



**Mithamo & another v Mithamo (Civil Appeal 76 of 2022)
[2024] KECA 1864 (KLR) (20 December 2024) (Judgment)**

Neutral citation: [2024] KECA 1864 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPEAL 76 OF 2022
W KARANJA, J MOHAMMED & LK KIMARU, JJA
DECEMBER 20, 2024**

BETWEEN

JOHN KANGANGI MITHAMO 1ST APPELLANT

GLADYS MUTHONI KANGANGI 2ND APPELLANT

AND

JOSEPHINE WANJIRU MITHAMO RESPONDENT

(An appeal from the judgment of the Environment and Land Court of Kenya at Kerugoya (E. Cherono, J.) dated 15th October 2021 in ELC Cause No. 120 of 2017)

JUDGMENT

1. This is an appeal against the decision of the Environment and Land Court (ELC) dated 15th October, 2021. Josephine Wanjiru Mithamo, (the respondent) filed her suit by way of Originating Summons dated 6th July, 2017 against John Kangangi Mithamo and Gladys Muthoni Kangangi (the 1st and 2nd appellants).
2. The respondent sought:
 - “(a) A declaration that under section 38 of the Limitation of Action Act cap 22 Laws of Kenya the Plaintiff/Applicant has acquired title of one-acre portion out of Land Parcel No. Inoi/Thaita /75 (the suit property) by adverse possession;
 - b. An order that the Plaintiff/Applicant be registered as the absolute proprietor of a One Acre portion to be curved from the suit property; and



- c. That in the alternative and without prejudice to the foregoing the defendant is estopped from in any way denying the Plaintiff title and possession of One Acre portion out of Land Parcel No. Inoi/Kerugoya /75 to the plaintiff.”
3. In the originating summons the respondent claimed that the suit property is held in trust by the 1st appellant. She urged the court to find that the suit property is a share of her inheritance from her deceased father and is held by the 1st appellant as the eldest and only male child of their father, Mithamo Gachungu (the deceased) in trust for her and other family members. She further claimed that the 1st appellant in breach of the said trust, had gifted his wife, the 2nd appellant herein w the suit property which was registered in the names of the 1st and 2nd appellants on 6th June, 2014 with the aim of defeating her claim over the one-acre portion of the suit property that she was in occupation of. The respondent further urged the ELC to issue orders that she was entitled and had acquired title by way of adverse possession to the one acre portion of the suit property that she had been utilizing.
 4. In her affidavit sworn on 6th July, 2017 in support of her claim, the respondent averred that the suit property was initially registered in name of the 1st appellant and was currently registered in the joint step brother and sister and son and daughter respectively to the deceased; that the deceased was polygamous having married the 1st appellant’s mother as the 1st wife and the respondent’s mother as the second wife; that the deceased died before the land adjudication process and during the demarcation their clan “Umbui of the branch of Ngima” chose the 1st appellant to be registered as a trustee of their father’s family in 1958.
 5. The respondent further stated that they had lived on the suit property together with her two children and her mother, Jane Wanjiru Mithamo (deceased) who passed away in 2006; that after her mother passed on the 1st and 2nd appellants had denied her access to the suit property; that when she insisted that she continues cultivating the portion that she and here mother had been utilizing, the 1st and 2nd appellants demolished the house that she was living in with her mother; that on 6th June, 2014 the 1st appellant enjoined the 2nd appellant in the title by way of a gift to defeat the respondent’s claim of one (1) acre out of the suit property as the same belonged to their deceased father; that the 1st appellant was registered as proprietor of the suit property with the understanding that he holds the same in trust for the Mithamo family as he was the only son of their deceased father.
 6. Further, that the 1st appellant knew that the suit property comprises the estate of Mithamo family and caused the same to be registered jointly with his wife (the 2nd appellant) without consent from the other respective mothers were deceased at the time; that after the 1st appellant adamantly refused to allow her access to the suit property, she sought the assistance of their clan elders; that on 13th May, 2017 the Chairman of the clan summoned her and the 1st appellant and after hearing the matter the Chairman of the clan assisted by six members resolved that the respondent be given one acre of the suit property by the 1st appellant for the reasons that she had been living on the suit property for many years together with her late mother.
 7. The respondent further stated that she has resided on the suit property since birth continuously until the demise of her mother in 2006; that she has developed the suit property by planting coffee stems which the 1st appellant has denied her access to attend to. Further, that she has been advised that due to her long stay on the suit property she has acquired one acre thereof by way of adverse possession and urged the court to declare her as the owner of one acre of the suit property and that title thereof do issue in her name after subdivision; and that the 1st appellant has never interfered with her occupation of the one acre of the suit property for over 12 years until her mother died.



