



REPUBLIC OF KENYA



KENYA LAW
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**Muraguri & 5 others v Macharia (Civil Appeal 193 of 2018)
[2023] KECA 384 (KLR) (31 March 2023) (Judgment)**

Neutral citation: [2023] KECA 384 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPEAL 193 OF 2018
F SICHALE, FA OCHIENG & WK KORIR, JJA
MARCH 31, 2023**

BETWEEN

**HUMPHREY PETER MURAGURI 1ST APPELLANT
MARY MUKAMI MUIRURI 2ND APPELLANT
GILBERT MWANGI MURAGURI 3RD APPELLANT
STEPHEN KINYUIRO MURAGURI 4TH APPELLANT
ROSE WANGARI MURIGU MURAGURI (SUING AS THE
ADMINISTRATOR OF THE ESTATE OF SIMON NGUGI MURAGURI
(DECEASED) 5TH APPELLANT
JOSEPH THIBITIE MURAGURI 6TH APPELLANT**

AND

JOHN NGIGI MACHARIA RESPONDENT

*(Being an appeal from the Judgment of the Environment and Land Court at Nakuru
(Munyao Sila, J.) delivered on 23rd November, 2017 in ELC Case No. 125 of 2012)*

JUDGMENT

1. This is an appeal from the judgment of the Environment and Land Court (Munyao Sila, J). The dispute in this case is with regard to the ownership of the land parcel Nyandarua/Matindiri/27 hereinafter, “the suit land”. The suit land is registered in the name of the respondent. The appellants’ contention was that the respondent was holding the suit land in trust for all of them.
2. Vide a Complaint date July 30, 2012 the appellants sued their elder brother, John Ngigi Macharia, (deceased), the respondent herein. The complaint was amended on April 11, 2014. The appellants claim



was that the respondent was holding the suit land in trust for himself and the appellants. The suit land was approximately 15 Hectares/38 Acres. The appellants suit was dismissed with costs.

3. The appellants' case was that; the respondent is the first born sibling of the appellants. In 1964, their mother, Wachinga Wangui Muraguri (deceased) acquired the suit land. The suit land was registered in the name of the respondent who was to hold the same in trust for the appellants.
4. The appellants alleged that the respondent had, in breach of the trust, claimed the whole of the suit land as his own to the exclusion of the appellants. The respondent had failed to subdivide and distribute the suit land to the appellants and he had the intention of distributing the same to his own children.
5. The appellants sought a declaration that the respondent held the suit land in trust for himself and the appellants; an order for the subdivision and distribution of the suit land as follows, John Ngigi Macharia - 2.5 Ha., Mary Mukami Muiruri - 2.0 Ha., Humphrey Peter Muraguri - 2.0 Ha., Gilbert Mwangi Muraguru - 2.0 Ha., Stephen Kinyuiro Muraguri - 2.0 Ha., Simon Ngugi Muraguri - 2.0 Ha., Joseph Thibitie Muraguri- 2.0 Ha. and Graveyard and Memorial Site - 0.5 Ha.
6. The respondent claimed that he and the appellants were born of the same mother but had different fathers. He denied that the suit land was acquired by their mother and denied any allegation of trust. He pleaded that he acquired the suit land and nowhere did their mother feature in the process of acquisition. He pleaded that his mother loaned him Kshs 1,000/- to top up. Their mother had demanded that the sum be returned by the respondent educating his other siblings, including the appellants, which he fulfilled. He asserted that the suit land had always been his private property.
7. Evidence as adduced before the trial court was as follows: PW1 testified that the respondent was their elder brother born of the same mother and father. The suit land was acquired in 1964 from the Settlement Fund Trustees (SFT) which their mother had paid through the respondent. At the time women were not allowed to have ID cards and as such although the money was hers, she gave it to the respondent to make payments to SFT. He stated that their mother was married in a polygamous home of five wives and had she registered the suit land in her name, it would have ended up with her husband, but she had wanted it for her own children. He stated that the respondent was born in 1940 and was 24 years at the time. The 2nd born was born in 1943; the 3rd born was born in 1948; the 4th was born in 1949; the 5th born was born in 1953; the 6th was born in 1957; and the 7th born was born in 1959.
8. He stated that their father was a forest squatter. He had apportioned some land to each wife and each wife would then fend for her own family. In 1964 their mother was 43 years old and very active. She was a farmer and business lady. She sold her farm produce and had saved Kshs 5,000/- to purchase the suit land. At that time, the respondent had finished his 'O' Level exams in 1963 and was a trainee in various institutions. The respondent also had a wife and a child. Their mother paid dowry for him. In 1963, the respondent married again. When the respondent was still in school, it was their mother who accommodated him and his family. In 1964, the respondent could not maintain himself or his family. He was employed as a cashier trainee by the Municipal Council of Nakuru towards the end of 1964.
9. He further stated that it was their mother who educated all of them. They in turn assisted her in farming. He stated that after their mother had paid the deposit of Kshs 5,000/- to the SFT for the suit land, no specific person lived on it, although there were workers. The land is about 38 acres. They assisted the workers during the weekends. He stated that the suit land had pyrethrum, livestock and other crops. He stated that the farm was making money, through the farm produce, and the money would be paid into a cooperative, which would remit some of it to the SFT to pay off the loan. He testified that the loan was cleared in 1977 through money from the farm.



