



**Kimotho v Kabui & 7 others (Civil Appeal 31 of 2017)  
[2024] KECA 804 (KLR) (5 July 2024) (Judgment)**

Neutral citation: [2024] KECA 804 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NYERI  
CIVIL APPEAL 31 OF 2017  
W KARANJA, MSA MAKHANDIA & AK MURGOR, JJA  
JULY 5, 2024**

**BETWEEN**

**STEPHEN KIMOTHO ..... APPELLANT**

**AND**

**BEATRICE WAMBUI KABUI ..... 1<sup>ST</sup> RESPONDENT**

**JANE MUTHONI NYAMU ..... 2<sup>ND</sup> RESPONDENT**

**CATHERINE WANGUI KINYUA ..... 3<sup>RD</sup> RESPONDENT**

**ELIZABETH GACAMBI WACHIRA ..... 4<sup>TH</sup> RESPONDENT**

**MERCY WACHUKA KABUI ..... 5<sup>TH</sup> RESPONDENT**

**TABITHA NJOKI WACHIRA ..... 6<sup>TH</sup> RESPONDENT**

**DAMARIS WAMUTIRA KABUI ..... 7<sup>TH</sup> RESPONDENT**

**ANDREW KABUI ..... 8<sup>TH</sup> RESPONDENT**

*(Being an appeal from the judgment of the Environment and Land Court at Kerugoya (B.N. Olao, J.) dated 18th September 2015 in ELC Case No. 29 OF 2012 'B')*

**JUDGMENT**

1. The appellant filed the present appeal to challenge the decision of the Environment and Land Court (ELC) dated 18<sup>th</sup> September, 2015 in ELC Case No. 29 of 2012, whereby Beatrice Wambui Kabui, Jane Muthoni Nyamu, Catherine Wangui Kinyua, Elizabeth Gacambi Wachira, Mercy Wachuka Kibui, Tabitha Njoki Wachira, Damaris Wamutira Kabui and Andrew Kabui, (the respondents herein) filed a suit by way of a plaint dated 4<sup>th</sup> September 2012 against, Stephen Kimotho Kabui, (the appellant herein).



2. The respondents sought orders, inter alia, as follows:-

- “ a) A declaration that Land Parcel Number Mutira/Kaguyu/3157 is registered in the name of the defendant as a trustee for himself and the plaintiffs;
- b) An order compelling the defendant to sub-divide into equal portions and to register the sub- divisions and transfers in favour of the plaintiffs and the defendant respectively.”

3. The appellant filed his defence and denied the respondents’ claim in totality. He averred that Title No. Mutira/Kagura/3157 (the suit property) was a gift inter vivos to him from his father Livingstone Kabui Kimotho given during his lifetime and that he accepted the gift and was registered as the absolute owner on 24<sup>th</sup> November 1998. He further averred that the interest passed to him by way of the gift of the suit property was absolute and outright and free from any restrictions. He alleged that the gift was not subject to any trust or other obligations at all and that he, therefore, did not owe any trust obligation to the respondents over the suit property. That they were adults and if any wanted a gift of land from their father they would have asked for it from him or coerced him to release it during his lifetime. He stated that his father owned the suit property absolutely and therefore had the legitimacy to dispose of it in any manner he deemed fit, and as such the respondents had no proprietary interest in the suit property and the purported claim was an afterthought and unfounded and that other than the 7<sup>th</sup> respondent, the rest of the respondents did not reside or work on the suit property.

4. The ELC (B.N. Olao, J.) entered judgment in favour of the respondents against the appellant, with the learned Judge expressing himself as follows;

“After considering the evidence on both sides this court is satisfied that the plaintiffs have proved their case against the defendant and that he holds the suit property in trust for them. In a case such as this the plaintiff ought to seek the determination of trust in the pleadings and this court will do just that because it is the natural consequence where a trust is found to exist. Secondly the 8<sup>th</sup> plaintiff is only a son of the 1<sup>st</sup> plaintiff and so he can only claim his mother’s share of the suit property. His Claim against the defendant is therefore dismissed. Ultimately therefore there shall be judgement for the 1<sup>st</sup> to 7<sup>th</sup> plaintiffs against the defendants in the following terms:-

1. A declaration that Land Parcel No.Mutira/Kaguyu/3157 is registered in the defendant’s names as trustee for himself and the 1<sup>st</sup> to 7<sup>th</sup> plaintiffs and the said trust is hereby determined.
2. An order compelling the defendant to sub- divide it into equal portions and to register the sub-divisions and transfer in favour of the 1<sup>st</sup> to 7<sup>th</sup> plaintiffs and defendant respectively.
3. As much as possible the subdivisions should be in accordance with the portions currently occupied by the 1<sup>st</sup> to 7<sup>th</sup> plaintiffs.
4. The Deputy Registrar of this court should be at liberty to sign the transfer on behalf of the defendant should he fail to do so upon application by the 1<sup>st</sup> to 7<sup>th</sup> plaintiffs.
5. As the parties are family each shall bear their own costs.”