8. In the 1st appellant's replying affidavit sworn on 30th August, 2017 on his behalf and that of the 2nd appellant, in response to the application, the 1st appellant averred that he was not a son of Mithamo Gachungu (deceased); but a son of Ngunga Gachungu also known as Mwai Gachungu, and that his father and that of the respondent were that he only took his uncle's name, Mithamo as his surname because his father had died before he attained the age of majority.
9. The 1st appellant further stated that at the time of demarcation he was an adult and gainfully employed as a teacher and he used his own contributions to their Umbui Clan and was allocated the suit property absolutely and not as a trustee for anyone; that the respondent's step brother, one Kimotho Mithamo was also allocated his land L.R Inoi/Thaita/181 and if indeed anyone was registered as trustee for the respondent it would be the said Kimotho Mithamo; that at the time of demarcation the respondent's mother, one Jane Wanjiku Mithamo was elderly and requested to live on his land which was in a warm climatic zone and he therefor granted her licence to live on his land until she passed on.
10. The 1st appellant further averred that the respondent has no property on the suit property, and that she visited her mother during her lifetime with her children; that the respondent got married and acquired L.R Mutira/Kanyei/537 on 22nd November 1977 and has settled on the said land where she lives; and that the respondent has never been in adverse possession of any portion of the suit property. The 1st appellant further claimed that he never attended the purported meetings on 11th March, 2017 and 13th May, 2017 where it is alleged that some alleged elders made a resolution to compel him to give the respondent one acre of an undisclosed parcel of land and that the resolution was null and void for lack of legal mandate and for violating the rules of natural justice.
11. The ELC (Cherono, J.) heard the matter by way of oral evidence and held in part as follows:

“The upshot of my analysis is that the suit property which is a clan land was registered in the name of the 1st Defendant to hold in trust for himself and the rest of the family members including the Plaintiff herein. That explains why the Plaintiff and her mother (deceased) lived on the land and was even buried therein.

37. Since I have established that the 1st Defendant is holding the suit property in trust for the family, I find the second issue untenable. In the final analysis, I enter judgment for the Plaintiff against the Defendants as follows:1. A declaration that the Defendants hold the suit property land parcel No. Inoi/Kerugoya/75 in trust for the family including the Plaintiff;2. An order for determination of trust by directing that one acre (1) out of land parcel No. Inoi/Kerugoya/75 be transferred and registered in the name of the Plaintiff herein and 3. The Land Registrar Kirinyaga County to rectify the register to reflect the changes under paragraph (2) above and 4. The Plaintiff and the Defendants being family relatives, I order each party to bear her own costs.”
12. Aggrieved by the decision of the trial court, the appellants filed a notice of appeal and a Memorandum of Appeal in which they raised six grounds of appeal. These were that the ELC erred in law and fact in: making judgment against the weight of evidence; in disregarding the contradictions and inconsistencies in the evidence adduced by and on behalf of the respondent; in failing to find that the respondent did not prove that she was entitled to the suit property by way of adverse possession; in making a finding that the appellants hold the suit property in trust for the respondent when she had not made the said prayer in her originating summons dated 6th July, 2017 and did not make submissions in regard to the same; in granting orders in respect of prayers that were not sought for by the respondent and which



were not subject of the submissions filed by both parties; and in failing to fairly evaluate and analyze the evidence adduced by the parties and the submissions made on their behalf.

