a meeting stating that the land should be given to the grandsons named after their grandfather. He also testified that he does not know the history of the said parcel of land because he was young. He also stated that his father had his own parcel of land that was allocated to him. He further testified that it is not written anywhere that the Defendant was holding the land in trust for the Defendants. Further that he was suing the Defendant because he is holding the land in trust for the Macharia family.

### **Defendant's Case**

15. DW 1 John Mwangi Oscar adopted his written statement dated 7<sup>th</sup> March 2023, as part of his evidence. In the statement, the Defendant recalled his parents and siblings, and gave a brief history of the events surrounding the death of their grandfather and when he lived with his grandmother. He stated that the land was first tilled by his mother who was good friends with the grandmother. He stated that if the grandmother intended for the land to be held in trust, she would have stated that to the land adjudicating officers. He gave a breakdown of how his grandmother gave parcels of land to her sons and if their titles were not held in trust, his title too should not have been held in trust.
16. DW 1 states that he as the first registered owner of the said property and that the law respects his rights as a sole proprietor. He stated that in the year 1972, in a business trip with the late Ephantus Manyeki Macharia, he allowed him to build a house in his portion of land so that he would be closer to the main



- road and he would in turn excise an equal portion of land for him in exchange for his parcel of land. That as they were very close friends and business partners, they did not put the agreement to writing. He testified that Ephantus Manyeki Macharia passed on before the exchange could happen and his wife reneged the agreement.
17. DW 1 also testified that it was for this reason that Ephantus Manyeki Macharia was buried in his own property and not the suit property. A suit was instituted and a restriction placed on the suit property. However, it was removed when the Plaintiffs failed to prosecute the case. He stated that this suit had been hurriedly brought in order to forestall his plans with the suit property, as he was not even issued a demand letter. He stated that at no point in the life of their grandmother did they or their fathers confront their grandmother asking for the said land. She died 20 years after the Registration of the suit land in his name, and that there could not have been created a trust for someone who was not born at the time of demarcation.
  18. He also denied that the matter was ever brought to the D.O. i.e. Land Disputes Tribunal. It was his evidence that what was before the D.O was not the matter of the suit property.
  19. The Court directed the parties to file and exchange written submissions. The Plaintiffs through the Law Firm of Njui Kariuki & Co Advocates filed their written submissions dated 14<sup>th</sup> July 2023. They submitted that there was established a customary trust as the suit property was being held in trust for the benefit of other members of the family. They relied on the Supreme Court case of Isack M'inanga Kiebia vs Isaaya Theuri M'lintari & another (2018) eKLR, that sets out the elements that would qualify the Defendant as a trustee as follows:
    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.
  20. It is the Plaintiffs' further submissions that the suit property qualified the above test of being held in customary trust. They further relied on the case of Mbui Mukanga v Gerald Mutwiri Mbui (2004) eKLR, in which the learned judge noted that most land that was held under custom was in the land consolidation process converted to personal property. In the case of Jason Gitimu Wangara v Martin Munene Wangara & others (2013) eKLR, the Plaintiffs relied on the decision which stated that registration of land in the name of one party does not extinguish the right of other parties who may be entitled to it under Customary Law.
  21. The Defendants through the Law Firm of Irungu Mwangi Nganga T. T. & Co Advocates filed their written submissions dated 4<sup>th</sup> July 2023. He submitted that the property was held by the Defendant as an absolute owner free from all encumbrance. The Defendant submitted that no notice of obligations were bestowed on him by the settlor, who is their grandmother. He cites the aforementioned Supreme Court case of Isack M'inanga Kiebia, in which the court draws the line between a registered owner of the land and an unregistered claimant. The Defendant submits that the Plaintiffs have not met the elements of a Customary Trust because there were no express instructions from the settlor that the property should be held in trust and that the Plaintiffs claim is of implied nature. He also submitted