5. It is against this judgment that the appellant brought this appeal. In his memorandum of appeal dated 20<sup>th</sup> March, 2017, the appellant raises nine (9) grounds of appeal which principally assail the learned Judge for finding that the respondents had proved their case on a balance of probabilities; and in particular for finding that the appellant held the suit property in trust for his named siblings.
6. The appellant faulted the learned Judge for failing to rely on section 27(a) of the Registered Land Act (repealed) as read with Section 24(a) of the Land Registration Act which clearly highlighted the legal status of the appellant as the absolute owner of the suit property. According to the appellant, the learned Judge erred in law and fact in holding that the suit property was clan land and, therefore, the appellant held it in trust for the respondents.
7. Although the Court gave directions on filing of submissions, only Mr. Gathara Mahinda, learned counsel for the appellant did. Learned counsel for the respondents, Mr Ngigi Gichoya, did not file any submissions but when the appeal came up for plenary hearing he was allowed to make brief oral submissions.
8. With regards to ground 1, Mr. Gathara submitted that on inference of a trust the appeal hinges on whether there was evidence tendered to prove on a balance of probabilities that the appellant held the suit property in trust for respondents. It was submitted that in appreciation of the provisions of section 126(1) of the Registered Land Act (repealed) which made it a non-requirement for the existence of a trust to be endorsed on the instrument of acquisition a trust cannot, because of its lack of endorsement, be easily inferred. Further that in line with the provisions of the Evidence Act a party alleging trust must lead evidence to prove the same. It was submitted that where there is no express evidence then the position addressed in the case of Marie Ayoub & another -vs- Standard Bank of South Africa, Privy Council Appeal No.14 of 1962 is applicable to wit: “The concept of a trust is not new, in case of absolute necessity but only in case of necessity the court may presume a trust. But such presumption is not to be arrived at easily. The intention of the parties to create a trust must be clearly determined before a trust is implied.”
9. It was submitted that from the evidence on record Livingstone Kabui Kimotho was the registered proprietor and absolute owner of land Title No. Mutira/Kaguyu/226 measuring around 8 acres and that he thereafter subdivided it into two parcels, the suit property measuring about 7 acres and land Title No. Mutira/Kaguyu/3158 measuring one acre, that it was the 1<sup>st</sup> respondents’ unsupported evidence that the suit property was registered in the appellant’s name in trust for himself and the respondents while land Title No. Mutira/Kaguyu/3158 was registered in the name of one Beatrice Wanjiku Kabui, Livingstone Kabui’s second wife in trust for the second house.
10. It was also submitted that the sum of the 1<sup>st</sup> respondent’s evidence is not only to infer the said subdivisions were held in trust but also to infer that there was a nomination of two trustees each representing one house and further that Livingstone Kabui Kimotho only owned that one parcel of land Title No. Mutira/Kaguyu/226. Further that in simpler terms the 1<sup>st</sup> respondent wanted to show that because Beatrice Wanjiru Kabui was given land Title No. Mutira/Kaguyu/3158 the same was to be held in trust for the second house and therefore the appellant must have held the suit property in trust for the first house which is unsupported.
11. It was further submitted that from the evidence presented by the appellant, Livingstone Kabui in 1998 gave his three parcels of land as follows: that the suit property was given to the appellant as a gift absolutely, land Title No. Mutira/Kaguyu/3158 was allocated to his step mother, Beatrice Wanjiru absolutely and that land Title No. Mutira/Kaguyu/227 was given to his step brother Kabata Kabui absolutely. Also, that the evidence was not contradicted and was further supported by the copy of