Submissions by Counsel

13. The appeal was disposed of by way of written submissions. The parties filed written submissions in support of their respective cases in this appeal. Learned counsel, Miss Muturi was holding brief for Mr. Magee who is on record for the appellants while learned counsel Mr. James Igati Mwai was on record for the respondent. Counsel for the appellants submitted that it is trite that a court cannot grant reliefs that a party has not sought in her pleadings as it is well settled by precedents that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Reliance was placed on *Daniel Otieno Migore v South Nyanza Sugar Co. Ltd* [2018] eKLR in support of this proposition. Counsel further submitted that the respondent filed suit vide an originating summons and her claim was founded on alleged adverse possession of the suit property where she sought for a declaration that she had acquired one acre out of the suit property under Section 38 of the [*Limitation of Actions Act*](#).
14. Counsel asserted that it is not in doubt that the respondent sought for one acre out of the suit property on the grounds of adverse possession and she did not make any other prayer for declaration of trust or determination of trust in respect of the suit property. Counsel submitted that the ELC erred when setting down the issues for determination and as such the said issue was not subject of determination as it was not one of the prayers in the originating summons.
15. Counsel further submitted that the decision in favour of the respondent was based on the ground that the 1st appellant held one acre of the suit property in trust for the respondent. Counsel asserted that since the ELC made a determination on an issue that was legally not for determination, the impugned judgment was unlawful and ought to be set aside. Counsel further submitted that the respondent did not prove that she was in adverse possession of any portion of the suit property.
16. Counsel further submitted that the ELC did not make any determination of the issue and that the respondent did not prove that she was in adverse possession of the suit property. Counsel submitted that the respondent stated that her mother passed on in 2006 and that the appellant started denying her access to the suit property. Further, that her deceased mother's house was demolished in 2008. Counsel asserted that if this was the case and was taken to be true, which is denied, the respondent would only have been in adverse possession of the suit property for 2 years between 2006 and 2008 as an adverse possessor must be in possession without consent.
17. Counsel further asserted that when the respondent was in possession, with the consent of the appellants it cannot be said to be adverse possession. Counsel further submitted that the respondent did not indicate when she allegedly started living on the suit property.
Further, that her evidence and pleadings did not prove the salient ingredients of adverse possession. Reliance was placed on the decision of *Thomas Muka Mauro & Anor v Robert Ouma Oduori* [2021] eKLR.
18. Counsel further submitted that although the issue of declaration of trust was not the subject of the suit before the ELC there was no evidence to support the same. Further, that numerous precedents have held that the existence of a trust is a matter of evidence and that the onus of proving trust is on the one alleging the existence of trust as provided under Section 107,108 and 109 of the [*Evidence Act*](#). Counsel further submitted that it is trite law that a court cannot imply trust and the intention of the parties to create a trust must be clearly determined before a trust is implied. Reliance was placed on the decision of *Kazungu Fono Shutu & Anor v Japhet Noti Charo & Anor* [2021] eKLR.



