



**Kabata v Mbugua (Civil Appeal 274 of 2019)
[2025] KECA 524 (KLR) (21 March 2025) (Judgment)**

Neutral citation: [2025] KECA 524 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 274 OF 2019
DK MUSINGA, F TUIYOT & GV ODUNGA, JJA
MARCH 21, 2025**

BETWEEN

SOLOMON MUNIU KABATA APPELLANT

AND

ELIUD NGUGI MBUGUA RESPONDENT

*(Being an appeal from the judgment of the High Court of Kenya at Kiambu
(Mulwa, J.) delivered on 10th April 2019 in Civil Appeal No. 19 of 2018)*

JUDGMENT

1. This is an appeal from the judgment of the High Court at Kiambu (Mulwa, J.) delivered on 10th April 2019 in Civil Appeal No. 19 of 2018.
2. The dispute culminating in this appeal relates to the administration of the estate of one Kabata Munyuko, (hereinafter referred to as “the deceased”), who died on 4th June 2004. As it will become evident later in this decision, what is in dispute is whether the deceased held one of the assets registered in his name in trust for and on behalf of his nephews.
3. Upon his demise, one Mungai Munyuko, a brother to the deceased, applied for Grant of Letters of Administration Intestate in respect of the deceased’s estate through Succession Cause No. 127 of 2008 which was filed at the Limuru Magistrates’ Court. In his affidavit in support of the petition, he listed the following as the persons who survived the deceased:
 - i. Mungai Munyuko - Son of the deceased
 - ii. Njeri Mbugua - Daughter-in-law of the deceased
 - iii. Elizabeth Mugure Kabata - Widow of the deceased



4. The assets of the deceased as per the same affidavit included Limuru/Rironi/51, Limuru/Rironi/T.150, and Limuru/ Ngesha/114.
5. The Petition by Mungai Munyuko precipitated objection proceedings as to the issuance of a Grant in his favour. The objection proceedings were brought by Elizabeth Mugure Kabata, Solomon Muniu Kabata, Florence Wangui Kimani and Evanson Kangethe Kabata. Save for bringing the objection proceedings, the aforesaid persons filed a Petition by way of Cross-Application for a Grant in respect of the deceased's estate. They contended in the cross-application that Mungai Munyuko was not entitled to apply for letters of administration to the estate of the deceased as the deceased was survived by a widow and children, and that the said Mungai Munyuko was merely a brother to the deceased and therefore not a dependant.
6. In the affidavit in support of the Cross-Application for Grant of Letters of Administration Intestate, they averred that the deceased died intestate leaving the following persons surviving him: Elizabeth Mugure Kabata - widow; Solomon Muniu Kabata - son; Florence Wangui Kabata - daughter; Evanson Kangethe Kabata - son; Stephen Kironji Kabata - son; Mary Nyambura Kabata - daughter; Mary Wambui Kabata - daughter; Ernest Kimotho Kabata - son; and Virginia Njeri Kabata - daughter.
7. The assets of the deceased as per the said affidavit were LR No. Limuru/Rironi/T.190 and LR No. Limuru/Rironi/51 respectively.
8. Their contention was that the said Mungai Munyuko in his Petition for Grant of Letters of Administration Intestate had failed to disclose that the deceased was survived by his widow and children, and that he had fraudulently described himself in the petition and the affidavit in support as a son of the deceased, whereas he was a brother to the deceased. They contended, therefore, the court could not grant letters of administration to Mungai Munyuko whereas the deceased was survived by a widow and children.
9. Mungai Munyuko withdrew his petition, precipitating the taking out of Summons by Elizabeth Mugure Kabata, Solomon Muniu Kabata and Evanson Kangethe Kabata (in their capacity as widow and sons of the deceased), through which they sought to be issued with a Grant of Letters of Administration Intestate in respect of the deceased's estate.
10. The summons by Elizabeth Mugure Kabata, Solomon Muniu Kabata and Evanson Kangethe Kabata were opposed by Jidraph Ngugi Mbugua, Eliud Ngugi Mbugua, Peter Mungai and Mungai Munyuko (hereinafter referred to as "the objectors"). They contended that they were nephews and brother to the deceased respectively; that the petitioners (Elizabeth Mugure Kabata, Solomon Muniu Kabata and Evanson Kangethe Kabata) had failed to disclose to the court that the objectors were also beneficiaries of the deceased's estate; and that the petitioners had concealed material facts to the effect that the assets listed in the affidavit in support of the cross-application, that is, parcels of land known as LR No. Limuru/Rironi/T.190 and LR No. Limuru/Rironi/51 were actually held by the deceased in trust for the objectors.
11. They averred that the said parcels of land were the property of the deceased's father known as Munyuko Kimotho who happened to be their (Jidraph Ngugi Mbugua, Eliud Ngugi Mbugua, and Peter Mungai) grandfather and that the deceased was tasked to hold the said properties in trust for his brothers and on their behalf as grandsons. The objectors further averred that all those entitled had already taken possession of their portions, but the deceased died before he could transfer the titles to them. To buttress their claim that the deceased held the said properties in trust for them, they contended that one Mbugua Munyuko, a brother to the deceased, had also been tasked by the deceased's father to hold LR No. Limuru/Ngecha/296 in trust for his brothers and his father's



