IN THE COURT OF APPEAL

AT NAIROBI

[CORAM: WAKI, NAMBUYE & GATEMBU, JJA

CIVIL APPEAL NO. 168 OF 2013

BETWEEN

ESTHER NYAMWERU WARUHIU...1ST APPELLANT

SOLOMON NG'ANG'A WARUHIU...2ND APPELLANT

AND

GEORGE KANG'ETHE WARUHIU...RESPONDENT

(Being an appeal against the whole of the judgment and decree of the

High Court of Kenya at Nairobi (Gacheche, J.) Dated 20th April, 2011

in

Civil Appeal No. 2 of 2008 (OS))

****

JUDGMENT OF THE COURT

The appeal arises from the judgment of **Jeanne Gacheche, J**, (as she then was) dated the 20th April, 2011, dismissing the appellants' claim against the respondent.

The background to the appeal is that, the appellants and **Samuel Njoroge Waruhiu, (Samuel)** now deceased filed a plaint dated the 22nd May, 2018 against the respondent averring *inter alia*, that they and the respondent are among the children of the late Senior Chief **Waruhiu,** who had five (5) wives namely, **Wanjiru Waruhiu, Ruguru Waruhiu** (A), **Waruchu Waruhiu, Mary Njeri Waruhiu** and **Ruguru Waruhiu** (B); that the deceased died intestate leaving a vast estate, inclusive of a fifty five (55) acre farm, subdivided in the year 1959, into five (5) parcels namely, **Githunguri/Giathieko/332, 333, 334, 335,** and **336;** that the above five subdivisions were registered in the names of the 1st born sons of each household as trustees for themselves and the deceaseds' children of the respective households; that the late **David Wainaina Waruhiu** as the undoubted eldest son of the appellants mother's household was registered as a proprietor of parcel **No. 336** (the suit property) as a trustee for himself and all the children of their mothers' household; that without their consent, knowledge and or participation, the late **David** transferred the suit property to the respondent, on 17th October, 1980; and that it was not until the year 2005 that they discovered the fraud and illegality; that efforts to have the issue resolved amicably at family level bore no fruits, hence the appellant's move to seek the courts intervention.

It is on the basis of the above averments, that the appellants sought from the Court declarations that they are beneficiaries of the suit property; that the late **David** as a trustee for himself and the appellants had no mandate to transfer the suit property to the respondent without their consent and or participation; that the Court should therefore declare that the transfer of the suit property by the said late **David** to the respondent was fraudulent and therefore illegal, null and void; and that therefore an order do issue restraining the respondent from either selling and or transferring the suit property to any 3rd party or howsoever, receiving proceeds of such sale.

In rebuttal, the respondent filed a defence on 20th June, 2008, *inter alia* denying that the appellants were beneficiaries of the suit property; denying that **David** was registered as trustee for himself and the appellants; asserting that **David** was registered as an absolute proprietor of the suit property with the freedom to deal with it as he wished; that he had no knowledge that the appellants discovered the transfer of the suit property from the late **David** to him in 2005; and finally denying that the transfer of the suit property to him was fraudulent, illegal, null or void.

In the alternative, and without prejudice to the foregoing, the respondent averred *inter alia*, that in 1980, the late **David** informed the appellants that he was disposing of the suit property to him, to which they assented; that if there was any breach of trust by the late **David**, the appellants' cause of action should have been directed against the estate of the late **David** and not him as he was a *bona-fide* purchaser for value; that an inquiry set up by the Commissioner of Lands into the ownership of the suit property pursuant to a gazette notice on 12th January, 2007, intending to acquire the suit property established that he was legally and procedurally registered as owner of the suit property.

The late **Samuel**, who had filed an Authority to plead and testify on his own behalf and on behalf of the appellants, is the only party who gave evidence at the trial. The sum total of his testimony both in Chief and cross-examination was a reiteration of the background information already set out above, save for adding that he came to learn of the transfer of the suit property from the late **David** to the respondent in the 1990s, while in the cause of his participation in the administration of the estate of the late **David.** He conceded that from the record, the transfer of the suit property from the late **David** to the respondent was effected way back on 17th September, 1980; while the claim resulting in this appeal was filed in the year 2008; that upon discovery of the said transfer, there were amicable family negotiations with a view to reversing the said transfer from the respondent to the appellants; but these fell through, hence the litigation.

At the conclusion of **Samuel's** evidence, the respondent closed his case without tendering any evidence in support of the averments in the defence, nor adopting the defence or the replying affidavit he had filed in opposition to the appellants' application for an interim application as his evidence.

At the conclusion of the trial, the trial Judge assessed and analyzed the record before her in light of the sole testimony of late the **Samuel** and the rival submissions of the parties and rejected the appellants claim in totality. The reasons the Judge gave for rejecting the appellants' claim against the respondent were that, the alleged trustee relationship between the late **David** and the appellants had not been proved by credible evidence; that allegations of fraud as pleaded had not been established to the required threshold; and, thirdly, that the appellants' claim was time barred in terms of the provisions of **section 7** of the Limitation of Actions Act, Cap 22 of the Laws of Kenya.