19. Counsel further submitted that the respondent only speculated that the suit property was registered in the name of the 1st appellant to hold in trust for the family and she did not tender any evidence in support thereof and her evidence was inconsistent and contradictory. Counsel further asserted that the ELC failed to consider the appellant's evidence contained in the replying affidavit sworn on 30th August, 2017. That the said evidence was not impeached even on cross examination and clearly demonstrated that the appellants did not hold the suit property in trust for the respondent and that she had ever been in adverse possession of any portion of the suit property. Counsel urged that the appeal be allowed as prayed.
20. The appeal was opposed. Counsel for the respondent submitted that the appellant has not shown this Court the contradictions and inconsistencies referred to in the pleadings. Further, that the evidence tendered by the respondent is clear and enabled the ELC to reach the proper issues for determination in its judgment. Counsel submitted that 3 issues were raised for determination:
 - a. Whether the 1st appellant was registered as proprietor of the suit property to hold the same in trust for his family members;
 - b. In the alternative, whether the respondent has proved that she is entitled to the suit property by way of adverse possession; and
 - c. who will bear the cost of this suit.
21. Counsel further submitted that in the respondent's originating prayers. That the ELC considered the case and determined that the issue for consideration was whether the respondent was in any way entitled to the one acre out of the suit property whether by way of adverse possession or in any other way.
22. Counsel asserted that the issues for determination brought themselves up during the hearing which led the ELC to arrive at the decision it made. Counsel further asserted that a prayer can be brought either directly or indirectly and the same emerges from the hearing. Counsel further asserted that the ELC had the discretion to determine and frame issues for determination which it did in the instant case. Further, that even without making any submissions in the ELC in regard to the issue of trust by the respondent, the evidence which was tendered by the respondent was sufficient for the ELC to determine what the respondent was claiming and to find that a customary trust existed in respect of the suit property. Counsel relied on the case of *Isaak Minanga Kiebia v Ilsaaya Theuri M'Lintari & Anor* [2018] eKLR, where the Supreme Court held that the grounds set out should be clear that a party does not have to show what he or she is claiming but they may come out through the evidence tendered. Counsel further submitted that the respondent brought the suit under Section 38 of the *Limitation of Actions Act* which stipulates that if the land is registered under one of the registration acts then the title is not extinguished, but held in trust for the person in adverse possession vesting the land in his/her name. Reliance was placed on the case of *Mtana Lewa v Kahindi Ngala Mwangandi* [2015] eKLR. Counsel urged us to dismiss the appeal with costs.

Determination

23. We have considered the record of appeal, the submissions by counsel, the authorities cited and the law. As this is a first appeal, we are required to re-evaluate the evidence presented before the trial court in order to arrive at our own independent conclusions of law and fact. In doing so, we must bear in mind



that we have neither seen nor heard the witnesses, which the trial court had the benefit of doing. As was held in *Selle v Associated Motor Boat Co. Limited* (1968) EA 123:

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions. In particular this Court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”

24. We discern two pertinent issues for consideration. These are: whether the ELC erred in determining the respondent’s claim based on the issue of trust which was not pleaded; and whether the 1st appellant was registered as the owner of the suit property in trust for the respondent to take ownership and possession of one acre of the suit property. The respondent’s claim as presented to the Court, was anchored on the originating summons dated 6th July, 2017.
25. It is instructive that trust or particulars of trust were not pleaded in the originating summons. As we have endeavoured to demonstrate above, the issue of trust was not pleaded by the respondent. However, from the issues identified by the ELC, it is evident that the issue of trust was central to its analysis and determination. The question is whether the ELC erred in addressing and determining the suit on the unpleaded issue of trust?
26. In *Odd Jobs vs Mubia* [1970] EA 476, the Eastern Africa Court of Appeal held that a court may base its decision on an unpleaded issue, if it appears from the course followed at the trial that the issue has been left to the court for determination. In *Vyas Industries vs Diocese of Meru* [1976] eKLR, the Eastern Africa Court of Appeal applied and approved *Odd Jobs vs Mubia* (supra), holding that, as the advocate for the appellant had led evidence during the trial and addressed the court on the unpleaded issue, the trial court could base its decision on the unpleaded issue, as the issue had been left for the court’s decision during the trial.
27. In *Nairobi City Council vs Thabiti Enterprises Limited* [1995-98] 2EA 231, Thabiti Enterprises had filed a suit in the High Court seeking, inter alia, damages for trespass against Nairobi City Council (NCC) for trespassing onto the Thabiti Enterprises’ property LR. No. 209/10466 Nairobi (suit property), and erecting certain structures thereon. Upon Thabiti Enterprises’ application, the High Court struck out NCC’s defence and counterclaim. Thereafter there was some negotiations between the parties regarding the property being surrendered to NCC, but the parties did not agree on the purchase price. The matter was listed for formal proof for assessment of damages, during which Thabiti Enterprises called a valuer who assessed the value of the suit property at Kshs. 80 million. The learned Judge of the High Court in his judgment awarded Thabiti Enterprises Kshs. 80 million being the value of the suit property. Thabiti Enterprises had not amended their original claim, which was for trespass.
28. This Court in a majority decision (*Akiwumi & Tunoi, JJ.A*), set aside the judgment of the High Court, holding that the learned Judge erred in determining the issue of compensation which had not been pleaded; that as there was no claim for compensation/purchase price, it was irrelevant that the parties had agreed to the learned Judge determining the purchase price or compensation payable for the suit property; and that the unpleaded issue determined by the learned Judge being the purchase price/compensation was a claim for special damages, that should have been specifically pleaded. It is apparent that this was not simply a question of the learned Judge considering an unpleaded issue, but making an award that was neither pleaded nor sought.