grandsons and that before the said Mbugua Munyuko died, he determined the trust and made sure that he transferred the parcels of land to the respective beneficiaries.

12. After a full hearing of the objection proceedings as to whether a grant of letters of administration intestate should be issued to Elizabeth Mugure Kabata, Solomon Muniu Kabata and Evanson Kangethe Kabata, the trial court delivered its ruling on 16th April 2012. The court ordered that the grant be issued jointly to a family member of the petitioners and a family member from the objector's side. In arriving at this decision, the trial court observed, inter alia, as follows:

“The issues raised in court to me did not seem acrimonious since the land dispute was ongoing even during the lifetime of the deceased as evidenced by the former Chief Rironi. It therefore goes without saying that the objectors rightfully before court are entitled to their prayers. In this case the deceased has an immediate family and also other dependants as per the wording of the P&A rules. It will be unjust to lock out the objectors in the administration of property clearly held in trust for them.”

13. As per the ruling and orders of the trial court, a grant of letters of administration intestate was made to Solomon Muniu Kabata (son of the deceased), and Eliud Ngugi Mbugua (son of Mungai Munyuko - the original petitioner) on 20th May 2014. It is the events which followed after the issuance of the said grant that proved to be acrimonious.
14. Vide summons dated 8th July 2014, Solomon Muniu Kabata sought orders that the grant made jointly to himself and Eliud Ngugi Mbugua be confirmed. The thorn in the flesh was his proposed mode of distribution as per his affidavit in support of the said summons for confirmation of the grant. He had proposed that Limuru/Rironi/51 be shared out as follows: Solomon Muniu Kabata, Stephen Kironji Kabata and Earnest Kimotho Kabata (all sons of the deceased) to get a 1/3 share which they would share amongst themselves equally, Eliud Ngugi Mbugua (nephew of the deceased) to get 1/3 share of the said property, and the remaining 1/3 share to go to Peter Mungai (nephew of the deceased); Limuru/Rironi/T.190 to be shared jointly in equal shares by Solomon Muniu Kabata and Stephen Kironji Kabata (both sons of the deceased); and Limuru/Rironi/1114 to go to Evanson Kangethe Kabata (son of the deceased) and Elizabeth Mugure Kabata, who was to hold it in trust for the daughters of the deceased.
15. The summons and more specifically the proposed mode of distribution of the deceased's estate precipitated the filing of an affidavit of protest by Eliud Ngugi Mbugua in his capacity as a joint administrator of the said estate and a beneficiary. He reiterated that Limuru/Rironi/T.190 and Limuru/Rironi/51 were assets held by the deceased in trust for his brothers and his nephews and thus the proposed mode of distribution by his joint administrator was flawed. He also contended that the trial court vide its ruling delivered on 16th April 2012 had held that the aforesaid two properties were held by the deceased in trust for the objectors. His proposed mode of distribution was as follows: Limuru/Rironi/51 - Solomon Muniu Kabata, Stephen Kironji Kabata and Ernest Kimotho Kabata to get 1/3 share which they would share equally, Jidraph Ngugi Mbugua and Eliud Kabata Mbugua to hold 1/3 share of the said property for themselves and in trust for the other children of Mbugua Munyuko (deceased), Paul Kahura Mungai to hold for himself and other ^{children of Mungai Munyuko the remaining 1/3} share; Limuru/Rironi/T.190- Eliud Ngugi Mbugua to get 1/3 share, Peter Mungai to get 1/3 share and the remaining 1/3 share to go to Solomon Muniu Kabata and Stephen Kironji Kabata; Limuru/Ngecha/1114 to go to Evanson Kangethe Kabata and Elizabeth Mugure Kabata, who was to hold it in trust for the daughters of the deceased.
16. In his replying affidavit to the mode of distribution proposed by Eliud Ngugi Mbugua, Solomon Muniu Kabata contended that contrary to the allegations by Eliud Ngugi Mbugua, the ruling delivered