- that there is no connection between the Defendant's family, clan or group since they were born years later after the grandfather died in a detention camp.
22. The Defendant further submitted that other beneficiaries who were the children of the Defendant's grandmother inherited several parcels of land from her estate, which they hold in free simple. He states that the grandmother gave him the suit property as a gift inter vivos for his charisma towards her.
  23. Having now carefully read and considered the pleadings, the evidence and the written submissions by the parties, the court finds that the issues for determination are:
    - a. Whether there was a trust created on the suit property.
    - b. Whether the Plaintiffs are entitled to the reliefs sought.
  24. Before the Court delves into the above stated issues, the Court will point out the undisputed.
  25. There is no doubt that the parties herein are related. The parties herein are cousins and they have a common Patriarch by the name Macharia Gicheru, who was married to one Milka Wairimu Macharia, the grandmother to the parties herein, as was pleaded by the Plaintiffs herein and later confirmed by the Defendant in his Defence. It is evident that the above-named grandparents of the parties herein are deceased. Macharia Gicheru preceded Milka Wairimu Macharia in death. It was pleaded that the said Milka Wairimu, the grandmother to the parties herein, died in 1997, and she participated actively during the land demarcation and adjudication. Further, from the pleadings and list of the documents availed by the parties, the two Patriarchs had four sons and one daughter. These sons are;
    - i. Oscar Gitau Macharia.
    - ii. Nahashon Gitonga Macharia.
    - iii. David Kamau Macharia
    - iv. Ephantus Manyeki Macharia
  26. It is also evident that the above sons of Macharia Gicheru, were the fathers to the parties herein.
  27. Oscar Gitau, was the father to the defendant herein, whereas Nahashon Gitonga, was the father to the 1<sup>st</sup> Plaintiff; Edward Macharia, David Kamau, was the father to the 2<sup>nd</sup> Plaintiff; Antony Macharia kamau, and Ephantus Manyeki Macharia was a father to Patrick Macharia, who is not a party to the suit, but is included in the prayers sought by the Plaintiffs. Further, it is evident that all the above-named sons of Mzee Macharia Gicheru, are all deceased.
  28. There was evidence adduced that Ephantus Manyeki Macharia, occupies a portion of the suit land, and had put up a permanent house. The Plaintiffs alleged that the said Ephantus occupied the suit property with the permission of their grandfather, who was the owner of the suit property. However, the Defendant denied that allegation and averred that he is the registered and absolute owner of the suit property herein, and he only allowed the late Ephantus Manyeki, to occupy a portion of the land, with an agreement that the said Ephantus would give the Defendant an equal portion of land from his parcel of land being Loc 20/ Githuri/73. The Defendant alleged that after the death of Ephantus, his wife Jane Wambui, and her children reneged on the said agreement, which led to their filing a suit in Nairobi high court, which they later withdrew.
  29. There is no doubt that the said Jane Wambui, who was the wife of Ephantus Manyeki, still lives on the suit property. There was evidence from the Defendant that he had given the said Jane Wambui notice to vacate the suit property. It is also evident that the parties herein have had several disputes before various forums like the Chief of the area, the District Officer and even Court cases. Though the suit property



is registered in the name of the Defendant, it is evident that there are various restrictions and cautions that have been lodged on the title over different claims as is evident from the copy of the Green Card.

30. From the Green card, the suit property was registered in the name of John Mwangi Oscar, on 13<sup>th</sup> March 1970. That was a first registration and as provided by Section 27, of the Registered Land Act, Cap 300(now repealed), the said registration vested in the John Mwangi Oscar, the absolute ownership of that land together with rights and privileges appurtenant thereto.
31. The certificate of title was issued on 9<sup>th</sup> May 1977, but on 13<sup>th</sup> June 2000, the said title was changed to John Mwangi Oscar Gitau, otherwise known as John Mwangi Oscar, and a title deed was issued on 16<sup>th</sup> June 2000. Thereafter, there were restrictions and cautions placed by various people, but who are mostly related to the parties herein for various reasons.
32. The above being the undisputed issues, the Court will now proceed to determine the disputed issues.

