



**Peter v Kamacho & another (Civil Appeal 171 of 2017)  
[2024] KECA 1003 (KLR) (12 April 2024) (Judgment)**

Neutral citation: [2024] KECA 1003 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NYERI  
CIVIL APPEAL 171 OF 2017  
J MOHAMMED, LK KIMARU & AO MUCHELULE, JJA  
APRIL 12, 2024**

**BETWEEN**

**NANCY WANGECHI PETER ..... APPELLANT**

**AND**

**GIDEON KANINI KAMACHO ..... 1<sup>ST</sup> RESPONDENT**

**CYRUS KANINI NDEGE ..... 2<sup>ND</sup> RESPONDENT**

*(Appeal from the judgment of the Environment and Land Court at Nyeri (A. Ombwayo J.) dated 14th October 2016 delivered by L. Waitthaka J., on 8th November 2016 in HCCC No. 137 of 2002)*

**JUDGMENT**

**Background**

1. This is an appeal arising from the judgment of the Environment and Land Court (ELC) which was delivered on 8<sup>th</sup> November, 2016, in which the learned Judge (Ombwayo, J.) found in favour of Gideon Kanini Kamacho (Gideon) and Cyrus Kanini Ndege (Cyrus) (the 1<sup>st</sup> and 2<sup>nd</sup> respondents, respectively) against Kariuki Kanini (Kariuki), Nancy Wangechi Peter (Nancy) and Tabitha Wawira Kariuki (Tabitha) who were defendants in the suit.
2. A brief background will help place the appeal in context. Kariuki was the older brother of Gideon. From the record, their father, Kanini Kimacho was the owner of Land Parcel No. L.R. Kabare/Mutige/65 (the suit property) having been given the said land by the Unjiru clan.  
  
Kariuki was the father of Nancy and the husband of Tabitha while Gideon was the father of Cyrus. They all lived on the suit property. Upon the death of Kanini Kimacho, the suit property was registered in the name of Kariuki, as the first-born son. Gideon and Cyrus contended that Kariuki was supposed to hold the suit property in trust for himself and for Gideon and for their respective dependants all of who lived on the suit property.



3. Gideon and Cyrus further contended that in 1997 Kariuki wrongfully and without regard to the interests of Gideon and Cyrus who were all living on the suit property transferred the suit property to Nancy and Tabitha which action defeated Gideon's and Cyrus' interests in the suit property. Further, that the said transfer was fraudulently perpetrated by Nancy and was done with a view of denying Gideon and Cyrus their lawful entitlement to the suit property.
4. The particulars of fraud by Nancy were namely, procuring her father, Kariuki who was senile to irregularly transfer the suit property to Nancy and Tabitha while she was aware that the suit property was held by Kariuki in trust for himself, Gideon and Cyrus and other persons living on the suit property. Further, that Land Control Board consent was fraudulently and secretly procured without the other beneficial owners of the suit property being informed, yet they were living on the suit property. It was further claimed that the interests of Gideon, Cyrus and other beneficial owners of the suit property was concealed to the local Land Control Board during the subdivision and transfer which fraudulently disentitled Gideon and Cyrus from their rightful entitlement to the suit property.
5. Gideon and Cyrus further contended that as a result of the fraudulent acts of Nancy as aforesaid, Kariuki proceeded to sub-divide the suit property into three (3) portions namely: L. R. Kabare/Mutige/468, L.R. Kabare/Mutige/469 and L.R. Kabare/Mutige/470 (the subdivisions of the suit property) and transferred the said portions to himself, Nancy and Tabitha respectively. Further, that Nancy has attempted to harass and evict Cyrus from the suit property and had instigated criminal proceedings in Kerugoya being Kerugoya SRM Criminal Case 2502 of 1997 where Cyrus was charged with creating disturbance within the suit property.
6. Gideon and Cyrus further claimed that Nancy had further filed Kerugoya SRMCC No. 78 of 1998 seeking to evict Cyrus from the suit property where he has lived all his life. Further, that as result of the fraudulent acts aforesaid and the aforesaid transfers, Gideon and Cyrus risk losing their lawful entitlement to the suit property unless the court finds that Kariuki held the suit property in trust for himself and Gideon and their dependants and the subdivision and transfers of the suit property is fraudulent and irregular.
7. The claim by Gideon and Cyrus was for a declaration that Kariuki held the suit property and all the sub-divisions thereto in trust for himself and Gideon and their dependants and for a declaration that the subdivision and transfers of the suit property was fraudulent and irregular.
8. Gideon and Cyrus further claimed for an order of cancellation of the titles to the subdivisions of the suit property and for an order of injunction restraining Kariuki, Nancy and Tabitha by themselves or their agents and or servants from evicting, harassing or otherwise interfering with Gideon's and Cyrus' quiet enjoyment of the suit property.
9. Kariuki, Nancy and Tabitha as the defendants filed a joint defence denying the allegations in the plaint and stated that the matters raised in the plaint were res judicata; that similar cases were filed by Gideon and Cyrus being Kerugoya Civil Suit No. 81 of 1997; Land Disputes Tribunal Case No. Award 37 of 1997 which was filed at Kerugoya; Milimani Commercial Courts, Nairobi Case No. ELC 1 of 1997 which renders the entire matter res judicata.
10. Kariuki, Nancy and Tabitha further claimed that Gideon and Cyrus have their own land parcel Baragwe/Guama/301 to which they had obtained transfer from Gichugu Land Control Board.
11. At the hearing, Cyrus testified that he was born in 1952 and that Gideon was his father who had since died. He further testified that Kariuki was Gideon's older brother and that they belonged to the clan known as NJiru Mbari ya Ukuba. It was his further evidence that the title to the suit property was closed upon subdivision. That upon carrying out a search in respect of the suit property, the search