by the trial court on 16th April 2012 was on administration and not on the distribution of the deceased's estate. He averred that there was no dispute as far as the distribution of Limuru/Rironi/51 and Limuru/Ngecha/1114 was concerned, and that the disputed distribution as per the mode of distribution contained in the affidavit by Eliud Ngugi Mbugua was in respect of Limuru/Rironi/T.190 which was a plot measuring about $\frac{1}{4}$ of an acre. He averred that Limuru/Rironi/T.190 was the deceased's inheritance from his late father and was never a property held in trust for any person. He further contended that Eliud Ngugi Mbugua and Peter Mungai ^{who were proposed to get $\frac{1}{3}$ share each out of the said property} were nephews of the deceased and could not therefore have any right to inherit the deceased's property which was an inheritance from his late father. In addition, that the deceased's brothers known as Mbugua Munyuko (father to Eliud Ngugi Mbugua) and Mungai Munyuko (father to Peter Mungai) had already inherited LR No. Limuru/Rironi/T.166 in 1979. As such, Eliud Ngugi Mbugua and Peter Mungai could not seek to inherit their father's share in Limuru/Rironi/T.190 again since they got a share of LR No. Limuru/Rironi/T.166.

17. Lastly, he averred that the issue over Limuru/Rironi/51 and Limuru/Rironi/T.190 had been deliberated before the elders and the Land Disputes Tribunal where it was resolved that Kabata Munyuko, Mbugua Munyuko and Mungai Muriuki, get equal shares in Limuru/Rironi/51 and that Limuru/Rironi/T.190 was the sole property of the deceased.
18. In a further affidavit of protest, Eliud Ngugi Mbugua reiterated that Limuru/Rironi/T.190 was held by the deceased in trust and that he (Eliud Ngugi Mbugua) had even built his own house on a section of the said property where he lived with his family. He denied that Limuru/Rironi/T.166 was an inherited property and averred that it did not belong to their grandfather as alleged, and that Mbugua Munyuko and Mungai Munyuko paid for it as required under the Kikuyu customs with 2 rams and a debe of honey.
19. Although the decision by the trial court as to the distribution of the deceased's estate is not part of the record herein, at paragraph 4 of the judgment of the High Court it is indicated that the trial magistrate made a finding that LR No. Limuru/Rironi/T.190 was not held by Kabata Munyuko in trust for Eliud Ngugi Mbugua and his cousins and, therefore, found in favour of the respondent Solomon Muniu Kabata's proposed distribution that Limuru/Rironi/T.190 be shared between himself and his brother Stephen Kironji Kabata, as they were children of the deceased in line with section 38 of the [*Law of Succession Act*](#).
20. Eliud Ngugi Mbugua, being dissatisfied with the decision of the trial court, proffered an appeal before the High Court at Kiambu to wit, Civil Appeal No. 19 of 2018. He contended that the trial Magistrate erred in law and in fact in failing to hold that the deceased Kabata Munyuko held parcel LR No. Limuru/Rironi/T.190 in trust for the respondent (then appellant), Peter Mungai and the late Charles Munyuko Kabata; in departing from the earlier finding of the court dated 6th April 2012 which held that the deceased held Limuru/Rironi/T.190 in trust for the objectors without an appeal or review; in dismissing the respondent's protest dated 12th August 2014; and by misdirecting himself in the appraisal of the evidence, thus arriving at wrong conclusions.
21. After a hearing which proceeded by way of written submissions, the High Court rendered its decision on 27th March 2019. The court identified two issues for determination, namely, whether the deceased held Limuru/Rironi/T.190 in trust for the appellant and his two cousins pursuant to the court ruling dated 16th April 2012, and whether the trial magistrate misdirected himself in the appraisal of evidence and thus erred in dismissing the respondent's protest dated 12th August 2014.
22. As regards the first issue, the court held that the trial court's ruling dated 16th April 2012 did not determine the distribution of the deceased's estate but only directed that the objectors be represented



in the Administration of the Estate. According to the court, the issue for determination by the trial magistrate was for inclusion of the objectors as Administrators, but not distribution of the deceased's estate. To that extent, therefore, the learned judge did not find any fault with the trial magistrate's departure from the order dated 16th April 2012, the same having been complied with.

