



Mwaura v Njuguna (Sued in Her Capacity as the Administratrix of the Estate of Njuguna Karanja - Deceased) (Environment and Land Appeal E019 of 2023) [2024] KEELC 3330 (KLR) (24 April 2024) (Judgment)

Neutral citation: [2024] KEELC 3330 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT AND LAND APPEAL E019 OF 2023
LN GACHERU, J
APRIL 24, 2024**

BETWEEN

MARY WAMBUI MWAURA APPELLANT

AND

ALICE WAMBUI NJUGUNA (SUED IN HER CAPACITY AS THE ADMINISTRATRIX OF THE ESTATE OF NJUGUNA KARANJA - DECEASED) RESPONDENT

(Being an Appeal against the Judgment of Hon P. N Maina, (CM) delivered on 18th May 2023, in Muranga CMC ELC NO. 1 of 2019)

JUDGMENT

1. The Appellant herein, Mary Wambui Mwaura, was the Plaintiff in Muranga CM ELC NO. 1 OF 2019, wherein Hon. P. N. Maina (CM), as the trial magistrate delivered a judgement on 18th May 2023, and dismissed the Plaintiff's suit with costs. The Appellant was aggrieved by the said Judgment which dismissed her claim entirely, with costs to the Defendant/ Respondent herein. Consequently, the Appellant filed the instant Appeal vide a Memo of Appeal dated 13th June 2023, and prays that:
 - a. The appeal be allowed,
 - b. An order allowing the Appellant's suit at the lower court;
 - c. The costs of the appeal and the suit filed at the lower court be borne by the Respondent.
2. The Appellant as the Plaintiff in MCELC No. 1 of 2019, had sought for judgement against the Defendant/ Respondent herein for;



- a. A declaration that the husband of the defendant, Njuguna Karanja, now deceased held land parcel No. Loc 17/Sabasaba/2083, and Makuyu/Makuyu/Block 1/298, in trust for himself and the Plaintiff in equal shares.
 - b. The trust be dissolved and the defendant be ordered to transfer half of land parcels No. Loc 17/ Saba Saba/ 2083 and Makuyu/Makuyu/ Block 1/298, to the Plaintiff.
 - c. Costs of the suit.
 - d. Further relief as may be just.
3. The Appeal is premised on the following six grounds:
1. That the trial Court erred in law and in fact in holding that the Appellant herein did not prove her case on a balance of probabilities whereas the converse is true.
 2. That the trial Court was misdirected in itself holding that the appellant did not possess the requisite capacity or locus standi to file the suit whereas the Appellant is a Protestor in another suit concerning the estate of the husband to the Respondent herein.
 3. Further, the Appellant contends that the trial Court disregarded her intention to establish the existence of a trust in respect to land parcels No. LOC.17/Sabasaba /2083 and Makuyu/ Makuyu/Block 1/298 belonging to the estate of husband to the Respondent herein.
 4. That the trial Court’s decision was narrowly-founded on procedure and did not consider the substantive law relating to the issues raised in the suit.
 5. That the trial Court’s decision was unsound in reasoning by disregarded the law pertaining to trusts attaching to land.
 6. That the trial Court did not distinguish the Judgment of the Supreme Court in the case of Isack M’Inanga Kiebia Vs Isaaya Theuri M’Lintari & Another [2018] eKLR, from the facts of the suit before it, resulting in a misapplication of the test developed by the Supreme Court in the preceding case.”
4. At the trial Court, the Appellant as the Plaintiff gave evidence for herself and called two more witnesses to support her case, while the Respondent herein as the Defendant, gave evidence for herself and called no witness. After analyzing the evidence before it, the trial court held; After carefully evaluating all the evidence and submissions on record, I find that the Plaintiff has failed to establish her case against the defendant to the required standard. The Plaintiff has not only failed to establish that she has the requisite capacity / locus standi to institute this suit, but she also failed to establish the existence of customary trust in relation to the suit properties. I accordingly find that the Plaintiff case lack merit and dismisses the same in entirety with costs to the Defendants.
5. The Appeal was admitted under Section 79B of the *Civil Procedure Act* on 3rd October 2023, and the Court directed that the said Appeal be canvassed by way of written submissions.
6. In compliance thereto, the Appellant filed her written submissions on 3rd November 2023, through the Law Firm of T. M. Njoroge & Co Advocates, and identified two issues for determination by the Court:
- a. Was there evidenced of a customary trust (adduced by the Appellant before the lower Court?)
 - b. Does registration extinguish a trust?