- abstract of title, which shows Kabata Kabui as the registered proprietor of land parcel Title No. Mutira/Kaguyu/227 measuring around 5.6 acres. Counsel submitted that from those facts there was no intention to create a trust.
12. Learned counsel went on to state that it is quite peculiar that contrary to Kikuyu custom no one, no elders, none of the respondents' uncles were present when the alleged trust was created or, could even be presented before the honourable court to affirm existence of the alleged trust. Also that it is even more puzzling to allege existence of a trust in these circumstances when such trust could serve no purpose for the reason that in 1998 all the respondents were mature adults and that if the deceased Livingstone Kabui transferred Title No. Mutira/Kaguyu/3158 to his second wife what could have prevented him likewise from transferring a portion of the land to his first wife or the 1<sup>st</sup> respondent who says she was divorced and had gone back to her father's house. That the truth of the matter is that Livingstone Kabui Kimotho the registered proprietor and absolute owner of the said parcels of land legitimately disposed of his land in a manner he deemed fit while alive.
  13. Counsel further submitted that the respondents' controverted evidence alone should not be relied upon to infer a trust and that the respondents failed to establish their case on a balance of probability. Also, that the appellant is the absolute registered owner of the suit property being a gift from his father and the same is not held in trust for the respondents. Reliance was placed in the case of *Muriuki Marigi -vs- Richard Marigi Muriuki, Nyeri Court of Appeal No.189 of 1996* (UR) for the proposition that a child cannot demand or coerce his or her parent while alive to give out his or her properties to the child as a share of inheritance. We were urged to allow the appeal with costs.
  14. In opposing the appeal, Mr. Ngigi, as already stated, made brief oral submissions at the plenary hearing of the appeal. He reiterated that after the sub-division of the original parcel into two portions, one portion was transferred to Beatrice Kabui to hold in trust for the first house, while the appellant was registered as trustee for himself and the other members of his house. Counsel placed reliance on the Supreme Court decision in *Isack Kieba M'inanga -vs- Isaaya Theuri M'Lintari & another* [2018] eKLR, which he submitted set out the principles the Court has to consider in determining whether a person qualifies as a trustee under customary law. He urged that the respondents had proved that the appellant held the suit property in trust for them, and we should so find.
  15. We have considered the appeal, the submissions of both counsel and the law, particularly as espoused in the cases cited before us. This being a first appeal, it is our duty to re- evaluate, re-assess and re-analyze the evidence on record and then determine whether the conclusions reached by the learned ELC Judge should be upheld. See *Kenya Ports Authority -vs- Kuston (Kenya) Limited* [2009] 2EA 212.
  16. In addition to the above parameters, we are alive to the fact that this Court should only interfere with the findings of the trial court where the decision is based on no evidence or on a misapprehension of the evidence or where the trial court is demonstrably shown to have acted on wrong principles in reaching its findings. See *Mwanasokoni -vs- Kenya Bus Services* [1985] KLR 931.
  17. This appeal being one that turns on the issue of trust, we reiterate at the outset the statement made by this Court in *Juletabi African Adventure Limited & Another -vs- Christopher Michael Lockley* [2017] eKLR 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.’ See *Mbothu & 8 Others vs Waitimu & 11 Others* [1986] KLR 171 at p. 189.”

See also Peter Ndung’u Njenga -vs- Sofia Watiri Ndung’u [2000] and Ayoub -vs- Standard Bank of S.A [1963] E.A. 619 at pp 622, 623.

18. As the issue of trust is the gravamen of this appeal, we find it appropriate to quote, in extenso, the following passage from *Twalib Hatayan & another -vs- Said Saggar Ahmed Al- Heidy & 5 others* [2015] eKLR, in which this Court expounded the law on the subject.

“Trusts are created either expressly (by the parties) or by operation of law. An express trust arises where the trust property, its purpose and beneficiaries have been clearly identified (see. *Halsbury’s Laws of England Vol. 16 Butterworths 1976 at para 1452*). In the absence of an express trust, we have trusts created by operation of the law. These fall within two categories; constructive and resulting trusts. Given that the two are closely interlinked, it is perhaps pertinent to look at each of them in relation to the matter at hand. A constructive trust is an equitable remedy imposed by the court against one who has acquired property by wrong doing. (See *Black’s Law Dictionary 9<sup>th</sup> Edition*). It arises where the intention of the parties cannot be ascertained. If the circumstances of the case are such as would demand that equity treats the legal owner as a trustee, the law will impose a trust. A constructive trust will thus automatically arise where a person who is already a trustee takes advantage of his position for his own benefit (see. *Halsbury’s Laws of England supra at para 1453*). As earlier stated, with constructive trusts, proof of parties’ intention is immaterial; for the trust will nonetheless be imposed by the law for the benefit of the settlor. Imposition of a constructive trust is thus meant to guard against unjust enrichment.”