23. As regards the issue whether the deceased held the property in question in trust for Eliud Ngugi Mbugua and his cousins, the court held, inter alia, that evidence before the trial court showed that the respondent herein settled on the disputed plot in 1973, and that upon visiting the said plot, the trial magistrate observed that the respondent's family occupied the larger part thereof. In addition, that in 1995 a panel of elders determined that the plot be divided among the three beneficiaries, being the respondent and his two cousins. Therefore, according to the court, all the proceedings before the Land Disputes Tribunal and the elders pointed to the same conclusion, that the suit plot was held in trust by the deceased for the respondent and his two cousins. The court therefore held that the holding by the trial magistrate was not in tandem with the evidence on record. In the end, the court found the appeal to be merited and thus allowed it, with the result that the trial magistrate's ruling dated 20th December 2017 was set aside and substituted with one allowing the respondent's protest dated 12th August 2014 together with the proposed mode of distribution in regard to Land Parcel No. Limuru/Rironi/T.190. The said property was therefore to be distributed as follows: 1/3 to Eliud Ngugi Mbugua (the respondent herein); 1/3 to Peter Mungai; and 1/3 to be shared equally between Solomon Muniu Kabata and Stephen Kironji Kabata.
24. Being dissatisfied with the decision of the High Court, Solomon Muniu Kabata proffered this appeal. In his memorandum of appeal dated 21st June 2019, he contends that the learned judge erred in law and in fact in declaring that the deceased held Limuru/Rironi/T.190 in trust for the respondent and his two cousins; in misconstruing and confusing the parties in the cause and thereby arriving at an erroneous decision; in holding that section 66 (a) of the Law of Succession Act was not followed when the same was not applicable in this case; in misapprehending evidence of occupation, giving wrong observations and arriving at an erroneous decision; in misunderstanding the issue of gifts in succession matters and applying the law erroneously; and in misinterpreting and misconstruing the panel of elders decision and confusing LR No. Limuru/Rironi/T.166 and LR No. Limuru/Rironi/T.190 hence arriving at an erroneous decision.
25. At the hearing hereof, none of the parties was in attendance, despite their advocates having being served with a hearing notice. The appellant had filed his submissions dated 11th December 2019 and it was on this basis that this Court reserved a judgment date for this appeal. The respondent did not file any submissions.
26. The appellant submits that what was before the court was a succession matter governed under the provisions of the Law of Succession Act and that by dint of the provisions of sections 2 and 3 of the Law of Succession Act, the powers of the Probates Court do not extend to determination of issues of ownership of properties or determination of trusts. It is submitted that issues to do with ownership of land and trusts are a preserve of the Environment and Land Court. In this regard, therefore, the learned judge erred when she held that the respondent's submissions together with the proceedings before the Land Tribunal and the elders showed that Limuru/Rironi/T.190 was held in trust by the deceased for the respondent and his two cousins.
27. As to the question whether the learned judge misconstrued and/or confused parties and therefore arrived at an erroneous decision, it is contended, firstly, that the learned judge misdirected himself as who applied for confirmation of grant, stating that it was the respondent, while in actual fact both the appellant and the respondent filed summons for confirmation of grant. Secondly, it is submitted that the learned judge continued to misdirect herself by holding that when the trial magistrate visited the



property in question, she observed that the respondent occupied a bigger share, while in actual sense the observation by the trial magistrate was that the appellant's family (the deceased's family) occupied a bigger portion as opposed to the respondent's family. Thirdly, it is contended that the learned judge in confusing the applicant to the summons for confirmation of grant to be the respondent, ended up misdirecting herself when she referred to the deceased's two brothers as Eliud Ngugi Mbugua and Peter Mungai, while in actual fact the two were nephews of the deceased. It is therefore submitted that this confusion and apparent mix up on the part of the learned judge led to her arriving at an erroneous decision.