10. He stated that their mother died in the year 1971. She had never settled on the suit land but she had actively cultivated the same. Their father died in 1977. He assisted on the farm. Their mother was buried in the suit land but their father was buried in land held by the son of the 2nd wife. He and the respondent assisted in educating their other siblings. The respondent was sacked in 1973. He had acquired land in Ol Rongai area where he settled. He stated that the respondent also had other parcels of land elsewhere. In 1996 they shared correspondences with the respondent over the suit land through which the respondent asserted that he was the sole owner of it.
11. He further stated that the respondent did not allow them to access the suit land.
He wrote to the appellants asking them to first seek his permission in advance before they visit the suit land. In 2011 when they laid a tombstone on the grave of their mother on the suit land, the respondent protested and did not participate. PW1 said that the respondent threatened to sue them. He stated that they were ready to give the respondent a bigger share of the suit land since in Kikuyu tradition, the one who takes care of land is given a bigger share. He further stated that none of them live on the suit land although it was the respondent who farmed on it and leased out some portions of it. He indicated that the respondent had not properly managed the suit land leading to a protest by the SFT in 1975.
12. He denied that their mother only contributed Kshs 1,000/- towards the raising of the initial deposit of Kshs 5,000/-. He maintained that their mother paid the SFT the Kshs 5,000/- and set aside another Kshs 1,000/- which he and the respondent deposited in the bank. He stated that the respondent later withdrew this money and used it. He averred that in the year 1972, he himself was employed as a teacher earning a gross salary of Kshs 1,170/= and a net of Kshs 960/=. He could save about Kshs 200/= and even with these kind of savings, it would have taken him more than 2 years to save Kshs 5,000/=.
13. He stated that the respondent was the only one benefitting from the suit land.
He had harvested trees that the appellants had planted. He had also taken loans using the suit land.
14. On cross-examination, PW1 stated that their father died without leaving them any land. They did not live on the suit land and only used it. They lived in Dundori, a colonial concentrated village. Colonialists allowed the head of the family about 3/4 of an acre to share irrespective of how many wives he had, or how many children he had. Their father had 5 wives, his 3/4 acre was shared amongst the wives, each only getting a narrow strip to farm. The food was mainly for subsistence but they used to have a surplus, which would be sold in the market.
15. He reiterated that their mother was very aggressive and hardworking. She leased other parcels of land, through which she would plant more crops and sell to the market. Their granary was always full and there was enough to consume and sell. He never asked her how much she earned, but she catered for all their needs. Their father did not contribute to their upkeep, his role being more in discipline. Their mother never had a bank account and would put her money in a tin in the granary.
16. He stated that the respondent completed his form 4 in 1963. In 1964, the respondent was a trainee and he only used to receive a stipend for out of pocket expenses, but he could afford gifts for them. The suit land was purchased in December 1964 before the respondent was formally employed. He was not too sure of how much was paid for the suit land and did not know the purpose for the initial deposit of Kshs 5,000/- to the SFT.
17. He stated that he joined Form 1 in 1965. His fees was paid by their mother through the respondent. His other siblings were also in school. After their mother died in 1971, the respondent took care of the other siblings who were still in school. He trained as a teacher. He completed his training in 1971. He started working in 1972 after attaining his Diploma.