- indicated that the suit property was registered in the name of Kariuki as of 28<sup>th</sup> October, 1997. He produced the search which indicates that the suit property was subdivided into 3 as follows:
- a. Kabare/Mutige/468 – registered in the name of Nancy W. Peter
  - b. Kabare/Mutige/469 registered in the name of Nancy W. Peter and Thabitha W. Peter
  - c. Kabare/Mutige/470 registered in the name of Kariuki Kanini.
12. Cyrus further testified that before the suit property was subdivided, the families of Kariuki and Gideon occupied the suit property as their ancestral land. That they moved to occupy the suit property after land consolidation and adjudication. That the village elders registered the suit property in the name of Kariuki being the eldest son to hold in trust for himself and his brother, Gideon. Further, that they are still in occupation of the suit property. It was his further evidence that Gideon lodged a caution against the suit property as a licensee on 24<sup>th</sup> December, 1996. That the caution was removed on 21<sup>st</sup> April, 1997 vide Kerugoya SRMCC No 161 of 1996. It was his further evidence that he was not involved when the caution was removed and that the subdivision was done secretly but this did not oust their claim based on trust. It was his prayer that the subdivisions be cancelled and the suit property be restored to its original state and that the suit property which measured 3.1 acres be shared between the families of Kariuki and Gideon in equal shares.
13. Simeon Ngari Githongo (PW2) testified that he knew Gideon and Cyrus who were father and son. That he came from the same clan and was Gideon's age mate. It was his evidence that after the Emergency, people went back to their land and that Kariuki was registered by the clan elders as the owner of the suit property in trust for himself and his brother, Gideon. That the laws did not allow subdivisions of land below 3 acres and that Kariuki and Gideon were to share the suit property where they both lived with their families. It was his evidence that clan land is normally inherited in equal portions and Kariuki should therefore surrender half of the suit property to Gideon. It was his further evidence that he subsequently received information that Kariuki had subdivided the suit property and registered a part thereof in the name of his wife, Tabitha.
14. Nancy was the sole witness for the defence and testified that her father, Kariuki, was not registered as trustee. She denied that the registration of the subdivisions of the suit property in their favour was fraudulent as they were registered after a court order. That she and Tabitha sued Kariuki in Kerugoya SRMCC No. 161 of 1996 in which a consent order was registered. She testified that the suit property was registered in the name of Kariuki in 1958 and that she was born in 1962. She conceded that her father, Kariuki was given the suit land by the Unjiru clan and that Kariuki's family and that of Gideon both lived on the suit property.
15. In a nutshell, Cyrus' submission was that the parties belonged to the Unjiru clan and the suit property was ancestral land given to the family of Kanini Kimacho and was registered in the name of Kariuki to hold in trust for himself and his brother, Gideon. Further that the parties have lived on the suit property to date and the subdivision and transfer of the land was illegal and fraudulent.
16. Nancy submitted that upon registration of the suit property in the name of Kariuki in 1959, all customary land rights (if any) including the alleged customary trust were extinguished and Kariuki became the absolute owner. It was her further submission that the suit property was not subject to any overriding interests or encumbrances as contemplated under Section 30 of the Registered [Land Act](#) (repealed).