7. It was the Appellant's submissions that the legal burden of proving existence of trust rested with the one asserting a right under customary trust. She submitted in a bid to discharge such burden, the Appellant had proved that; the suit land was at all times family land; and was registered in the name of the husband to the Respondent herein to hold in trust for his brother and the entire family.
8. The Appellant further submitted that she presented evidence before the trial Court demonstrating that the suit properties constitute ancestral land and were registered in the name of the husband to the Respondent herein for the reason that the Appellant's husband who is a brother to the registered proprietor of the suit properties had not acquired a National Identity (ID) card, at the time of the said registration.
9. It was further submitted that the legal burden of proving the existence of a customary trust rests with the one who is asserting such a right; and, to discharge the preceding burden, it is necessary to prove the following three (3) elements, namely:
 - i. That the suit properties were ancestral land;
 - ii. That during the process of land adjudication and consolidation, one member of the family was designated to hold the suit land on behalf of the family.
 - iii. That the registered persons were the designated family members who were registered to hold the parcels of land on behalf of the family.
10. The Appellant relied on the cases of *Njenga Chogera Vs Maria Wanjira Kimani & 2 Others* [2005]e KLR and *Muthuita Vs Muthuita* [1982] 1 KLR 42, in support of the contention that the existence of a customary trust is a question of fact that must be established by the person making the claim on the basis of evidence and further, that Courts will not imply the existence of a customary trust.
11. The Appellant also relied on the decision of the Court in the case of *Kanyi Vs Muthiora* (1984) KLR 712, to anchor the proposition that registration of land does not extinguish a customary trust.
12. The Respondent filed her written submissions on 14th December 2023 through the Law Firm of Kimwere Josphat & Co Advocates, in opposition to the instant Appeal.
13. It was the Respondent's submissions that the trial Court's holding that the Appellant lacked locus standi to institute the suit was well-grounded because locus standi varies with the case under consideration and cannot be imported from one legal suit to another.
14. The Respondent further submitted that at the trial Court, the Appellant was required to discharge the legal burden applicable in civil cases by demonstrating that she was related to the registered proprietor of the suit land and it was not sufficient for the Appellant to merely assert that she was an Objector in a different suit involving the Respondent.
15. Further, the Respondent submitted that the Appellant failed to prove that she possessed the necessary locus standi to commence the suit before the trial Court as she did not prove that she was the wife to the late Auron Mwaura Karanja, brother to Njuguna Karanja, the registered owner of the suit properties. It was further submitted that it was necessary for the Appellant to establish a spousal relationship with the brother to the registered proprietor of the suit land in order to bring a claim founded on customary trust.
16. The Respondent also submitted that the trial Court was correct in its finding and holding that the Appellant failed to establish a nexus between herself and the registered owner of the suit properties.



17. The above is the available evidence before the trial court as is contained in the Record of Appeal filed on 2nd October 2023, together with the written submissions and cited authorities, which this court has carefully read and considered.
18. There is no doubt that the Appellant herein had filed an ELC suit before the Muranga Chief Magistrate for a Claim of customary trust. The said suit was heard by Hon. P.N Maina, the Chief Magistrate, who after analyzing the available evidence before him dismissed the Plaintiff/ Appellant suit with costs.
19. It is was the evidence of the Appellant that her husband Mwaura Karanja(deceased) was a brother to Njuguna Karanja(deceased), who was the husband to Alice Wairimu Njuguna, the Respondent herein.
20. It was also adduced that the late Mwaura Karanja, died in 1996 or 1997, and Njuguna Karanja died in 2014. There was no evidence that during the lifetime of Mwaura Karanja, there was any dispute over the suit properties.
21. Further, it is evident that apart from the suit properties, there was land parcel No. Loc 17/ Kamahuha/85, which was initially registered in the name of Njuguna Karanja, but was later subdivided into three portions on 6th October 2000. The Respondent, as a Defendant had alleged that this was the only parcel of land that her late husband held in trust for the family of Karanja, as it was an ancestral land, which was subdivided among the three brothers, the late Mwaura Karanja included.
22. It is also evident that the Respondent as the Defendant before the trial court had alleged that her late husband bought the two parcels of land in 1957 and 1988, and therefore, the two parcels of land are not ancestral land, subject of any customary trust.
23. Further, it is evident that land parcel no Loc 17/Sabasaba/2083, is a subdivision of Land Parcel No. Loc 17/Sabasaba/713, which was subdivided on 10th June 1992, and title issued. This subdivision was done during the lifetime of Mwaura Karanja, and there is no evidence of any objection from the said Mwaura Karanja (now deceased).
24. This is a first Appeal and as provided by section 65(b) of the *Civil Procedure Act*, this court has a leeway of determining the Appeal in both the law and facts, based on the available evidence.
25. Further, it is evident that in determining the suit, the trial court exercised the mandated duty granted by both *the Constitution* and statute law, and therefore this court cannot interfere with that discretion simply because it has been moved on Appeal. It will only interfere with the trial court's decision if the same is erroneous and is clearly wrong.
26. The court will rely on the case of Mbogo vs Shah (1968) EA, Page 15, where the court held;