28. As regards the issue whether the learned judge properly re- evaluated the evidence on the issue of the property being a gift, it is submitted that she did not, because had she properly analyzed the evidence on record, she would have arrived at a totally different decision as the claim for a gift cannot stand in succession matters. The decision of *Re Estate of the Late Gideon Manthi Nzioka (Deceased)* [2015] eKLR has been cited to draw a distinction between gifts made by living persons (gifts inter vivos) and gifts made in contemplation of death (gifts mortis causa) and the requirements of the law in respect of each. It is submitted that the property in question was registered in the name of the deceased, whereas the respondent claimed to have been gifted the said property by his late grandfather, who was not the registered owner thereof.
29. In sum, the appellant contends that the learned judge misapprehended the evidence on record and misdirected himself as to the parties in the proceedings before court and thus arrived at an erroneous decision. This Court is therefore urged to allow this appeal and set aside the decision of the High Court and reinstate the trial court's judgment.
30. This is a second appeal. Accordingly, the jurisdiction of this Court is limited to consideration of matters of law. As was held in *Stanley N. Muriithi & Another vs. Bernard Munene Ithiga* [2016] eKLR, on a second appeal, the Court confines itself to matters of law only, unless it is shown that the court below considered matters it should not have considered, or failed to consider matters it should have considered, or looking at the entire decision, it is perverse. See also *Kenya Breweries Limited vs. Godfrey Oduyo* [2010] eKLR.
31. We have considered the record of appeal, the submissions filed and the law. The only issue of law that is live for our determination is whether the parcel of land in dispute viz, LR No. Limuru/Rironi/T.190 registered in the name of the deceased was held by the deceased in trust for the respondent and his cousins.
32. Before delving into the merits of this appeal, the appellant has contended that the powers of the Probates court do not extend to the determination of issues of ownership of properties or determination of trusts, and that issues to do with ownership of land and trusts are a preserve of the Environment and Land Court. In essence, therefore, the appellant is challenging the jurisdiction of the High Court to make findings and/or orders regarding the existence of a trust in respect of Limuru/Rironi/T.190.
33. In *Bena Nafula Makana & 2 others vs. Nyaoro Akoth Muka Crescentia & 8 others* [2019] eKLR, this Court addressed itself to the question whether the High Court had properly applied the law when it directed the appellant to take proceedings elsewhere to prove the existence of a trust. This Court observed thus:

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“(12) The High Court has unlimited original jurisdiction in criminal and civil matters (Article 165(3)(9) of *the Constitution*). Further, section 47 of the LSA provides for the jurisdiction of the High Court thus:

“The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and pronounce such decrees and make such orders as may be expedient.”

Section 70 of the LSA gives a court wide powers before making a Grant and whether or not there is a dispute as to the Grant including power to call for further evidence as to rights of persons claiming interest on intestacy and power to issue special citations to any person appearing to have reason to object to the application.

Rule 17(1) of the Probate and Administration Rules gives a right to any person, to file an objection to the making of a Grant. Again, Rule 40(6) gives a right to any person wishing to object to the proposed confirmation of the Grant to file an affidavit of protest. Further, in an application for confirmation of Grant, an applicant has to satisfy the court that there is in existence no dependant of a deceased person (Rule 40(2)) and an affidavit in support of the application for confirmation is required to disclose, inter alia, step-parents, brothers, sisters, half- brothers and half-sisters who were living at the time of death of the deceased and were being maintained by him immediately prior to death (Rule 40(3)).

Lastly, Rule 44 gives a right to any person interested in the estate to apply for revocation or annulment of a Grant.”

34. At paragraph 15 of the same judgment, this Court held thus:

“As section 47 of the LSA expressly provides, the High Court has jurisdiction to determine any dispute under the Act relating to intestate and testamentary succession to estates of deceased persons. It does not matter that the determination of a question of trust would make the proceedings litigious or contentious. Rule 58 of P&A Rules recognizes that a succession court would deal with litigious proceedings and Rule 63(1) of P & A Rules imports specific provisions of the Civil Procedure Rules to facilitate the resolution of such disputes. Those rules relate to litigious proceedings. The Civil Procedure Rules which apply to succession proceedings relate to interrogatories and discovery, summoning and attendance of witnesses to give evidence, cross-examination of deponents of affidavits, security for costs and review. Whether or not a court can deal with litigious proceedings is not a question of jurisdiction of the court. Rather, it is a question of whether or not the issue in dispute can be conveniently determined in succession proceedings or in another forum. This was a family dispute. The fact that the land originally belonged to Gaitano and the appellants were closely related to Gaitano and Jacob and have lived in and cultivated the disputed land for a long time coupled with the fact that there were previous proceedings entitled them to be heard in the succession proceedings relating to devolution of the disputed property on intestacy.