18. He stated that the respondent obtained title to the suit land in 1977. He stated that it was the respondent who paid the SFT loan between 1965 and 1971, but he insisted that this was made through the farm produce, and that the farm could sustain itself. Their mother would also chip in when the income would be insufficient. After their mother died in the year 1971, the respondent was the one who serviced the loan. He asserted that he and his other siblings also contributed towards offsetting the loan by working on the suit land when their mother was still alive. He stated that there was a permanent employee, and some casual workers, all of whom were paid from the proceeds of the suit land.
19. He further stated that the respondent had taken his wife to live on the suit land, and built a temporary house for her, but she left in 1967 owing to health issues. He was not aware of any default on the SFT loan. He testified that although no document was written that this land was held in trust for them, it actually was, just as the rest of the houses of his father had registered land in the names of their first born to hold as trustees.
20. PW2 stated that she was 21 years old when the suit land was purchased in 1964.

At the time the respondent was a college student, and could not have been in a position to raise money to buy the suit land. He was being assisted and he had a family living in their mother's house. She stated that the money used to purchase the suit land came from their mother. She claimed that the land was registered in the name of the respondent, as he was the one who held an ID card, was clever, and had gone to school. She got married in 1964 and was employed as a coffee picker. She would earn a shilling and 5 cents a day. Her husband was an untrained teacher who at that time earned Kshs 130/= per month. They purchased their own parcel of land in 1971 at Kshs 1,200/=, for a two-acre share, which money they paid in instalments. She used this analogy to assert that the respondent could not have been able to raise Kshs 5,000/- in 1964. She stated that she would visit the suit land occasionally where their mother had crops and livestock. She at times helped their mother in picking pyrethrum. From the year 1964, the next time she visited the land, was in 1972.

She stated that she does not visit the land often since she has her own home to take care of.
21. In cross-examination, she asserted that their mother was richly blessed and did not miss going to the market at least twice a week. She could not however tell how much money she earned. She insisted that the land was bought by their mother through her farming activities. She could not however be registered, as the owner since women were not allowed to hold ID cards. She thought that the Kshs 5,000/= initially paid was for full payment of the land and an additional loan advanced for development of the suit land. The proceeds from the farm would then pay off the loan. She stated that the respondent would pay the money but when he lacked cash, their mother would pay. Apart from the respondent, the rest of them never lived on the suit land. She got married in 1962 and had only been on the suit land about two or three times. She could not tell how many times their mother visited the suit land but she said that it was frequent. She did not know how long it took to pay the SFT loan or when title was issued.
22. The respondent on his part stated that although they share the same mother, they had different fathers. He stated that their mother was initially married in Masailand. She got into a fight with her husband, which was taboo, and she got banished. She went to Elementaita where she was betrothed to a suitor but she could not be married as she was expecting the respondent. It was then that their father took her in, and he was born shortly after in 1941.
23. He stated that he was in a boarding primary school where the fee was about Kshs 60/-. He then went to a boarding secondary school where the fee was Kshs 250/-. Their mother could only raise Kshs 100/-. He got a remission of the balance of Kshs 150/-. While in Form 2, their mother was unable to send