“an appellant court will not interfere with the exercise of the trial courts discretion unless it is satisfied that the court in exercising its discretion misdirected itself in some matters and as a result, arrived at a decision that was erroneous, or unless it is manifest from the case as a whole that the court has been clearly wrong in the exercise of judicial discretion and that as a result there has been injustice”
27. The role of this court is provided for in section 78 of the *Civil Procedure Act*, which is to re- evaluate, re-assess and re-analyse the evidence as is contained in the Record of Appeal and the grounds set out



in the Memo of Appeal. See the case of Abok James Odera t/a A.J Odera & Associates vs John Patrick Machira t/a Machira & Co Advocates (2013) eKLR, where the court held;

“this being a first Appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way” see also the case of Selle vs Associated Motor Boat Co (1968) E.A 123.

28. Further, in the case of Peter M. Kariuki Vs Attorney General [2014] eKLR, the court held:

“We have also, as we are duty bound to do as a first appellate court, reconsider the evidence adduced before the trial court, and re-evaluate it to draw our own independent conclusions, and to satisfy ourselves that the conclusion reached by the trial judge are consistent with the evidence.

29. Being guided as above, the court will now delve into factual details and reconsider the evidence presented before the trial court, re-analyze, re-evaluate, re-assess it and then come up with its own independent conclusion.

30. Taking into consideration the above analysis and having considered the Record of Appeal, the court finds the issues for determination are;

- i. whether the Appellant had capacity to file the suit before the trial court;
- ii) whether the Appeal is merited;
- iii) who should bear costs of the Appeal.

31. On whether the Appellant had capacity/ locus standi to file the suit before the trial court; this court notes that the trial Court held and found that the Plaintiff (now Appellant) had instituted the suit without having obtained the necessary grant of letters of administration, which would have vested her with the necessary legal capacity to institute the said suit. On page 5 of the Judgment, the trial Court observed as follows:

“The first issue for consideration is whether the plaintiff had the requisite locus standi to institute this suit. It is clear from the foregoing that the plaintiff instituted this suit for the benefit of the estate of her deceased husband. She identified her husband as the late Mwaura Karanja. She then went ahead to claim that her husband was entitled to the suit properties on a customary trust basis.

Although she has sued the defendant in her legal capacity as the administrator of the estate of the late Njuguna Karanja, she did not find it prudent to institute the suit in a similar capacity yet she was claiming an interest to land for and on behalf of a dead person. She instituted this suit before she could even obtain the necessary letters of administration which would have given her the capacity to institute the instant suit”.

32. On the issue of locus standi or capacity, the trial Court, relied on the holding in the cases of Law Society of Kenya Vs Commissioner of Lands & others, Nakuru High Court Civil Case No.464 of 2000 and Alfred Njau and Others Vs City Council of Nairobi (1982) KAR 229, and determined that if a party is found not to have locus standi, that party’s case cannot be heard by the Court whether or not it is a case worth listening to.