17. Upon considering the evidence, the learned Judge found inter alia as follows:

“To begin with, this court finds that there was no court order removing the caution entered on 24.12.1996. the procedure for removal of caution is clearly spelt in the Registered Land Act (repealed)...This procedure was not followed. It was wrong for the Land Registrar to remove the caution without following the laid down procedure. Failure to follow the said procedure led to the Land Registrar making a decision without affording the plaintiff’s a hearing...there is evidence of concealment from the court that here was a caution on record in the register and that the plaintiffs were in possession of a portion of the land.

The second issue is whether there exist a Kikuyu Customary trust in respect of the parcel of land. ...At the time of filing the suit, the plaintiffs had been in possession and occupation of a portion of the land for more than 50 years. PW2 brought into context evidence

of the customary trust when he testified that he knew what happened during land consolidation and adjudication in 1956 -1957. He testified that Kariuki Kanini was registered as the owner of L.R. No. Kabare/Mutige 65 in trust for himself and his brother Gideon Kanini because the land could not be subdivided below 3 acres and therefore the two brothers were to share the land. On this issue, I do find that there is evidence that Kariuki Kanini held half share of the parcel of land in trust for the 1<sup>st</sup> plaintiff.”

18. The learned Judge went on to hold as follows:

“The upshot of the above is that judgment is entered for the plaintiff in the following terms thus a declaration is hereby issued that the 1st defendant held the suit property L.R. Kabare/Mutige/65 and all the sub divisions thereto namely, L.R. Kabare/Mutige/468, L.R. Kabare/Mutige/469 and L.R. Kabare/470 in trust for himself and the 1st plaintiff and their dependants in equal shares and there (sic) the said trust is hereby desolved (sic) and the property to be shared equally between the two families, and secondly a declaration is issued that the subdivision and transfers of the suit property is irregular. Furthermore, an order is hereby issued cancelling the titles to L.R. Kabare/Mutige/468,

L.R. Kabare/Mutige/469 and L.R. Kabare/Mutige/470 curved following the aforesaid irregular subdivision and transfer of L.R. Kabare/Mutige/468. Lastly, an order of injunction is hereby issued restraining the defendants by themselves or their agents and or servants from evicting, harassing or otherwise interfering with the plaintiffs’

quiet enjoyment of the suit property. Each party to bear own costs, this being a family dispute.

19. Aggrieved by the decision of the ELC, Nancy lodged a notice of appeal dated 11<sup>th</sup> November, 2016 and an amended memorandum of appeal lodged on 5<sup>th</sup> April, 2018 seeking that the impugned judgment be substituted with an order dismissing the respondents’ case on the grounds that the trial Judge erred in: making judgment against the weight of the evidence and on relying on extraneous facts; disregarding that Gideon was deceased by the time the matter was heard and determined; disregarding that the 2<sup>nd</sup> respondent did not have letters of administration for the estate of Gideon hence lacked locus standi to seek for determination of trust on his behalf; failing to find that Kariuki was deceased before determination of the suit hence it was erroneous to make orders for cancellation of the titles to L.R KABARE/MUTIGE/470; failing to find that the existence of a trust was not proved to the required standard; disregarding the decree issued in Kerugoya SRMC CC NO. 161 of 1996, yet there



was no appeal lodged against it; and disregarding the fact that the respondents had their parcel of land, BARAGWI/GUAMA/301.