- him to school as she had to pay fees for his other siblings. He therefore, used the carpentry skills that he had been trained while in primary school, to make furniture during the school holidays, so as to raise money. Between Form 1 and Form 4, their mother only contributed the initial Kshs 100/-.
24. He stated that their family was poor as his father did not earn much and never contributed to their upkeep. Their mother would however, work hard. She used to sell potatoes and maize. According to him, there was enough to eat, but not much to sell, and what she sold went towards educating the children. He stated that at times, she could borrow money from some elders in the village, and during holidays, she would do some casual jobs and pay off these debts.
 25. He stated that after completing Form 4 in 1963, he was taken in by Kenya Power and Lighting Company as a trainee technician and was being paid over Kshs 400/- per month. He was there for about 3 to 4 months, after which he joined the Survey of Kenya as a Junior Survey Assistant. He earned over Kshs 400/= per month. He was there for 6 months, after which he joined the Municipal Council of Nakuru, as a Clerk in the Treasury Department. He was earning over Kshs 400/= per month. He stated that to purchase the land, he contributed Kshs 4,000/= out of his own earnings. A deposit of Kshs 5,000/= was however needed and he was short of Kshs 1,000/=. He testified that his mother used to save some money in a big glass bottle which he thought was not safe and he advised her to open a bank account. She gave him the money, which he deposited in a joint account held by himself and PW1. When he got into the deficit of Kshs 1,000/- it is this money which he convinced his mother to give him. He stated that his mother allowed him this money on condition that he would educate his other siblings, since in their large family, priority had to be given to education.
 26. He stated that he paid the sum of Kshs 5,000/= to the SFT. Out of this money, Kshs 700/= was paid as 10% for the land, which was valued at Kshs 7,000/=:, and Kshs 200/= went towards stamp duty. The sum of Kshs 4,050/= was working capital. The loan that he had to pay, over a period of 30 years, was of Kshs 6,750/= and the land was charged for this amount. He was later advanced another loan of Kshs 5,300/= for livestock, housing, fencing and tools. This sum had to be paid over a period of 10 years. His wife used to live on the suit land from 1965 to 1968 when she left owing to illness. He then left a caretaker on the suit land.
 27. When he took over the suit land, they cultivated less than an acre of it where his wife used to grow potatoes. They did not have money to farm much, as the amount of Kshs 4,050/-, which was to be working capital was never actually used as working capital because he paid fees for his siblings. In 1968 and 1969, he expanded the area under cultivation to about 8 acres. He stated that the suit land could not sustain itself and he used to service the loan out of his salary. He produced a letter where he had instructed his employer to be deducting Kshs 300/= from his salary to pay off the loan.
 28. He stated that, save for a caretaker, there were no employees on the suit land, and no member of the family. The suit land remained unattended, leading to a complaint by the SFT in 1975, where they threatened to repossess the land. He stated that owing to the threat, he went to SFT and paid all the outstanding money. He completed in 1977 and was given the title.
 29. He refuted the claim that their mother paid for the suit land and stated that the appellants did nothing on the suit land. He denied that the suit land was held in trust. He stated that he educated the appellants out of the covenant that he had with their mother. After the death of their mother, he became responsible for the family. He resigned from gainful employment in 1974, by which time his own nuclear family was also growing and in need, and he had children going to secondary school. He stated that he ensured that his siblings were educated. He stated that the appellants are now professionals, and they have had their chance to buy their own land. He stated that he allowed their mother to be buried on the suit land as she had no other land and would have otherwise been buried in the forest.



30. In cross-examination, he reiterated that he was earning a salary of over Kshs 400/- per month when he was a trainee at Kenya Power and Lighting. He denied that he was only being given a subsistence allowance of Kshs 80/-. He maintained that he earned Kshs 446/- per month at the survey department and Kshs 475/- per month when he was first employed by the Municipal Council of Nakuru. He stated that he used to spend only about Kshs 20/- and the rest went to his savings. It was possible to save this much because one would get free housing. He stated that he would save over Kshs 300/- per month. His wife was also working and gave him some money to raise the sum of Kshs 4,000/-. He also borrowed some money from his workmate.
31. He admitted that their mother was hard working, and had worked for a long time, although there were periods of crisis such as those during the Mau Mau war. He admitted having had an affair in 1961 and that it was their mother who took care of his girlfriend after she delivered a baby since he was still in school. She also paid dowry on his behalf which was less than Kshs 1,000/-. He admitted that their mother paid his fees in primary school but not in secondary school as all she paid was Kshs 100/- when he joined Form 1. He stated that he would work in the school farm and do carpentry work to raise fees.
32. He stated that the Kshs 1,000/- given to him by their mother was kept in an account in 1962. Their mother had no ID and could not hold the account which was held by himself and PW1. He denied that this money was kept in the account for the school fees of PW1 and denied squandering it.
33. He stated that the first crop of pyrethrum was planted 3 years after he bought the suit land and there were no proceeds out of pyrethrum. There were potatoes for consumption but not for sale. His siblings would cultivate the land as a token of appreciation because he was paying their fees. He agreed that they planted some trees on the suit land which he harvested in 2010 and earned Kshs 500,000/-.
34. He stated that their mother only went to the suit land once during her lifetime when he took her to see the land that he had bought. He explained that their mother could not be buried in any family land because there was none. Their father was buried in land owned by a child of his 2nd house. He agreed that he had buried his wife and son on other land but not because the suit land was family land. He agreed that he had other land which the appellants had not laid claim to.
35. The learned Judge in determining the suit discerned that the appellants' main prayer was to have a declaration that the suit land was held in trust for them, and for an order to have the suit land subdivided in various portions to be separately held by each of them.
36. While relying on the decision in the case of *Kanyi v Muthiora* [1984] KLR 712, the learned Judge acknowledged that one sibling can hold property in trust for his other siblings and that registered land was subject to the equitable doctrines of implied, constructive and resulting trusts.
37. The court stated that, under the current law, Section 25 of the *Land Registration Act* came into force on May 2, 2012 before this case was filed. A reading of the said section provides that, although a proprietor has the absolute right to hold land, such holding is subject to interests that do not require noting in the register, and such holding does not absolve the proprietor from any duty or obligations under a trust.
38. The court held that the interests which do not need noting in the register, or overriding interests, are described in section 28 of the statute, and these interests include at section 28 (b), trusts including any customary trust. It could not therefore, be argued that because such interests were not noted in the register of a parcel of land, a person could not claim on the basis of an unregistered trust. A trust could constitute an overriding interest and need not be noted in the register. Thus in as much as the register herein does not have any entry that the suit land was held in trust, that did not mean that the appellants were precluded from claiming that the suit land was held in trust on their behalf.