**a. Whether there was a trust created on the suit property.**

33. The Plaintiffs in their claim had averred that the defendant herein was holding the suit land in trust for them and one other Patrick Macharia. The Defendant on his party denied that allegation. The defendant in his submissions had alleged that the Plaintiffs did not specify which kind of trust that the defendant was holding over the suit property. The Plaintiffs on their part submitted that there exists a Customary trust as the suit land is an ancestral land, which belonged to their grandparents and the Defendant got registered as the proprietor of the suit property to hold it in trust for all the grand sons of Macharia Gicheru, named after him. That is, all grandsons bearing the name Macharia. Clearly, this is a claim brought under customary trust.
34. Customary trust is an encumbrance on land and these are non- registrable rights which run with the land. See the case of *Kanyi vs Muthiora*(1984) KLR- 712, where the Court held that registration of land in the name of a proprietor under the Registered Land Act( Cap 300 repealed) did not extinguish rights under Kikuyu Customary Law, and duties and obligations of a trustee as provided under Section 28 of the said Act.
35. Therefore, it is correct to state that customary trust is one of the overriding interests pegged on the land that is registered in favour of a proprietor, who is alleged to hold the said land in trust for the claimant/ s. Further, the courts have variously 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. See the case of *Mbui Mukangu vs Gerald Mutwiri Mbui*, C.A NO. 281 Of 2000).
36. It is also clear that the burden of proving existence of customary trust lies with the person asserting it. In the case, the burden of prove is with the Plaintiffs herein. In this case of *Njenga Chogera vs Maria Wanjira Kimani & 2 others*( 2005) eKLR, which referred to the case of *Muthuita vs Muthuita*( 1982-88) 1klr 42, the Court of Appeal held that, Customary trust is proved by leading evidence. That trust is a question of fact that must be proved by the person claiming it under Customary trust. Further, a trust is never implied by the court, unless there was an intention to create a trust in the first place.
37. The Court in the case of *In Juletabi African Adventure Limited & Another Vs Christopher Michael Lockley* [2017] eKLR, held that;-

“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.”

38. The evidence produced by the claimant must point out to the root of the title, and the pertinent question that the Court must seek answers to is how the land was first registered. Was it a family or clan land before registration, was it inherited land. The question herein would be; how did the Defendant herein acquire the suit land? Was it a family land or was it inherited land?

39. The Supreme Court dealt with the issue of Customary trust in the case of *Isack Kieba M'inanga v Isaaya Theuri M'Lintari & another* [2018] Eklr, where it held as follows:

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

40. From the Green Card produced in Court, the suit land was registered under the regime of Registered *Land Act*, Cap 300 Laws of Kenya. As pointed earlier by the Court, under Section 27 of the said Cap 300, the Defendant is deemed to the absolute and indefeasible owner of the said parcel of land. This provision of law is mirrored under Section 24(1) of the *Land Registration Act* 2012. Further, Section 28, of the said Act provides that these rights of the registered proprietor cannot be defeated except as provided by the Act, but subject to the provisions of Section 30 of the said Cap 300.

41. It has been accepted by the Courts that Section 30(g) of Cap 300, provide for Customary trust and as pointed out earlier customary trusts are overriding interests which attach to the land and need not be registered in the register. This position has been well captured in Section 28 of the *Land Registration Act*, 2012, which provides that customary trust is an overriding interest. Therefore, it is clear that a registered proprietor's absolute and indefeasibility to his parcel of land can be defeated once a claim for customary trust has been proved.

42. Have the Plaintiffs herein availed sufficient evidence to prove existence of trust, given that a Court cannot imply trust and that the intention of the settlor must be very clear.

43. It was the evidence of the parties that the suit property herein initially belonged to Macharia Gicheru, who passed on before the suit land was adjudicated and registered. The Plaintiffs testified that the Defendant was registered as the proprietor so that he could hold the land in trust for all the grand sons of Macharia, named after him. The defendant disputed this allegation and stated that the land was



given to him wholly because his mother was hardworking and had cleared the virgin land and that the defendant was the errand boy of his grandmother, and she rewarded him with the suit land.