29. It is noteworthy that this Court in *Nairobi City Council vs Thabiti Enterprises Limited* (supra), considered *Odd Jobs vs Mubia* (supra), but followed *Sheikh vs Sheikh & Others* [1991] LLR 2219 (CAK); and *Sande vs. Kenya Cooperative Creameries* [1992] LLR 314 (CAK) in holding that:

“A Judge had no power or jurisdiction to decide an issue which had not been pleaded unless the pleadings were suitably amended.”

30. In *Sheikh vs Sheikh & Anor* (supra), the following passage from Bullen & Leake on pleadings, 12th Edition was relied upon:

“The system of pleadings operates to define and delimit with clarity and precision the real matters in controversy between the parties upon which they can prepare and present their respective cases and upon which the court will be called upon to adjudicate between them. It does serve the twofold purpose of informing each party what is the case of the opposite party which he will have to meet before and at the trial, and at the same time, informing the court what are the issues between the parties which will govern the interlocutory proceedings before the trial, and which we the court will have to determine at the trial.”

31. The following passage by this Court in *David Sironga ole Tukai vs Francis Arap Muge & 2 Others* [2014] eKLR is also instructive:

“It is well established in our jurisdiction that the court will not grant a remedy, which has not been applied for, and that it will not determine issues, which the parties have not pleaded. In an adversarial system such as ours, parties to litigation are the ones who set the agenda, and subject to rules of pleadings, each party is left to formulate its own case in its own way. And it is for the purpose of certainty and finality that each party is bound by its own pleadings. For this reason, a party cannot be allowed to raise a different case from that which it has pleaded without due amendment being made. That way, none of the parties is taken by surprise at the trial as each knows the other’s case is as pleaded. The purpose of the rules of pleading is also to ensure that parties define succinctly the issues so as to guide the testimony required on either side with a view to expedite the litigation through diminution of delay and expense.”

32. We take the view that parties should specifically state their claim by properly pleading the facts relied upon and the relief sought, as the pleadings are the primary documents that guide the court and the parties concerning the claim and the contesting positions of the parties. In accordance with the Civil Procedure Rules, the parties should also either provide a list of agreed issues, or if there is no agreement, each to provide their own list of issues so that the court can settle the issues. While it is desirable that where necessary the pleadings should be amended to bring in all the issues, *Odd Jobs vs Mubia* (supra) remains good law, that in limited circumstances where an unpleaded issue is crucial to the matters in issue, the court may determine a suit on the unpleaded issue, provided both parties have clearly addressed the unpleaded issue in their evidence or submissions, and left the matter for the determination of the court.

33. The issue of trust was central to the dispute between the appellants and the respondent, and featured prominently in the written submissions. In *G.K. Macharia & Anor vs Lucy N. Mungai* [1995] eKLR, this Court held that:

“It is the duty of the court to frame issues as may be necessary for determining the matters in controversy between the parties....In this respect, a trial court may frame issues on a point that is not covered by the pleadings but arises from the facts stated by the parties or their



advocates, and on which a decision is necessary in order to determine the dispute between the parties.”

34. In the impugned judgment, the ELC was alive to the fact that the respondent had not pleaded trust. Nonetheless, it directed itself as follows:

“26. The parties have engaged each other in a vigorous contest on whether the suit property was a customary land and whether the same was held by the 1st defendant in trust of his family members. However, I find that these issues are irrelevant in relation to the claim of adverse possession made by plaintiff.