39. However, the court noted that for the appellant's claim to succeed, they had to prove that the suit land was held in trust for them. The basis upon which the appellants alleged that the suit land was held in trust was the claim that the suit land was purchased by their late mother from the SFT between the months of July and December of 1964. It was further claimed that the respondent was registered as proprietor because he held an ID card and was the first born in the family.
40. The learned Judge held that the appellants could not sustain a customary trust since the suit land was not land held under customary tenure. The suit land was purchased from the SFT; an entity that was used by the Government to buy off white colonial settlers and have land redistributed to the local population. The learned Judge further held that the appellants had not shown under which customary law the suit land can be said to be held. The learned Judge distinguished this case from the case of *Mukangu vs Mbui* [2004] 2 KLR 256 as cited by counsel for the appellants.
41. The learned Judge further held that it was trite that he who alleges must prove. The burden of proving that the suit land was purchased by money from their mother was of the appellants. To his mind, the appellants did not discharge this burden. There was no documentary evidence that the money that was paid for the purchase of the suit land came entirely from their mother or that the respondent was appointed by their mother to hold the suit land on her behalf or on behalf of her children. The only evidence adduced was oral and none of the appellants ever witnessed the respondent being given any money by their mother. PW1 was in school at the time while PW2 was already married and was living elsewhere. The learned Judge came to the conclusion that the entire case of the appellants was based on an assumption, that because their mother was hardworking and keen in business, then she must have been the one who raised the sum of KShs 5,000/- required as a deposit to purchase the suit land.
42. The learned Judge held that there was a good probability that the respondent could have raised the money because he was actually in gainful employment and the probability that the deposit was significantly raised using the resources of the respondent could not therefore be ruled out. The learned Judge stated that maybe the case could have been a bit different if the property had been purchased in 1963, or earlier, when the respondent was still in school. But the property was purchased in December of 1964, after the respondent had been in employment for about one year, and one cannot state that he was impecunious at the time and incapable of raising funds on his own, whether entirely through his own resources, or by borrowing some money from his friends with the assistance of his wife. One could not therefore entirely rule out the claim of the respondent that he raised KShs 4,000/- from his own resources and that his mother gifted him the short fall of KShs 1,000/-. The learned Judge stated that he could not hold, on the mere assumption, that because their mother was industrious, then she must have been the one who entirely contributed towards the purchase of the suit land.
43. The learned Judge further held that even if it were to be assumed that their mother raised the entire sum of KShs 5,000/- for the deposit, no other evidence was adduced that their mother continued to make any additional payments for the suit land. Out of the sum of KShs 5,000/- that was paid, only KShs 950/- went towards the purchase of the suit land and the sum of KShs 4,050/- was allocated to development. That evidence was adduced to the effect that an additional sum of KShs 5,300/- was taken as a loan by the respondent in order to receive various inputs for the suit land. These sums were not borrowed by their mother but by the respondent. The evidence tendered was that the payment of the loan amount came from the respondent, and not from their mother, nor from the suit land.
44. The learned Judge held that there was no evidence to sustain the appellants' claim that the suit land was self-sustaining. The appellants were never too involved in the management of the suit land and could not be privy to its intricacies. The learned Judge leaned towards the evidence of the respondent,



who produced documents which were not controverted by the appellants, that as at 1973, the SFT were still owed Kshs 10,159/. If indeed the farm was so lucrative, and the produce used to offset the loan, then the SFT would not have been asking for this money, for it would have been paid off a long time ago. That the statement of accounts produced by the respondent did not indicate instances when their mother, on various occasions, made payment for the SFT loan. In a letter dated August 5, 1975 the SFT complained that the suit land was not being managed and that the respondent had failed to cultivate at least an acre of arable land, erect a good dwelling house, or manage the livestock on the suit land. According to the learned Judge, this did not paint a picture of a thriving and productive farm as the appellants claimed.