19. In brief what arises from the above decisions is that whereas trusts are normally created expressly by the parties where their intention is made clearly known, a constructive trust may arise through operation of the law where there is no formal trust or express intention to create a trust. In such a situation, the prevailing circumstances must be such as to require equity to come in to guard against unfairness and unjust enrichment. A trust may, therefore, be inferred in favour of the beneficiary where a person who is in a position of trust takes advantage of his/her position, for his or her own benefit, to the detriment of the beneficiary.
20. The burden of proof was on the respondents to prove the facts upon which they alleged the existence of a trust on the suit property. There was the oral evidence from the 1<sup>st</sup> respondent to the effect that the 2<sup>nd</sup> to 6<sup>th</sup> respondents were her sisters while the 7<sup>th</sup> respondent was her mother and the 8<sup>th</sup> respondent was her son, she testified that their late father Kabui Kimotho (deceased) was the registered owner of land parcel No. Mutita/Kaguyu/226 and that her father during his life time subdivided the same into two portions namely Mutita/Kaguyu/3158 which was given to Beatrice Wanjiru Kabui (deceased) and the suit property which was given to the appellant to hold in trust for the house of the 7<sup>th</sup> respondent. She stated that she lived on the suit property where she had planted tea bushes and other crops and so did the 7<sup>th</sup> and 8<sup>th</sup> respondents. Her further evidence was that the 2<sup>nd</sup>, 3<sup>rd</sup> and 6<sup>th</sup> respondents cultivated a portion of the suit property but they did not live there. Her evidence was corroborated by PW2 Joseph Nguyo Karoki, a member of their Ugaciku Clan who testified that the late Kabui Kimotho had two wives; the late Beatrice and Damaris the 7<sup>th</sup> respondent and that during his life time he subdivided his land Mutita/Kaguyu/226 into two portions being (the suit property) measuring six (6) acres which he gave to the appellant to share with his siblings and that is why they lived on the suit property and that the other house was to occupy the other parcel of land being Mutita/Kaguyu/3158.



21. In his judgment, the learned Judge stated as follows:

“Part of the documentary evidence produced herein were the proceedings in the Land Disputes Tribunal Case No 6 of 2011 (Plaintiff’s Exhibit 4) in which the 7<sup>th</sup> plaintiff who is the defendant’s mother had sued him over this same land. In that case the other plaintiffs were her witnesses and in her evidence in chief, the 7<sup>th</sup> plaintiff stated as follows:-

“This land Mutira /Kaguyu/3157 belonged to my husband awarded to him by the clan during demarcation. My husband has since married another woman and so he subdivided the land into two on my part we agreed that Stephen Kimotho to be registered as a trustee of the land and that is how he became the proprietor of the land. Before my husband died he had given everybody in the family a portion to work on including those who were married. He also directed that everybody in the family is at liberty to acquire a portion in the land and as you can see I am alive as his wife and this land is rightly mine but we set my son just as a trustee which he now wants to violate. My plea is that the time has now come for this land to be sub-divided each person to his or her own portion as was the wish of my late husband. I want to leave my children in peace when I die.””

22. The learned Judge observed that the Land Dispute Tribunal accepted the testimony which was supported by all the other witnesses and proceeded to order sub-division of the suit property between the plaintiffs and the defendant. But since the Land Disputes Tribunal had no jurisdiction, the orders were set aside but he held that, nevertheless, what the 7<sup>th</sup> respondent told the Land Disputes Tribunal remained evidence and formed part of the record irrespective of the fact that the decision was subsequently set aside for want of jurisdiction.
23. The learned Judge went on to hold that he Court must consider and take that evidence into account notwithstanding the fact that the 7<sup>th</sup> plaintiff did not testify in this case. Her evidence clearly supported that of the 1<sup>st</sup> plaintiff and showed the existence of a trust. The learned Judge found there was evidence that although some of the plaintiffs do not live on the suit property they in fact work on it. Therefore, both the respondents and the appellant either occupy or work on the suit property. This can only be pursuant to the directive of their deceased father that they share the same on behalf of their mother’s house, the other portion having gone to the house of the second wife. Although the suit property is registered in the names of the appellant, it is clear, following the decision of this Court in *Mbui Mukangu -vs- Gerald Mbui C.A. Civil Appeal No 231 of 2000 (Nyeri) (UR)* which was cited by Mr. Ngigi, that the registration of land in one’s name does not relieve the registered proprietor of his duties or obligations as a trustee. The suit property herein was originally clan land given to the parties’ father before being registered in the appellant’s name.
24. We find that the learned Judge properly directed himself that in the absence of an express agreement, a look into the conduct of the parties was the most plausible way to establish whether such an agreement existed. The learned Judge properly addressed the conduct of the parties and their late father and husband, Livingstone Kabui Kimotho, who before his death subdivided his land being parcel No. Mutita/Kaguyu/226 into two portions: the suit property and Mutita/Kaguyu/3158 which he gave to his first wife Beatrice Wanjiru Kabui to hold in trust for her house which was the 1<sup>st</sup> house and the suit property which was given to the appellant to hold in trust for the 2<sup>nd</sup> house.