26. The plaintiff claimed that the suit property was customary land held by the 1st Defendant in trust for the family members of the late Mithamo Gachugu.”

35. It is trite that where a party seeks to anchor a claim on trust, the issue should be pleaded and particulars of trust given. Where this is not done, the opposite party has the right to move the court under the Civil Procedure Rules to have the pleadings struck off. Should the application for striking out of pleadings not be made, and it is followed by the issue of trust being addressed in evidence at the hearing and in submissions, it is assumed that the party has opted to forgo his right to challenge the pleadings, and acquiesced to the issue being determined by the court.

36. Given the fact that the issue of trust was raised by both the parties and that during the hearing witnesses adduced evidence that touched on the issue of trust and that in the written submissions the issue was extensively addressed by both parties, it is clear that the issue was left for the determination of the court.

37. Though unpleaded, the issue of trust therefore had to be determined, and must therefore be construed as having been left to the ELC for determination, and the ELC did not therefore err in determining this unpleaded issue.

38. On the second issue as to whether trust was proved, we have considered the evidence that was adduced before the trial court by the parties, which we have set out above. This evidence shows that the 1st appellant and the respondent were step brother and sister. They were the son and daughter of one Mithamo Gachungu (deceased). The 1st appellant was the deceased’s only son. The 1st and 2nd respondents father died prior to the registration of the suit property which was registered in the name of the 1st appellant on 29th September, 1958.

The registration of the suit property was done in the lifetime of Jane Wanjiku Mithamo (deceased), the 2nd wife of Mithamo Gachungu (deceased). From the evidence, there was no dispute about the ownership of the suit property until after the demise of the respondent’s mother in 2006. The suit property is registered in the names of the 1st and 2nd appellants under the provisions of the Registered *Land Act* Cap 300 Laws of Kenya, (now repealed). The respondent claims that the 1st appellant was holding the suit property under a customary trust for the respondent and other family members.

39. The appellants’ contention is that the ELC shifted the burden of proof from the respondent who was claiming that a trust existed. For reasons which will become clear, we agree with the findings by the learned Judge that the 1st appellant’s claim that the suit property had been purchased for value following his contributions to the Umbui clan was not substantiated with documentary evidence. Further, the evidence had extensive contradictions and this is borne out of the verbatim extract from paragraph 8,12 and 14 of the 1st appellant’s replying affidavit where he stated:

“8. That I only took my uncles name, Mithamo, as my surname because my father had died before I attained the age of majority.



12. That during the time land demarcation I was an adult and was gainfully employed as a teacher. That I therefore used to make my own personal contributions to our Umbui Clan and was allocated L.R. Inoi/Kerugoya/75 absolutely and not as a trustee of anyone.
14. That at the time of land demarcation the plaintiff's mother Jane Wanjiku Mithamo was elderly and requested to live on my land which was in a warm zone. That I therefore granted her license to live on my land until she passed on.”
40. This evidence undoubtedly shows that the 1st appellant was not a truthful witness and his evidence contained material contradictions. It is settled law that in civil cases, a party who wishes a court to give a judgment or to declare any legal right dependent on a particular fact or set of facts, that a party has a legal obligation to provide evidence as proof of the existence of those facts.
41. On the other hand, the respondent discharged her burden by demonstrating her claim that the suit property was ancestral property by calling two witnesses who had first-hand knowledge of the adjudication process that resulted in the 1st appellant being registered as the sole proprietor of the suit property. It is therefore clear to us that the findings by the ELC were based on cogent evidence adduced before the trial court. Moreover, it is the trial court that had the advantage of assessing the credibility of the witnesses. The evidence patently demonstrated that the 1st appellant was the step brother of the respondent despite his attempt to disown Mithamo Gachungu, his deceased father and whose name he uses and which from the record appears on his identity card.
42. The law is that a customary trust is one of the overriding interests that was recognised under the Registered *Land Act* (repealed). Sections 27 and 28 of the RLA provided that the rights of a registered proprietor of registered land under the RLA were absolute and indefeasible, and were only subject to the rights and encumbrances noted on the register or the overriding interests which were set out under section 30 of the RLA. Section 30(g) of the RLA provided for customary trusts. Such trusts are also recognised under Section 28 (b) of the *Land Registration Act*, 2012 which provides for overriding interests as may subsist on the land and affect it without it being noted on the register.
43. In order for a customary trust to be recognised as an overriding interest in respect of registered land, the person alleging the existence of such a trust must satisfy the court of the existence of certain elements. These elements were enunciated by the Supreme Court in *Isack M'inanga Kiebia V Isaaya Theuri M'lintari & Another* (supra) as being whether:
- “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.”
44. The 1st appellant and the respondent are step-brother and sister.