45. Documentary evidence, which was not controverted, was tendered before the court indicating that the SFT loan was being paid off from the respondent's salary through a check-off system. The learned Judge held that he had no reason to doubt the respondent's evidence that he single-handedly struggled to pay off the SFT loan and there was no input whatsoever from their mother or the appellants.
46. The learned Judge further held that there was very little evidence that their mother had any attachment to the suit land. She never farmed or lived on the suit land. That her lack of interest in the suit land, buttressed the learned Judge's opinion that she did not purchase the suit land, and never intended to own it.
47. The learned Judge concluded that, it was the respondent who purchased the suit land using his own resources and a little help from their mother. That little help, was not meant to place any trust upon the respondent. A parent can gift his/her child some money, or other property, for the child to advance himself/herself. Such gift should not be construed to be an obligation that whatever the child will produce out of that gift is going to be held in trust for his/her siblings.
48. For there to be a trust, it must be clear, that the person is granted the property to hold on behalf of others. The learned Judge was not persuaded from the evidence tendered, that this suit was a case of trust. The appellants did not prove their case on a balance of probabilities. The relationship of brother and sister, or the fact that the defendant was the first born, by itself without anything more, cannot be said to automatically raise the presumption of a trust.
49. Consequently, the suit was dismissed with costs to the respondents.
50. Aggrieved, the appellants have moved this Court vide an amended Memorandum of Appeal dated May 5, 2022. They have raised six grounds which they compressed into three main grounds as follows: the learned Judge;
 - a. failed to fully analyze the pleadings and facts of the case which evidenced the existence of a customary trust by the respondent in respect of the suit land;
 - b. failed to interrogate the incredible and inconsistent evidence of the respondent regarding his earnings/resources pertaining to purchase and loan repayments for the suit property as would be required under provisions of Section 112 of the *Evidence Act*; and
 - c. condemned the appellants to pay costs of the suit without appreciating that the case was a family dispute involving siblings.
51. The appeal was canvassed by written submissions.
52. In their written submissions, the appellants maintained that the suit land had been purchased by their mother in 1964. They claimed that the respondent was not financially stable as he had just finished his O-levels in 1963 and had a young family who were under their mother's care. They claimed that their mother was a businesswoman who could raise the required deposit for the purchase of the suit



- land. They contended that only their mother was capable of raising the deposit of Kshs 5,000/- for the purchase of the suit land.
53. In a letter dated February 2, 1996 the respondent in response to the appellants' letters stated that the suit land was not inherited from their parents. It was private land and not communal land. The appellants contended that the only reason the suit land was registered in the respondent's name was because he was the first born son, because their mother did not have an identity card and because their mother was married in a polygamous family and she did not intend for the suit property to be considered as part of her husband's property. They alleged that the respondent only assisted with the school fees of the 6th appellant after their mother died. The rest of them were schooled through the proceeds from the suit land.
 54. The appellants submitted further that their mother was buried on the suit land and in 2011 they erected a memorial tombstone. They stated that neither their father nor the respondent's deceased wife and children were buried on the suit land.
 55. They faulted the learned Judge for failing to take cognizance of the fact that customary trust does not necessarily involve land belonging to a clan or ancestral land. They claimed that in patriarchal African society land could be registered in the name of the first son to hold in trust for himself and other family members. To buttress this submission, the appellants relied on the provisions of Section 28(b) of the Land Registration Act and the decisions in the cases of Mukangu v Mbui [2004] 2 KLR 256; Njenga Chogera v Maria Wanjira Kimani & 2 Others [2005] eKLR and Kihari v Kihari [1994] KLR 261.
 56. The appellants confirmed that they had never settled on the suit property. They faulted the learned Judge for arriving at the conclusion he did with regard to their mother's occupation of the suit land. They alleged that it was a taboo for a wife to desert her matrimonial home and as such their mother could not leave her matrimonial home. They maintained that their mother bought the suit land for the benefit of her children. (See: Isack M'Inanga Kiebia v Isaaya Theuri M'Lintari & another [2018] eKLR).
 57. The appellants called upon us to infer that their mother gave directions regarding the suit land as the owner when she forced them to plant trees thereon. They proposed the sub-division of the suit land with the respondent receiving 2.5 Hectares and the rest of them 2.0 Hectares each. They said this was a sign of appreciation to the respondent for having taken care of the suit land. They contended that the respondent had benefited more from the suit land through loans and selling of trees.
 58. The appellants contended that the respondent's earnings in 1964 were vital to the case and the same should not have been omitted from his pleadings. They wanted the respondent to prove that he was able to raise the deposit for the purchase of the suit land in 1964. They faulted the learned Judge for holding that the respondent was able to source for loan repayments and the deposit for the purchase price of the suit land. They contended that the suit land was capable of offsetting the loan through its economic activities.
 59. They claimed that their suit was not vexatious. It was a family dispute and as such they should not be condemned to pay costs. They prayed that the appeal be allowed.
 60. The respondent did not file his written submissions.
 61. This is a first appeal. Being the first appellate court we are obliged to re-evaluate all the evidence tendered, and to draw therefrom, our own conclusions. However, we are also alive to the fact that, unlike the learned trial Judge, we did not have the benefit of observing the witnesses when they were testifying. Therefore, should there be a determination which the trial court pegged upon the demeanour of any particular witness, we would be slow to interfere with such decision. That is not