It follows that, and we find that, the court erred in declining jurisdiction to entertain the application. Since the court had jurisdiction to entertain the claim in the succession proceedings, the application should not have been dismissed merely on a technicality of procedure.” [Emphasis supplied].

35. We fully associate ourselves with the holding of this Court in *Bena Nafula Makana* (supra). The question as to whether the deceased held the property in issue in trust was one that the High Court



could have conveniently determined in the succession proceedings. The High Court therefore did not err in assuming jurisdiction and in its determination on the issue of the existence of a trust.

36. Returning to the merits of this appeal, the respondent in his affidavit of protest to the summons for confirmation of grant taken out by Solomon Muniu Kabata averred that LR No. Limuru/Rironi/T.190 was a gift from his grandfather, Munyuko Kimotho, to his grandsons (the respondent and his two cousins), who are nephews of the deceased. He contended that the said property was registered in the name of the deceased for him to hold in trust for them. The said gift was made in the year 1973 whereas their grandfather died in the year 1977. In essence, what the respondent was saying was that LR No. Limuru/Rironi/T.190 was a gift made to them by their grandfather inter vivos. As regards the requirement of law and as far as the principle of gift inter vivos is concerned, we adopt the finding of Nyamweya, J. (as she then was) in the case of *Re Estate of the Late Gedion Manthi Nzioka (Deceased)* [2015] eKLR, where the learned Judge stated as follows:

“In law, gifts are of two types. There are the gifts made between living persons (gifts inter vivos), and gifts made in contemplation of death (gifts mortis causa). Section 31 of the *Law of Succession Act* provides as follows with respect to gifts made in contemplation of death:... For gifts inter vivos, the requirements of law are that the said gift may be granted by deed, an instrument in writing or by delivery, by way of a declaration of trust by the donor, or by way of resulting trusts or the presumption of gifts of land must be by way of registered transfer, or if the land is not registered it must be in writing or by a declaration of trust in writing. Gifts inter vivos must be complete for the same to be valid.”

37. According to the respondent, their late grandfather left the said property in the hands of the deceased to hold it in trust for them. In other words, there was declaration of trust by their late grandfather as the donor in regards to LR No. Limuru/Rironi/T.190.
38. The law on trust is well settled. We reiterate the holding of this Court in *Juletabi African Adventure Limited & Another vs. Christopher Michael Lockley* [2017] eKLR that:

“25. 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.’”

39. This Court expressed similar views regarding trusts in *Peter Ndung’u Njenga vs. Sofia Watiri Ndung’u* [2000] eKLR thus:

“The concept of trust is not new. In case of absolute necessity, but only in case of absolute necessity, the court may presume a trust. But such presumption is not to be arrived at easily. The courts will not imply a trust save in order to give effect to the intention of the parties. The intention of the parties to create a trust must be clearly determined before a trust is implied. See *Ayoub vs. Standard Bank of S.A* [1963] E.A. 619 at pp 622, 623.’

See also *Kazungu Fondo Shutu & another Vs. Japhet Noti Charo & another* [2021] eKLR.”

40. It is clear from the above decisions that the existence of a trust is a question of evidence the court will not presume, and/or imply a trust unless in a case of absolute necessity and in order to give effect to the intention of the parties.