33. The Appellant herein filed the suit at the trial court on a claim that Njuguna Karanja(deceased) was holding the titles to the two suit properties in trust for his brother, the husband to the Appellant, Mwaura Karanja, who is deceased. In essence, the Appellant filed the said suit on behalf of the estate of her husband Mwaura Karanja.
34. But how could she bring a suit on behalf of the estate of her deceased husband? The Appellant ought to have taken letters of administration in respect of her husband estate, and after being appointed as an administrator, then she ought to have been clothed with necessary capacity to sue on behalf of the estate of her husband, just the way she has sued the Respondent as a legal administrator of the estate Njuguna Karanja, the Appellant should have sued as an administrator of the estate of Mwaura Karanja.
35. The powers of Personal Representative or administrator are provided for in section 82 of the [Law of Succession Act](#), which provides; “the personal representative shall subject only to any limitation imposed by the grant have the following powers: a) to enforce, by suit or otherwise all causes of action, which by virtue of law, survive the deceased or arise out of his death for his estate”
36. See the case of *Trouistik Union International & Another v Jane Mbeyu & Another* (2008) IKLR (G&F) 730, where it was held that;
- “To determine who may agitate by suit any cause of action vested in the deceased at the time of his death, one must turn to section 82 (a) of the [law of succession Act](#). That section confers that power on personal representatives and on them alone”
37. In the proceedings before the trial Court, the main issue in contention was the ownership of land parcel nos. LOC.17/SABASABA/2083, and MAKUYU/MAKUYU/BLOCK.1/298 (the suit properties). More particularly, whether the suit properties were subject to a customary trust as claimed by the Plaintiff (now Appellant).
38. The Appellant had claimed that Njuguna Karanja(deceased) was holding the two parcels of land in trust for himself and his brother Mwaura Karanja. The suit herein is brought on behalf of Mwaura Karanja, who is now deceased, and therefore the Appellant ought to have been clothed with sufficient locus standi by having obtained Letters of Administration.
39. See the case of *Julian Adoyo & another vs Francis Kiberenge Bondeva* (Supra), where the court held that;-
- “A party without locus standi in a civil suit lacks the right to institute and/or maintain that suit even where a valid cause of action subsists. Locus standi relates mainly to the legal capacity of a party. The impact of a party in a suit without locus standi can be equated to that of a court acting without jurisdiction since it all amounts to null and void proceedings. It is also worth-noting that the issue of locus standi becomes such a serious one where the matter involves the estate of a deceased person since in most cases the estate involves several other beneficiaries or interested parties.”
40. It is clear therefore that the Appellant could not bring a suit on a claim for customary trust, touching on her deceased husband, without letters of administration of his estate. Without the said letters of Administration in respect of the estate of Mwaura Karanja, this court finds and holds that the Appellant herein had no capacity to bring the suit on a claim of customary trust, wherein, her late husband Mwaura Karanja was supposed to be the beneficiary of that customary trust. Simply put, the Appellant had no capacity to file the suit before the trial court, and has no capacity to sustain this Appeal.



41. In the case of Alexander Mutunga Wathome –Vs- Peter Lavu Tumbo & Another [2015] eKLR (Machakos Succession Cause No. 80 Of 2011) the court noted that;

“In law one can only represent the estate of a deceased person when a grant of representation has been made in respect of the estate of such deceased person under the Law of Succession Act. In addition, section 82 of the Law of Succession Act provides that it is the personal representative who has the powers to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased. A personal representative is defined under section 3 of the Act as the executor or administrator, as the case may be, of a deceased person.

40. The court holds as above since Locus standi goes to the jurisdiction of the court, and without jurisdiction, the court has no option but to down its tools. See the case of Nasra Ibrahim Ibren Vs IEBC & 2 Others, the Supreme Court Petition No. 19 of 2018, the court held; -

“This is for the reason that where a court has no Jurisdiction, there would be no basis for the continuation of the proceedings pending other evidence. A court of law down its tools in respect of the matter before it, the moment it holds the opinion that it is without jurisdiction while a court lacks Jurisdiction...”.

40. However, since the trial court did not down its tools, but proceeded to determine the merit of the case, this court will also determine the second issue being; whether this Appeal is merited?

41. The Appellant as the Plaintiff before the trial court had alleged that the late Njuguna Karanja, who was a brother to her husband the late Mwaura Karanja was holding the suit properties Loc 17/ Sabasaba / 2083, and Makuyu/Makuyu/Block 1/298, in trust for himself and his brother Mwaura Karanja. The Appellant had further averred that the said suit land belonged to her husband Mwaura Karanja(deceased), but since he had no Identity Card, during the land consolidation and demarcation, the said land were registered in the name of Njuguna Karanja (deceased), to hold them in trust for the said Mwaura Karanja(deceased).

42. The Respondent had vehemently opposed that averment and the trial Court, while citing the holding of the Court of Appeal in the case of Henry Mwangi Vs Charles Mwangi CA 245 of 2004, found and held that, pursuant to the Kikuyu customary law, registration of family land in the name of the eldest son, who then assumes the role of “Muramati”, does not extinguish the trust which continues to inhere in the land subsequent to such registration.