to say that we would necessarily feel bound to uphold the findings made by the trial court on matters of fact.

62. If this Court were to find that the trial court had failed either to take into account any particular circumstance or that it took into account something that was not verifiable from the record of the proceedings, that may well lead us to hold that the decision arising therefrom was plainly wrong.
63. As we carry out the process of re-evaluation, the same shall be focused primarily on the aspects which the appellant had taken up issues with.
64. As regards the contention that the trial court failed to analyse the pleadings and evidence tendered, the appellant submitted that the learned Judge did not take cognizance of the fact that customary trust does not necessarily involve land belonging to the clan or ancestral land.
65. We have carefully read the plaint, but did not find any specific claim that what had arisen was a customary trust in favour of the appellants. At paragraph 19, there was an assertion that the respondent was;

“... continuing to breach his customary and legal duties as a trustee over the suit parcel.”

66. The said pleading does not, in our view, imply that a customary trust had arisen, from the circumstances prevailing in this case. However, if that was the purpose and intent of the appellants, we need to examine the evidence, so as to ascertain whether or not the appellants had made out a case for a customary trust.
67. In order to assist us in answering that question, we will begin by looking at the authorities cited before us. In the case of *Mukangu v Mbui* [2004] 2 KLR 256, this Court noted that the land in question;

“... was ancestral land that devolved to him on the death of his father. It was unregistered land held in custom but the tenure changed during the land consolidation process and subsequent registration under the Registered Land Act. It is a concept of intergenerational equity where land is held by one generation for the benefit of succeeding generations.”

The Court went on to find as follows;

“But more significantly, we think that a trust arose from the possession and occupation of the land by Gerald, which has the protection of Section 28 and 30(g) of the Act unless there is an inquiry made which discloses no such rights, which would be superfluous this case.”

68. In contrast, the appellants herein readily conceded that they have never been in possession or in occupation of the land in issue. Therefore, this case is distinguishable from the case of *Mukangu vs Mbui*.
69. In the case of *Njenga Chogera vs Maria Wanjira Kimani & 2 Others* [2005] eKLR, the Court of Appeal noted thus;

“What emerges from the evidence on record is that all the parties to the suit land had been using and living on this land as family land.

The plaintiffs and their witnesses were able to demonstrate that the suit land had been purchased by the husband of the 1st plaintiff, and further that the same land was registered in the name of the defendant as a trustee.”



70. Based upon the evidence tendered, the Court of Appeal upheld the decision in which the High Court had held that the son of the purchaser, (who was the defendant in the suit) was holding the land in trust for the family. The fact that the defendant therein was the registered proprietor did not extinguish the rights of the other members of the family.
71. Once again, the evidence in that case was of use and occupation of the land, by the members of the family.
72. However, in *Isaac M'Inanga Kiebia vs Isaaya Theuri M'Litari & another* [2018] eKLR the Supreme Court had occasion to determine the question as to whether or not the physical possession and occupation of land was a necessary requirement for a trust to be established. The Court pronounced itself thus;

“ 52. Flowing from this analysis we now declare that a customary trust, as long as the same can be proved to subsist, upon a first registration, is one of the trusts to which a registered proprietor is subject under the proviso to Section 28 of the Registered Land Act.