44. However, it is clear that at the time of registration in 1970, the Defendant was a young lad of about 15 years and he told the court that he was a student at Murang'a High School then. At that time of registration of the suit land, some of the Plaintiffs had even not been born. PW1, told the Court that he was a minor then aged about 4 years.
45. What has not escaped the attention of this Court is that all the sons of Macharia Gicheru, were also registered as proprietors of their respective parcels of land. The Defendant told the court that it was their grandmother who played a role in determining who was to be registered over which property. Indeed, the Court has seen the certificates of official search and it is evident all the sons of Macharia including Oscar Gitau, the father to the Defendant were registered proprietors of their respective parcels of land. These parcels of land are; -
  - Loc 20/Githuri/76 for Gitonga Macharia approx. 2.6 acres.
  - Loc 20/ Githuri/ 72 for David Kamau approx. 2.8 acres
  - Loc 20/ Githuri/ 69 for Gitau Macharia approx. 1.21 ha
  - Loc 20/Githuri/ 73 for Manyeki Macharia approx. 1.05 ha.
46. Looking into the acreage of the above parcels of land, this Court has noted that the said parcels of land are of almost equal acreage.
47. However, the suit land is approximately 10.5 acres and therefore, it is bigger in size than all the other parcels of land. The parties herein had testified that the suit land was being utilized by their grandmother before she passed on in 1997.
48. The Defendant on his part had alleged that he allowed Ephantus Manyeki, his uncle to utilise a portion of the suit land because it touched the road, and Ephantus was in turn to give him equal portion from his parcel of land. This allegation was vehemently denied by the Plaintiffs.
49. This Court will now have to look at the root of registration of the parcel of land in favour of the Defendant. There is no dispute that the suit land initially belonged to the grandparents of the parties herein. The grandmother of the parties caused the suit property to be registered in the name of the Defendant who was a student then, but was the older of the grandchildren. Therefore, this was an ancestral land. The Defendant alleged that he was given the land as a gift for being an errand boy of his grandmother. However, there was evidence that Ephantus Manyeki occupies a portion of the land and had even built a permanent house thereon.
50. The Court has considered the size of the land and noted that the parties' grandmother Milka was using this parcel of land because it was her ancestral land. It was certainly bigger in size than what her sons held in their respective parcels of land. Each of the sons had been registered as owners of their respective parcels of land, and Malka's land was registered in the name of the Defendant because he was the older of the grandsons. Therefore, it is clear that the suit land is an ancestral or family land, which was later registered in the name of the defendant herein. As such, the Defendant is only holding the suit land in trust for the family members.
51. The Plaintiffs had testified that their grandmother had expressed a wish that the suit land be shared among her grandsons, who were named after their grandfather Macharia, the Defendant herein included.



52. That evidence of the Plaintiffs was not shaken during cross examination. Certainly Milka, the grandmother to the parties could not give the Defendant the suit land which was an ancestral land as a gift and leave out the other family members. This Court finds and holds that the suit land herein is an ancestral land, which was registered in the name of the Defendant to hold in trust for the family members and that is the reason why Ephantus Manyeki, has been in occupation of a portion of the suit land. The Court will rely on the case of Henry Mwangi vs Charles Mwangi C.A 245 OF 2004, where the Court of Appeal held that under Kikuyu Customary Law, to which both parties are subject to, the eldest son inherits the land as a Muramati to hold in trust for himself and other heirs. The Plaintiffs have met the elements set out by the Supreme Court in the case of Isack M’Inanga kibia vs Isaya M’Intari(supra), to qualify as claimants in a Customary trust claim. These are, the land in question was a family land before registration, the claimants belong to that family, and the claim is directed to the Defendant, who is a registered proprietor and a member of the family.
53. The Defendant herein who was the eldest grandson was registered as the proprietor of the suit land to hold it in trust for himself and his other family members of Macharia Gicheru, but the same was not solely given to him as a gift.
54. The fathers to the parties had their respective parcels of land registered under their names and that could be the reasons why none of them was registered over the suit property, but the grandmother went for the older grandson, who was even in school and cannot allege that he took care of the grandmother and was her errand boy
55. Consequently, this court finds and holds that though the defendant is the registered owner of the suit property, that ownership is not absolute as it is encumbered by the Customary trust which is an overriding interest as per section 30(g) of the Registered *Land Act*, (repealed), and which provision of law has been mirrored in section 28 of the *Land Registration Act*, 2012.
56. For the above reasons, the court finds that Customary trust subsists in favour of the Plaintiffs on the suit land herein.