41. The onus therefore lay squarely on the respondent to prove that indeed the deceased held the property in question in trust for himself (the respondent) and his cousins. To prove his claim, the respondent testified as PW1 and averred that indeed the property in question did not belong to the deceased and that it was being held by the deceased in trust. However, during cross-examination, he stated that he did not have any evidence to prove that his grandfather gave the said property to him and his two cousins. He also called Patrick Mbiu Kigamba, former Chief Rironi Location, who testified that the deceased was a trustee and that he had adjudicated on the land dispute related to Limuru/Rironi/T.190. However, during cross-examination, he stated that the dispute which he adjudicated on and for which there was a written record was Limuru/Rironi/51 and not Limuru/Rironi/T.190. He stated that in the year 1997 he adjudicated on the dispute involving Limuru/Rironi/T.190 wherein the deceased and his two brothers agreed to share the said property equally. However, the proceedings involving Limuru/Rironi/T.190 were not recorded as the parties did not disagree. Lastly, Mungai Munyuko (the respondent's father) testified as PW3 and stated that the deceased held the property in question in trust for his two brothers, Mungai Munyuko and Mbugua Munyuko.
42. The appellant on his part averred that the deceased was the registered owner of the property in question, and that the said property was never held by him in trust for the respondent and his cousins. He averred that the deceased inherited the said property from his late father, and that the two brothers of the deceased known as Mbugua Munyuko (father to Eliud Ngugi Mbugua) and Mungai Munyuko (father to Peter Mungai) had already inherited LR No. Limuru/Rironi/T.166 in 1979. As such, Eliud Ngugi Mbugua and Peter Mungai could not seek to inherit their father's share in Limuru/Rironi/T.190 again since they got a share in LR No. Limuru/Rironi/T.166.
43. In overturning the trial court's decision which held that the property in question was not being held by the deceased in trust, the High Court held, inter alia, that the proceedings before the Land Disputes Tribunal and the elders pointed to the same conclusion, that the property in question was held in trust by the deceased for the respondent and his two cousins.
44. We have perused the decision of the panel of the elders. From the onset, it is evident that the elders did not accept the purported written will by Munyuko Kimotho (the deceased's father) through which it was alleged that the said Munyuko Kimotho had intended to give the said property to his three grandsons. The pertinent findings by the elders in our view were as follows:
- “It has come to our attention that there exists a plot T/166. The plot originally belonged to Njoroge Kubiwho who was a step-father to the claimant and the defendants (the deceased and his two brothers). Therefore, the 3 sons (the deceased and his two brothers) are equally entitled to the said plot. However, the plot was allocated to Mbugua Munyuko and Mungai Munyuko only. The elders therefore agreed the plot T190 to remain the property of Kabata Munyuko (the deceased) because according to the Kikuyu customs he is entitled to it as a Gift (Uramati). (This is an extra share in division of property given to the son who is left as a trustee of the property to the others until they formally sub-divide it.)”
45. It is clear to us that the decision of the elders did not allude at all to the deceased having held Limuru/Rironi/T.190 in trust for the respondent and his cousins. In fact, in the opinion of the elders, the two brothers of the deceased having inherited Limuru/Rironi/T.166 which belonged to their late step-father and which property the deceased was equally entitled to inherit but did not, then Limuru/Rironi/T.190 would remain the property of the deceased.
46. We have perused the Green Card for Limuru/Rironi/T.166 and note that contrary to the allegations by the respondent that Mbugua Munyuko and Mungai Munyuko purchased the said property and



paid for it by 2 rams and a debe of honey, the said property is expressly indicated to have been a gift to them with each getting ½ share of the property. The decision by the elders and the contents of the said Green Card in our view corroborate the evidence by the appellant that the deceased's brothers known as Mbugua Munyuko (father to Eliud Ngugi Mbugua) and Mungai Munyuko (father to Peter Mungai) had already inherited LR No. Limuru/Rironi/T.166 in 1979. As such, Eliud Ngugi Mbugua and Peter Mungai could not seek to inherit their father's share in Limuru/Rironi/T.190 again since they got a share in LR No. Limuru/Rironi/T.166. The finding by the High Court that the proceedings before the elders supported the respondent's claim on trust was therefore not correct as the decision by the elders held differently as regards Limuru/Rironi/T.190.

47. The respondent, in our view, did not produce cogent evidence before the trial court to show that his grandfather gave Limuru/Rironi/T.190 to him and his cousins and that the deceased held the said property in trust. The former Chief, Rironi Location, did not avail a copy of the proceedings which took place in 1997 wherein it was agreed that the deceased was a trustee and that the three brothers agreed to share the said property equally. The proceedings which were availed in court related to a different property, Limuru/Rironi/51 which is not the property in dispute herein. With this in mind, it is our view that had the High Court properly analyzed the evidence on record, it could not have arrived at the impugned decision.

48. The onus to prove existence of a trust lay squarely on the respondent. Section 107 of the *Evidence Act* further provides that:

“(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

49. The respondent did not, in our view, discharge this burden and therefore the High Court did not have a proper basis for overturning the decision of the trial court.

50. The upshot is that this appeal is fully merited, and the judgment of the High Court cannot stand. We allow the appeal and set aside the judgment of the High Court. We direct that the estate of the deceased be distributed as per the proposed mode of distribution in the affidavit sworn by Solomon Muniu Kabata on 8th July 2014. The appellant shall have costs of this appeal.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF MARCH 2025.

D. K. MUSINGA, (PRESIDENT)

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

F. V. ODUNGA

.....

JUDGE OF APPEAL



I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