20. The appellant prayed that for orders that; the appeal be allowed with costs; and that the impugned judgment be set aside and be substituted with an order dismissing the respondents' case with costs.

### **Submissions by Counsel**

21. At the hearing of the appeal, the appellant was represented by the firm of Messrs Magee Law LLP. Counsel submitted that prior to hearing of the suit, the trial Judge made orders that the suit by the 1<sup>st</sup> respondent and that against Kariuki had abated, it was therefore erroneous to make orders relating to an abated suit. Counsel asserted that by virtue of the order that the suit against 1<sup>st</sup> defendant had abated, the respondents' prayer for a declaration of trust against Kariuki was not alive for determination. Counsel further asserted that parcel number Kabare/Mutige/470 was registered in the name of Kariuki hence the prayers for cancellation of this title or injunction thereto was also not alive for determination. Counsel submitted that the ELC therefore erred in making a declaration in respect of an abated suit.
22. Counsel further submitted that the respondents were bound by their pleadings; that the pleadings raised allegations of fraud in particular that the subdivisions of the suit property was fraudulent and the resultant parcels ought to be cancelled. Counsel submitted that the alleged fraud was pleaded to have been committed by the appellant and consequently, only the parcel number which was registered in her name (Kabare/Mutige/468) was available. Counsel asserted that the particulars of fraud were that the appellant procured Kariuki who was senile to transfer the portion of land to her and her mother, Tabitha; that no evidence was led to prove that allegation. However, the trial Judge made a finding that the sub-division of the suit property and transfer of the resultant parcels were fraudulent. Counsel submitted that this finding was based on unpleaded facts, to wit, there was a caution that was removed without a court order. The issue of removal of the caution was also not an issue for determination the same having not been pleaded. Additionally, that the caution was lodged by Gideon whose suit had abated.
23. Counsel further submitted that the trial court acknowledged that the subdivisions were done pursuant to a court order issued in SRMCC No. 161 of 1996 and there was no fraud in the said proceedings. Further, that it was found to be concealment of the caution lodged and the fact that the respondents were in possession of part of the suit property. Counsel further submitted that the trial court's finding amounted to altering the judgment in SRMCC No. 161 of 1996 at Kerugoya yet it was not sitting on appeal against the said judgment. Counsel asserted that the orders issued in SRMCC No. 161 of 1996 were not pleaded for determination in the plaint. Counsel for the appellant relied on the case of Demutira Nanyama Pururmu V. Salim Mohammed Salim [2021] eKLR in support of her argument that fraud was neither pleaded nor proved. Counsel also relied on the case of Tom Ojienda Associates V. Nairobi City Council [2018] eKLR in support of her proposition that an order can only be challenged on appeal or review.
24. The 2<sup>nd</sup> respondent was represented by Messrs Rakoro & Company Advocates. Learned counsel opposed the appeal and submitted that his case was based on trust and illegal subdivisions of the suit property. Counsel asserted that counsel for the appellant merely raised a defence of res judicata but did not controvert the issue of trust.
25. Counsel further submitted that he supported his arguments regarding the ELC's finding that a customary trust existed by relying on the Supreme Court case of Isack M'Inanga Kiebia v Isaaya Theuri M'Lintari & Another [2018] eKLR which spells out the prerequisites which should be present for a



claimant to qualify as a trustee. Counsel asserted that they had demonstrated that the prerequisites of a trust exist in the suit. Counsel urged us to dismiss the appeal.