**b) Whether the plaintiffs are entitled to the prayers sought in the Plaint.**

57. In their claim, the Plaintiffs have sought for six prayers. Prayers No. 1 to 3, are related to the issue of customary trust. Prayer No. 4, is on damages, which the Plaintiffs did not address in their evidence in Court and the submissions and so this Court will not address it or grant it. Prayer No. 5, is on costs which the Court will ultimately address on who is entitled to costs of the suit and prayer No 6 is on any other relief that the court may deem fit to grant.
58. Having found that the Defendant herein is registered as the proprietor of the suit property so that he can hold it in trust for the family of Macharia Gicheru, then this Court finds that the said trust needs to be dissolved. The Plaintiffs had alleged that their grandmother Milka Wairimu had called a family meeting and had directed that the suit land be shared by all the grandsons of the late Macharia, the parties’ grandfather, who were named after him. However, that evidence did not come out clearly. It is evident that all the sons of the late Macharia who initially owned the suit land are deceased. The parties herein are representing each of the four sons of Macharia Gicheru, and thus this Court finds that the parties herein will represent the houses of Oscar Gitau, Nahashon Gitonga, David Kamau and Ephantus Manyeki, and therefore, for the interest of justice, this court finds that the defendant is holding the suit property in trust for the Plaintiffs herein and one Patrick Macharia as prayed for in the plaint. For this findings, the court relies on the following cases, Kanyi vs Muthiora (supra) and Gathiba vs Gathiba, Nairobi Hccc No. 1647 of 1984, where it was held that registration under Section



28 of the Registered Land Act, does not relieve a proprietor from any duty or obligation to which he is subject as trustee.

59. The Court has found that the defendant herein is a trustee under Section 28 and 30(g) of the Registered Land Act, and the Plaintiffs having proved that their respective families are entitled to a share of the suit property, the court finds and holds that they are entitled to the prayers No, a, b and c of the Plaint dated 6<sup>th</sup> February 2023, and proceed to dismiss the defence raised by the Defendant herein. The existing Customary trust is dissolved and the suit land should be shared as per the prayers of the Plaintiffs.
60. On the issue of costs, it is trite that costs are granted at the discretion of the Court, but ordinarily, costs are awarded to the successful litigant. The Plaintiffs are the successful parties and are thus awarded Cost of this suit.
61. Ultimately, the Court finds and holds that the Plaintiffs have proved their case against the defendant herein, on the required standard of balance of probabilities. Consequently, this court enters judgement for the Plaintiffs against the Defendant as prayed in prayers No. a, b and c of the Plaint dated 6<sup>th</sup> February, 2023, plus costs of the suit and interests thereon from the date of this judgement to the date of payment in full.
62. It is so ordered.

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

**L. Gacheru.**

**JUDGE.**

**Delivered online in the presence of;**

**1<sup>st</sup> Plaintiff**

**Mrs Kariuki for the 2<sup>nd</sup> Plaintiff**

**Mr Irungu Mwangi for the Defendant**

**Joel Njonjo - Court Assistant**

**L. Gacheru.**

**JUDGE**

**25/1/2024**