Under the provisions of the RLA (now repealed) and now section 26 of the *Land Registration Act*, the certificate of title issued by the Land Registrar is to be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to, inter alia, the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and such title shall not be subject to challenge, except—(a) On the ground of fraud or misrepresentation to which the person is proved to be a party; or (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

45. We have considered the evidence that the appellants placed before the trial court, and we have not been able to find anything that shows that the appellant acquired the suit property by way of purchase. The only evidence is that he was a teacher and made his own personal contributions to the Umbui clan and was allocated the suit property absolutely and not as a trustee leading him to be registered as the proprietor of the suit property in 1958.

(1) Section 107 of the *Evidence Act* states that;

“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.”

46. On the other hand, the respondent led evidence to show that she and the 1st appellant belonged to the Umbui clan which the 1st appellant has acknowledged. From the respondent’s evidence it is clear that the 1st appellant was registered in trust for the entire family of Mithamo Gachungu (deceased) including the respondent. Like the trial court, we are not convinced that the 1st appellant was absolutely granted the suit property by the Umbui clan as the proprietor thereof.

47. The trial court found, and we agree with this finding, that the 1st appellant did not adduce any evidence to prove that he had only allowed the respondent’s mother (deceased) to live on the suit property as a licensee since she was elderly and the suit property was in a warmer climatic area. Like the trial court found, we are convinced that the suit property was clan land and was registered in the name of the 1st appellant to hold in trust for himself and the rest of the Mithamo Gachungu family members. Further, it is doubtful that if the respondent’s mother was a mere licensee on the suit property it is unlikely that the 1st appellant would have allowed her to be buried thereon.

48. We observe that prior to the demise of the respondent’s mother in 2006, there had been no dispute regarding the registration of the land.

A dispute appears to have arisen subsequent to the demise of the respondent’s mother when the appellants denied the respondent access to the suit property and demolished the house in which she and her deceased mother had resided in prior to her demise.

49. As observed by the Supreme Court in the case of Isaac M’inanga Kiebia (supra), while a customary trust is one of the overriding interests to which a registered proprietor was subject under the proviso to section 28 of the repealed RLA, evidence must be led to prove the existence of such a trust; the court will make a determination on the basis of the evidence before it as to the existence or otherwise of such a trust as binds the registered proprietor; and each case has to be determined on its own merits and the quality of the evidence presented before the court.

50. We agree with the conclusion reached by the ELC that the respondent tendered evidence that was sufficient to establish that the 1st appellant was registered as the proprietor of the suit property in



trust for the family of Mithamo Gachungu (deceased). We find that the ELC cannot be faulted for its findings.

51. It is therefore apparent that the respondent did prove her case against the appellants on her customary trust claim.
52. Taking all the above matters into account, we are satisfied that the instant appeal is devoid of merit and it is hereby dismissed with costs to the respondent.

DATED AND DELIVERED AT NYERI THIS 20TH DAY OF DECEMBER, 2024

W. KARANJA

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JUDGE OF APPEAL

JAMILA MOHAMMED

.....

JUDGE OF APPEAL

L. KIMARU

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

Deputy Registrar