43. Further the trial court cited Section 28 of the Land Registration Act, and held that registration of the suit properties in the name of the Respondent herein is not to be understood as precluding the Respondent from holding an interest in trust for another as a customary trust refers to those non-registrable rights which run with the land and subsist, notwithstanding the registration of the land in question.

44. The trial Court reiterated the holding of the Supreme Court in the case of Isack M’Inanga Kiebia Vs Isaaya Theuri M’Lintari & Another [2018] eKLR, regarding the elements which the Courts ought to consider in determining the existence of a customary trust.

45. The issue that this court will now determine is whether the trial court was wrong or erred in determining as above.

46. The Plaintiff case is a claim for customary trust, and it is evident from the previous decided cases that customary trust is one of the overriding interests, which attaches to land that is registered in favour of



a proprietor. However, that registration cannot defeat the right of a customary trust. The trial court correctly relied on the case of Henry Mwangi vs Charles Mwangi C.A 245 of 2004, where the court held that under kikuyu customary law, to which both parties are subject to, the eldest son inherits the land as muramati, to hold it in trust for himself and the other heirs.

47. Further, it is clear that customary trust is proved by leading of evidence, and trust is a question of fact that must be proved by whoever is asserting it, and trust is never implied by courts, unless there are intention to create a trust in the first place. See the case of Mbothu and Others vs Waitimu & 11 others (1980) KLR 171, where the court held; “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 intention of the parties. The intention of the parties to create a trust must be clearly determined before a trust will be implied”.

48. The supreme court in the case of ISack M’inanga Kieba Vs Isaaya Theuri M’lintari & Another (2018) eKLR, set out the elements to be considered in determining a case of customary trust. The court 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 v. 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.”

40. For the Appellant to succeed in her claim under customary trust, she needed to prove the above elements. Customary trust attaches to ancestral land. The Appellant had alleged in his claim that the late Njuguna Karanja got registered as the proprietor of the suit lands Loc 17/ Sabasaba/ 2083, and Makuyu/Makuyu/Block 1/ 298, as a trustee for his family and the family of Mwaura Karanja (deceased) the Appellant had claimed that her late husband did not have an ID CARD during the land demarcation and consolidation and thus the reasons why his brother got registered as the owner of the two parcels of land, but to hold in trust for himself and his brother.

41. In her witness statement dated 1st July 2019, the Appellant averred that the suit land originally belonged to Mwaura Karanja, but since she did not have a national identity card, the two parcels were registered in the name of Njuguna Karanja. From her statement of claim and her witness statement, the Appellant did not clearly state whether these suit lands were ancestral lands or whether the late Mwaura Karanja had bought them, but save for not having an ID CARD, the said parcels of land could have been registered in his name.



42. On her part, the Respondent had denied any existence of trust, and contended that the two parcels of land were not ancestral land, but were purchased by her late husband and thus could not be subjected to customary trust. She claimed that the only land that was subject to customary trust was Loc. 17/ Kamahuha/85, which was an ancestral land, and the same was subdivided among the three brothers. The Appellant did not oppose this averment, but only insisted that just like Loc 17/Kamahuha/85, which was shared among the brothers, the suit lands are also held in trust for the two brothers, and the existing trust should be dissolved and the suit land be shared by the two brothers.
43. For this court to establish whether there is indeed customary trust in existence over the two parcels of land, this court will have to trace the history of the two parcels of land in order to establish whether the land is ancestral land or not.
44. The Appellant is the one who had alleged, and the burden of proof was upon her, and that proof is on the required standard of balance of probabilities. See the case of *Miller Vs Minister of Pensions* [1942] 2 ALL ER 372, where the court held;
- “It must carry a reasonable degree of probability... If the evidence is such that the tribunal can say ‘we think it is more probable than not’ the burden is discharged., but if the probabilities are equal, it is not”.
40. Evidently, the onus of adducing evidence in support of any claim advanced in a civil suit falls on the party making the claim. In the case of *Hellen Wangari Wangechi Vs Carumera Muthini Gathua* [2005]e KLR, the Court held as follows:
- “It is a well-established fact that whoever asserts a fact is under an obligation to prove it in order to succeed.”
40. This burden of proof is provided for in Section 107 (1) and (2) of the *Evidence Act* (CAP. 80), provides as follows:
- “(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any facts it is said that the burden of proof lies on that person.”
40. Further, Sections 109 and 112 of the *Evidence Act* (CAP. 80) state as follows:
- S.109. “The burden of proof as to any particular fact lies on the person who wishes the court to believe in the existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”
- S.112 “In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him”.
40. Though the trial Court in its judgement held that the Appellant did not have locus standi, its determination was not based on that issue, but the trial court determined that the Appellant did not prove existence of customary trust, and thus the suit was determined on merit.