### Determination

26. This is a first appeal. We have an obligation to consider, analyze and re-evaluate the evidence that was adduced in the trial court in order to arrive at our own conclusion. In doing so we take cognizance of the fact that the trial court had the advantage of seeing and assessing the demeanour of witnesses, and therefore we should defer to the findings of fact made by that court and only interfere if satisfied that the trial court based its conclusion on no evidence or misapprehended the evidence or acted on wrong principles. (*Ephantus Mwangi & Another v Duncan Mwangi*, [1982-1988] 1KAR 278; and *Kenya Airports Authority vs. Kuston (Kenya) Limited* [2009] 2 EA 212). Bearing that in mind, we now turn to analyze the evidence against the issues for determination.
27. We discern the following issues for determination in the appeal: whether the suit was *res judicata*; whether there is a customary trust over the suit property and its subdivisions; whether the suit was purely founded on fraud and if so, whether the impugned judgment was based on fraud; whether the impugned judgment amounted to sitting on appeal on the judgment of SRMCC No. 161 of 1996 at Kerugoya; whether the declaration of trust by the trial court was erroneous in view of Gideon's and Kariuki's abated suits; whether the cancellation of title Kabare/Mutingi/470 was proper when the suit against the registered owner, Kariuki had abated; and whether the injunctive order issued against Kariuki, the appellant and Tabitha were proper.
28. On the question whether the respondent's suit was *res judicata*, issues for determination span from the pleadings filed. It was pleaded by the appellant that the suit before the trial court was *res judicata*, but that the trial court did not address this issue. The appellant has raised a ground that the impugned judgment was against the weight of the evidence. This is what has led to formulation of this issue as it came out boldly from the defence. The appellant highlighted several cases filed by the respondent over the suit property and raised the defence of *res judicata*.
29. Halsbury's Law of England, Fourth Edition (2001 Reissue) Volume 16(2) at paragraph 966 states that there must be a final judgment for the defence of *res judicata* to stand. It is stated as follows:-
- “When the word “final” is so used with reference to a judgment, it does not mean a judgment which is not open to appeal, but merely a judgment which is “final” as opposed to “interim” ...
- The proceedings must have resulted in a final judgment or decree; a pending action without judgment creates no estoppel”
30. Further, this Court in *The Independent Electoral and Boundaries Commission v Maina Kiai & 5 Others*, [2017] eKLR), held that:-
- “For the bar of *res judicata* to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms;
- a. The suit or issue was directly and substantially in issue in the former suit.
  - b. That former suit was between the same parties or parties under whom they or any of them claim.
  - c. Those parties were litigating under the same title.



- d. The issue was heard and finally determined in the former suit.
  - e. The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.
31. The appellant brought out the existence of three suits filed by the respondent, that is, CMCC suit No. 81 of 1997 at Kerugoya, SRMC Land Tribunal Award No. 37 of 1997 at Kerugoya and ELC No. 1 of 1997 at CMCC Milimani Commercial Court. From the record, the appellant has annexed her replying affidavit sworn 15<sup>th</sup> December, 1997, which states at paragraph 5 that the CMCC suit No. 81 of 1997 at Kerugoya by the respondent was terminated through withdrawal. As such the suit was not determined and there is no judgment to operate as estoppel. As regards the SRMCC Land Tribunal Award No. 37 of 1997 at Kerugoya, the same appellant averred in the said replying affidavit at paragraph 7 and 8 that when the award was filed in court, it was not adopted as judgment of the court as the court noted it could not take effect in view of the existence of suit No. 81 of 1997 at Kerugoya.
32. The proceedings for the Land Tribunal Award No. 37 of 1997 are also on record to that effect. It is our finding that no final judgment was entered in respect of this award. Turning to the CMCC ELC NO. 1 of 1997 at Milimani Commercial Court, the record shows that the same was also in respect of adoption of an award of the Land Dispute Tribunal. It is not clear whether judgment was entered as none is attached. That notwithstanding, from the evidence on record the suit land was registered way back in the year 1958 as per the copy of the register produced by Gideon. The proceedings over the suit property before the land tribunals whether judgment was entered in court or not are a nullity for want of jurisdiction. From the above analysis, we find that the defence of res judicata was not merited.
33. On the question whether a customary trust was proved to exist between the appellant and Cyrus over the suit property and its subdivisions, the suit before the trial judge was premised on alleged customary trust. From the record, Gideon died in 2008 while Kariuki died in 2005 after close of pleadings but before commencement of the hearing. The suit by Gideon and that against Kariuki was marked as abated. As such the hearing proceeded between Cyrus, Nancy and Tabitha.
34. In support of these allegation was the evidence of Cyrus and his witness, Simeon Ngari Githongo (Githongo) (PW2) who confirmed to court that the suit property was previously clan land and thereafter during adjudication it was registered in the name of Kariuki as an elder brother in trust for himself and Gideon who was his young brother. According to PW2, the suit property was less than 3 acres while the policy at the time was that the smallest shareholding should be 3 acres leading to registration of the suit property in the name of the elder brother, Kariuki in trust for Gideon. The two brothers, Kariuki and Gideon were to share the suit property in equal shares. Kariuki and Gideon and their families all lived on the suit property. PW2 testified that he later learnt that Kariuki had subdivided the suit property and transferred portions to his wife, Tabitha and daughter, Nancy.
35. Nancy, the appellant herein testified and confirmed that she was born in 1962 and that she found Gideon living on the suit land and they lived together with Cyrus. According to Nancy, the suit property was clan land that was given to her father, Kariuki by the clan.
36. Taking into account the elements of a trustee under customary trust as laid out in the Supreme Court case *Isack M'inanga Kiebia v Isaaya Theuri M'lintari & Another* (supra), the ELC's finding of the existence of a customary trust over the suit property is merited. The Supreme Court laid down the prerequisites for the existence of a customary trust as follows:
- i. the land in question was before registration, family, group or clan land;
  - ii. "the claimant belong to that family clan or group;