25. Customary trust was well explained by the Supreme Court in the case of Isack Kieba M'inanga -vs- Isaaya Theuri M'Lintari & another (Supra), 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 -vs- 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.”
26. In this case, the respondents had pleaded customary trust in the suit. The appellant's case is that he was the absolute registered owner of the suit property pursuant to the suit property being given to him as a gift by his deceased father. The provisions of the law above are to the effect that the overriding interest such as customary trust need not be noted in the Register of the suit property.
27. Therefore, it follows that registration of a person as a proprietor of land does not preclude him from holding an interest in trust for another. Customary trust is an encumbrance on land. These are non-registrable rights which run with the land. They are overriding. They subsist on the land. In the case of Kanyi Muthiora -vs- Maritha Nyokabi Muthiora [1984] eKLR this Court stated that;

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

28. We, like the trial Judge, note that the title of the suit property did not overtly indicate the suit property was trust land. The appellant was born to a polygamous family with the 1<sup>st</sup> - 6<sup>th</sup> respondents as his sisters and it was, therefore, realistic that he as the only son in that household to be entrusted by his father to hold the suit property in trust for that house. The legal burden to prove the existence of the trust rests with the one who is asserting a right under customary trust. To discharge this burden, the person must prove that:- (a) the suit properties were ancestral clan land; (b) during adjudication and consolidation, one member of the family was designated to hold on behalf of the family; (c) the registered persons were the designated family members who were registered to hold the parcels of land on behalf of the family. In essence, one had to lay bare the root of the title to create the nexus or link of the trust to the title holder and the claimant.



- 29. Going by the decision of the Supreme Court in Isack Kieba M'inanga -vs- Isaaya Theuri M'Lintari & another (supra), it follows that evidence must be led that points to the root of the land. Pertinent questions that must concern this Court are such as; how was the land first registered? Was it clan, communal or family land before registration? Was the land inherited or passed down from the family lineage of Livingstone Kabui Kimotho (Deceased)? How did Livingstone Kabui Kimotho (Deceased) acquire this land? Did he inherit or he acquired it by way of purchase or a gift? From the evidence led by both parties they agree that the land was registered and owned by their father and husband respectively. Upon his death it devolved to Beatrice Wanjiru Kabui (deceased) Livingstone Kabui Kimotho (deceased) 1<sup>st</sup> wife and to the appellant a son of Livingstone Kabui Kimotho (deceased). Both title deeds were issued on 24<sup>th</sup> November, 1998 as per the 2 houses that he had as a polygamist. There is evidence tendered before this Court to show that the land is customary land, that is to say, it is land that was encumbered with a trust.
- 30. In effect, possession, or occupation or usage of the land is no longer a requirement to establish a customary trust and as such the appellant's averments that some of the respondents do not reside on the suit property cannot hold. The respondents established the circumstances that could justify the court bringing a constructive trust into play and which circumstances this Court agrees with. From the record it is obvious that the appellant occupies the entire suit property which amounts to unjust enrichment by himself from the suit property which he was to hold in trust for the benefit of his mother's house, the 2<sup>nd</sup> house and for his sisters the 1<sup>st</sup> to 6<sup>th</sup> respondents.
- 31. We agree with the conclusion reached by the trial court that the respondents tendered evidence that was sufficient to establish that the appellant was registered as the proprietor of the suit property in trust for them. The trial court cannot be faulted in its findings. It is therefore clear that the respondents proved their case against the appellant.
- 32. Considering the entirety of the circumstances we find that the suit property was not an outright gift given to the appellant, but was given to be held in trust for respondents.
- 33. Taking all the above matters into account, we are satisfied that the present appeal is devoid of merit. This being a family dispute, each party to bear their own costs.

**DATED AND DELIVERED AT NAIROBI THIS 5<sup>TH</sup> DAY OF JULY, 2024**

**W. KARANJA**

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**JUDGE OF APPEAL**

**ASIKE-MAKHANDIA**

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**JUDGE OF APPEAL**

**A.K. MURGOR**

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**JUDGE OF APPEAL**

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

Signed

**DEPUTY REGISTRAR**