41. In dismissing the Appellant's case, the trial Court after evaluation of the evidence presented before it by the parties to the suit, held on page 9 of the impugned Judgment as follows:

“As enumerated above, the Defendant has been able to refute the plaintiff's claims/allegations and show the Court how her husband acquired the two suit properties one having bought it from one Amos and another acquisition through shares from Pundamilia Cooperative Society. The Plaintiff on the other hand, had the onus of proving the customary trust but has miserably failed to link the two suit properties to being ancestral land.

The plaintiff failed to prove the root as she did not tell Court in what manner the said suit properties were ancestral lands, how they were acquired by the bothers or whether they were even from their grandfather or what nexus made the suit properties ancestral land”.

40. In determining this Appeal, this court will proceed to consider the grounds of Appeal, the reasoning of the trial court in its Judgement of 18th May 2023, and the elements to be considered in a claim of customary trust as stated by the Supreme Court in the case of Isack kieba(supra).

41. One of the elements that qualifies a claimant to be entitled to a claim of customary trust is that the land in question was before registration a family and/ or ancestral land. The Appellant had claimed the land was for her late husband who could not be registered as the owner since he did not have an ID CARD.

42. This court will therefore trace the root of these two parcels of land. The Respondent in her evidence alleged that her late husband purchased land parcel No. Loc 17/ Sabasaba/713, from one Amos Njoroge in 1957. That after the late Njuguna Karanja paid the full purchase price, the land was registered in his name in 1961 (16th June 1961) as is evident from the Green Card. The Appellant did not dispute this history of land parcel No Loc 17/Sabasaba/713. Though the Appellant had alleged land parcel No Loc 17/Sabasaba/2083, belonged to her late husband, she did not adduce evidence of how he acquired it, was it purchase or inheritance?

43. Further, it is evident land parcel No Loc 17/Sabasaba/713, was subdivided on 10th June 1992, and the title was closed upon subdivision. This subdivision gave rise to Loc 17/Sabasaba/2082 and 2083, which is one of the suit land. Given that Loc 17/Sabasaba/2083, was a subdivision of Loc 17/Sabasaba/713, which land was allegedly purchased by the late Njuguna Karanja, then it is not an ancestral land. This parcel of land was registered in 1992, during the life time of Mwaura Karanja, and there is no evidence that he raised any claim. If Mwaura Karanja did not have an ID CARD, during land demarcation and consolidation in 1960s, can it be said of the same in 1992, when land parcel No. Loc 17/Sabasaba/2083, was registered? This court finds and holds that there was no evidence that the suit land NO. 2083, is an ancestral land

44. The court too will trace the history of Makuyu/Makuyu/Block 1/298, which was registered in the name of Njuguna Karanja on 2nd Feb 1988, as is evident from the title deed produced in court The Respondent produced exhibits such as membership card for Njuguna Karanja, to confirm that he was a member of Punda Milia Farmers' Cooperative Society, which Society had bought land in Makuyu area and distributed to its members. There was no evidence at all that the two brothers ever bought any shares together from the said Cooperative Society and/ or their late father and the acquired land was registered in the name of Njuguna Karanja to hold it in trust for himself and his other family members, Mwaura Karanja included.

45. Without evidence to prove that the two parcels of land were ancestral land, then this court cannot hold and find that the late Njuguna Karanja was holding the two parcels of land in trust for his family, one of them being the late Mwaura Karanja.