Under this legal regime (now repealed) the content of such a trust can take a several forms. For example, it may emerge through evidence, that part of the land, now registered, was always reserved for family or clan uses, such as burials, and other traditional rites. It could also be that other parts of the land, depending on the specific group or family setting were reserved for various future uses, such as construction of houses and other amenities by youths graduating into manhood. The categories of a customary trust are therefore not closed. It is for the court to make a determination, on the basis of evidence, as to which category of such a trust subsists as to bind the registered proprietor.

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 the 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 members, whether or not they are in possession or actual occupation of the land.”

In effect, possession, or occupation or usage of the land is no longer a requirement to establish a customary trust.

73. In this case the appellants have consistently complained that it was the respondent who had benefited from the land. Secondly, the appellants did not lead any tangible evidence to prove that the land was purchased by the mother.
74. Having re-evaluated all the evidence, we are in agreement with the learned trial judge, that;
- “ The entire case of the plaintiffs is therefore based on an assumption, that because their mother was hardworking and keen on business, then she must have been the one who raised the sum of Kshs 5,000/- required as a deposit to purchase the land.”
75. As the respondent had been in employment for a period of one year, by the time the deposit was paid, we agree with the trial court that he had the ability to raise the deposit in issue.



76. In any event, the appellants did not give any evidence to prove what the purchase price was: they said that they were unaware of the same. Apart from not knowing what the purchase price was, the appellants failed to produce evidence to prove that the same was paid by their mother.
77. The onus of proof vested on the appellants to establish that the land was purchased by their mother. However, they did not discharge that onus.
78. On the other hand, there is ample evidence of payments which were made by the respondent, to the Settlement Fund Trustees. For some inexplicable reason, the appellants presumed that such payments were made from proceeds earned from the land in issue. The appellants did not make available any evidence to establish that the respondent only remitted payments from money which had been given to him by their mother.
79. Considering that even after the demise of their mother, the respondent made substantial payments, we find that that was consistent with the respondent's contention, that the payments he had made during the time when the land was being purchased were from his own resources.
80. The fact that the mother of the parties herein was buried on the land did not, and could not, of itself, imply that the land belonged to her.
81. Similarly, the fact that the respondent had, during the trial, expressed a readiness to explore the possibility of an amicable settlement, does not mean that he had acknowledged that the land belonged to their mother. The parties herein are siblings. Sometimes, for the sake of peace within a family, it is possible to resolve disputes amicably, without holding onto legal rights. When negotiations fail to yield a settlement, the parties would then canvass their respective cases, and the court would make a determination. That is what transpired in this case.
82. In the final analysis, we find that the appellants failed to prove that the suit land was held in trust by the respondent. There was no proof that the land was given to the respondent by the mother of the parties herein, after she purchased it from the Settlement Fund Trustees. Therefore, we uphold the findings by the trial court.
83. As regards costs, we appreciate that the parties herein are siblings. However, the fact that the dispute was between siblings did not imply that costs of the suit would be borne by the respective parties, irrespective of other considerations obtaining in the matter.
84. Ordinarily, costs should follow the event. In this case, the learned trial Judge awarded costs to the successful party.
85. The respondent had been sued by his siblings, who lay claim to 12 Hectares out of the 14.5 Hectares of the land in issue. Had the appellants been successful, the respondent would have been left with only 2.5 Hectares.
86. We find that the work that the respondent had to put into the case, to defend his rights, must have been considerable.
87. We find that the appellants have not demonstrated how the award of costs to the respondent was erroneous.
88. Accordingly, we also uphold the order which the trial court had made in respect to the costs of the suit.
89. Finally, as the respondent had been successful in opposing the appeal, we award him the costs thereof. We so order because the appellants have not satisfied us that there was any justifiable reason to deny costs to the party who was successful.



DATED AND DELIVERED AT NAKURU THIS 31ST DAY OF MARCH, 2023.

F. SICHALE

.....

JUDGE OF APPEAL

F. OCHIENG

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