- iii. 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;
  - iv. the claimant could have been entitled to be registered as an owner or beneficiary of the land but for some intervening circumstances; and
  - v. the claim is directed against the registered proprietor who is a member of the family clan and group.
37. Further, the Supreme Court stated at paragraph 54 of the decision that the courts “were entitled to enquire into the circumstances of registration, to establish whether a trust was envisaged.” Thus, the evidence tendered by both parties surrounding the 1<sup>st</sup> registration of the suit property in the name of Kariuki and the absence of rebuttal in the defence as regards of existence of trust, points to only one conclusion that the suit property is held by Kariuki’s family in trust for Gideon’s family including Cyrus.
38. On the question whether the suit before the ELC was purely founded on fraud and that the impugned judgment was based on fraud, the appellant raised an issue in her submission that the ELC erred in making a finding of fraud when the same was not proved. The impugned judgment did not consider the issue of fraud. The trial court considered and made a finding on the legality of entry 5 and 6 of the land register that involved the removal of the caution. The trial court held that the required procedure was not followed. The second issue framed by the trial court was on the existence of customary trust and on analysis, the trial court found that Kanini Kariuki held half share of the suit property in trust for Gideon and Cyrus (the respondents). Consequently, the trial court made orders that the subdivision and transfers of the suit property was irregular. The appellant’s ground of appeal that the trial court made a finding of fraud by the trial court has no basis.
39. Further, Cyrus’ case was based on claims of customary trust, fraud and irregularities. The trial court reached its finding that there existed a customary trust over the suit property and there were irregularities committed by the appellant in carrying out subdivisions and transfers of the suit property.
40. On the question whether the ELC’s decision amounted to sitting on appeal on the judgment of SRMCC No. 161 of 1996 at Kerugoya, it is the appellant’s contention that the trial court’s finding that the court orders in SRMCC No. 161 of 1996 at Kerugoya were obtained through concealment from court on the existence of caution and possession of the respondents on the suit property amounted to sitting on appeal on the said judgment. Further the appellant contends that the orders in Kerugoya SRMCC No. 161 of 1996 were not issues for determination in the Plaint before the trial court and it was therefore an error on the part of the trial court to determine the same. Issues for determination spring from the pleadings filed by both parties and not just from the plaint. Issues raised in the defence also form part of issues for determination. This Court in *John Kamunya & another v John Nginyi Muchiri & 3 Others* [2015] eKLR held that:-
- “Generally, the law as we know it is that courts would only determine a case on the issues that flow from the pleadings and that judgment, would be pronounced on the issues arising from the pleadings or from issues framed for court’s determination by the parties.”
41. The appellant in her defence pleaded the existence of court orders in SRMCC No. 161 of 1996 at Kerugoya that led to the subdivisions and transfers, a matter that was challenged by Cyrus in his evidence and the court was mandated to determine the validity of the said line of defence.