46. It is the finding and holding of this Court that the trial Court was not misdirected on a question of law or of fact when it determined that the Appellant herein failed to establish that the suit properties constituted family or ancestral land. The Appellant herein having not drawn a link between the suit land and the lands belonging to her deceased husband's family, there was no basis upon which the trial Court could imply the existence of a customary trust in respect of the suit properties.
47. On ground no 1, the Appellant stated that the trial court erred in law and fact in holding that the Appellant did not prove her case on the required standard of balance of probabilities. It is trite that he who alleges must prove. The Appellant had alleged existence of customary trust and she had the onus of proving existence of the said trust as required by the law.
48. In the case of Alice Wairimu Macharia vs Kirigo Macharia (2019) eKLR, the court held that the legal burden of proving existence of a trust rests with the one who is asserting a right under customary trust, and that person must prove that the suit property was an ancestral land, and one family member was designated to hold it on behalf of the rest of the family member.
49. The court has considered the analysis by the trial court of the available evidence before it and the fact that the Appellant did not prove that the two parcels of land were ancestral land. There was indeed no evidence to link the two parcels of land as an ancestral land, and the trial court did not err at all in finding that the Appellant had not proved her case on the required standard of balance of probabilities.
50. On ground no 2, the Appellant alleged that the trial court erred in law and in fact in finding that the Appellant did not have locus standi. It is not in doubt that the Appellant claim at the lower court was to the effect that her late husband was entitled to a share of the suit land through customary trust. However, the Appellant did not provide prove of having taken letters of Administration to the estate of Mwaura Karanja. Without letters of administration, she has no capacity to bring this suit on behalf of her deceased husband. The Appellant has no locus to bring the suit herein. This court arrived at the same finding and thus the trial court did not err at all.
51. On ground No 3 to the effect that the trial court erred in law and fact in failing to find that the Appellant sole wish and intention was to prove the trust obtaining in two land parcels so that she can crystalize her claim in respect of her deceased estate, as submitted by the Respondent this ground is ambiguous, and the trial court could not help the Appellant to crystalize her claim if the available evidence was not sufficient to support her claim.
52. On ground No 4 that the trial court relied on procedural matters instead of substantive law, the court finds and holds that the suit before the trial court was heard through viva voce evidence. The trial court analyzed the evidence and even after finding and holding that the Appellant had no locus standi, the trial Court still analyzed the evidence and determined the matter on merit. The matter was not terminated preliminarily but was heard and determined on merit. Therefore, this court finds and holds that the trial court did not err in law and fact.
53. On ground No 5 that the trial magistrate delivered a judgment devoid of sound reasoning on matters of law and fact as pertaining to the issue of trust, this court has considered and evaluated the available evidence and the judgment of the trial court and this court finds no reasons to fault it. The impugned judgment is well reasoned and did cover all elements of customary trust and cited the relevant authorities. Consequently, the said judgement is not devoid of reasoning and this court finds this ground must fail too.
54. On ground No 6 that the trial magistrate failed to distinguish the judgement of the Supreme Court that he quoted with the facts and law surrounding this case, the court finds that the said Supreme Court Case of Isack Kieba quoted by the trial court was relevant as it set out the elements to be considered in



deciding a claim of customary trust. One of them is prove that the land in question is an ancestral land. The Appellant needed to prove that the two parcels of land were ancestral land, and thus the quoted Supreme Court case was relevant and this ground fails too.

55. It is evident that the Appellant did not prove the cardinal principles on a claim of customary trust. The Appellant did not have the requisite locus standi to institute the suit, as she had no grant of letters of administration and there was no connection between the registered parcels of land and the late Mwaura Karanja. The Respondent had owned up that the ancestral land had been shared among the three brothers. Therefore, this court finds no reasons to fault the whole judgement of the trial court.
56. The trial Court held that the Respondent herein having tendered evidence in support of her claim that the suit properties were acquired through purchase and, therefore, did not comprise ancestral land, it was incumbent upon the Appellant herein to controvert or refute the said evidence by means of her own evidence, which obligation was not discharged by the Appellant.
57. Having considered the available evidence as contained in the Record of Appeal, and having re-evaluated, re-analyzed and re-assessed the said evidence, this court finds and holds that the trial court did not misdirect itself or arrive at a wrong conclusion. This Court, as an Appellate one, finds no reasons to interfere with the trial court's Judgement of 18th May 2023.
58. Consequently, this court upholds the trial court's Judgement of 18th May 2023. Accordingly, the court finds and holds that this Appeal as stated in the Memo of Appeal dated 13th June 2023, is not merited, and the same is dismissed entirely with costs to the Respondent.

It is so ordered

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 24TH DAY OF APRIL, 2024.

L. GACHERU

JUDGE

Delivered online in the presence of:

Joel Njonjo – Court Assistant

Absent - for Appellant (though served with notice)

Mr. Kimwere for Respondent