Further this Court's decision of John Kamunya & another v John Nginyi Muchiri & 3 Others (supra) went ahead to quote with approval the decision in Chumo Arap Songok v Rotich [2006] eKLR on exceptional circumstances when issues for determination may arise outside the pleadings that:-

“Courts have to pronounce judgment only on the issue arising from the pleadings unless a matter has been canvassed before it by parties and made an issue in the suit through the evidence adduced and submission of the parties.”

The above position of the law supports the trial court's determination of the issue of the judgment in SRMCC No. 161 of 1996 at Kerugoya as that came out from the defence pleaded and the removal of the caution under entry 5 and 6 of the Land Register of the suit property that emerged from the testimony and evidence produced.

Further, the trial court having made a finding of the existence of a customary trust, then, the subdivisions and transfers of the suit property were subject to the customary trust. The same having been done in disregard of the trust, they were irregular. The decision of this Court (Chesoni J.A) in Kanyi v. Muthiora (1984) KLR 712 was quoted with approval in the Supreme Court case of Isack M'inanga Kiebia (supra) at paragraph 33 that:

“The registration of the suit land in the name of Kanyi under the Registered *Land Act* did not extinguish Nyokabi's rights under the Kikuyu customary law, Kanyi was not relieved from her duty or obligation to which she was as a trustee to Muthora's land ”

42. Accordingly, notwithstanding that the appellant had obtained a valid court order for subdivision and transfer of the suit property, the implementation of the said court order was subject to the existing customary trust. The subdivisions and transfers as per the impugned court order did not extinguish the customary trust that existed over the suit property. Kariuki held the suit property in trust for Gideon.
43. On the question whether the declaration of trust by the trial court was erroneous noting that the suits by Gideon and Kariuki had abated, although Gideon's suit had abated, because of the joint claim, paragraph 15 of the Complaint brings out Gideon's claim to court. Under the said paragraph, Gideon sought for a declaration that Kariuki held the suit property and all its subdivisions thereto in trust for himself, Cyrus and their dependants and for a declaration that the subdivision and transfers of the suit property to Kariuki, Nancy and Tabitha is fraudulent and irregular. This is repeated under prayer (a) and (b) of the Complaint. As such, the claim by Cyrus was still alive for determination notwithstanding that Gideon's suit had abated. Accordingly, the trial court had a duty to determine the issue and make a finding. This is in line with Order 24 rule 1 of the Civil Procedure Rules, 2010 which provides that the death of a plaintiff or defendant shall not cause the suit to abate if the cause of action survives or continues. Further Order 24 Rule 2 gives the procedure when one of several plaintiffs or defendants dies and right to sue survives as follows:-

“Where there are more plaintiffs or defendants than one, and any one of them dies, and where the cause of action survives or continues to the surviving plaintiff or plaintiffs alone or against the surviving defendant or defendants alone, the court shall cause an entry to that effect to be made on the record, and the suit shall proceed at the instance of the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants.”



44. This Court in *Mbui Mukangu v Gerald Mutwiri Mbui* [2004] eKLR stated that:-

“Customary trust is a concept of intergenerational equity where the land is held by one generation for the benefit of succeeding generations.”

We therefore find that notwithstanding that the claim by Gideon had abated, the claim by Cyrus was still valid and enforceable. The same reasoning applies to the claim against Kariuki. The claim against Nancy was therefore still valid and enforceable notwithstanding that the suit against Kariuki had abated.

45. The upshot is that this appeal has no merit and is dismissed with costs.

**DATED AND DELIVERED AT NYERI THIS 12<sup>TH</sup> DAY OF APRIL, 2024**

**JAMILA MOHAMMED**

.....

**JUDGE OF APPEAL**

**L. KIMARU**

.....

**JUDGE OF APPEAL**

**A. O. MUCHELULE**

.....

**JUDGE OF APPEAL**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