The appellants were dissatisfied with the said decision and filed this appeal raising seven (7) grounds of appeal. These were subsequently condensed into three, namely, that the learned Judge erred:

> ***(1) In failing to find that the property known as Githunguri/Giathieko/336 was held by David Wainaina Waruhiu in trust for himself and the appellants;***
>
> ***(2) In failing to find that the property was fraudulently transferred to the respondent;***
>
> ***(3) In holding that the appellants' suit was time barred.***

The appeal was canvassed by way of written submissions, orally highlighted by learned counsel for the parties. Learned counsel **Mrs. V. Wangui Shaw** instructed by the firm of Ransley, MC Vicker & Shaw Advocates, appeared for the appellants, while learned Counsel Miss. **Patricia Waruhiu** instructed by the firm of Mwagambo & Okonjo Advocates, led **Mr. Edward Otungo,** advocate for the respondent.

In support of the appeal, **Mrs. Wangui Shaw,** submitted that the appellants specifically pleaded in paragraphs 4 and 5 of the plaint and as verified by affidavits and the uncontroverted testimony of the late **Samuel**, that the suit property was one of the five (5) portions of land resulting from the subdivision of the appellant's late father's 55 acres farm and registered in the names of the first born sons of each household of the late Senior Chief **Waruhiu** as trustees for themselves and their respective household siblings**.**

Relying on the case of **Kimani versus Gikanga [1965] EA 735** for the meaning of a *Muramati*, counsel submitted that although the Judge made reference to this custom while quoting from the book on Kikuyu Customary Law by **Eugene Cotran**, the Judge failed to properly appreciate and apply the said custom in the determination of the appellant's claim against the respondent, notwithstanding, the undisputed fact that both parties were subject to Kikuyu customary law.

On proof of trust, counsel relied on section 28 of the Registered Land Act (RLA) Cap 300 Laws of Kenya (repealed), as construed and applied in **Mumo Versus Makau [20004] eKLR** and **Mbui versus Mbui [2005] IEA (C.A.K)** and submitted that whereas the law provides for absolute proprietorship of land particularly in a first registration, it does not preclude the declaration of a trust over such property. Counsel therefore urged us to fault the Judge for the failure to properly appreciate the late **Samuel's** uncontroverted and undiscredited evidence that the late **David**, held title to the suit property as trustee for himself and the appellants and that the transfer of the suit property to the respondent without the knowledge, consent and or the participation of the appellants was not only in breach of his fiduciary duty to the appellants, but was also fraudulent and therefore illegal, null and void.

Counsel also relied on the case of **James Allan Davies & 2 others versus Holiday Centre Limited & 2 Others, Civil Appeal No. 142 of 1992** and urged us to fault the Judge for admitting *suo motu*, the contents of the respondent's replying affidavit filed in opposition to the appellants' application for interim injunction and acting on it as a basis for disallowing the appellants' claim, in an instance where the respondent had neither tendered evidence in support of his depositions in the said replying affidavit, nor even adopted both the defence and the said replying affidavit as evidence in rebuttal to the appellants evidence tendered through the late **Samuel.**

Turning to the role of the court as a first appellate court, counsel relied on the case of **Ephantus Mwangi versus Duncan Mwangi Wambugu [1984] eKLR** and **Selle & Another versus Associated Motor boat Company Limited & 2 others [1968] E.A 123,** and urged us to reappraise the record, apply the Kikuyu *Muramati* customary law land tenure system to the appellants' claim against the respondent and allow the same; reverse the trial Judge's findings as those findings were based not only on a misapprehension of the evidence, but also on a misapplication of wrong principles of law to that evidence, leading to the erroneous decision arrived at by the Judge, which decision we should not allow to stand.

Turning to the issue of proof of fraud; counsel urged that the appellants had established fraud to the required threshold as **Samuel's** evidence

that they neither consented to nor were they privy to the transfer of the suit property from the late **David** to the respondent, was neither controverted by any other evidence tendered by the respondent nor shaken in cross-examination. It was therefore counsels' submission that as long as that evidence stood, fraud was proved against the respondent to the required threshold and the trial Judge should have held so.

Lastly, counsel submitted that the Judges' finding that the appellants claim was time barred, had no basis as it went contrary to the appellants' uncontroverted evidence that the appellants only came to learn of the transfer of the suit property by the late **David** in 2005; that thereafter, they engaged the respondent for an amicable resolution of the dispute and it was only after such efforts bore no fruits that they filed the suit in 2008. On account of the totality of the above, counsel urged us to allow the appeal with costs.

Rising up to oppose the appeal, **Miss Patricia Waruhiu,** in a brief submission relied on the cases of **Mbui versus Mbui,** (supra), **Edward Kipkoskei Chemurbii & another versus Charles K. Kosgei & another [2014] eKLR,** and **Gachanja Gitau & 2 others versus Mwangi Gitau alias Waithaka Gitau [2016] eKLR,** for the submission that the evidence tendered by the appellants through the late **Samuel** did not demonstrate any existence of a trust in favour of the appellants over the suit property, for the appellants' failure to explain their conduct of not taking any remedial action after learning in the 1990s that the suit property had been transferred from the late **David** to the respondent way back on 17th October, 1980; and lastly, that the objection to the transfer of the suit property to the respondent was raised only after the property had been gazetted by the Commissioner of Lands for compulsory acquisition.

Relying on the case of **Patrick Waweru Mwangi versus Housing Finance Company of Kenya Ltd [2013] eKLR,** counsel urged us to affirm the trial Judge's finding that the conduct of the appellants with regard to the ownership of the suit property, operated to disentitle them to any equitable remedy they may have held in the suit property.

In reply to the respondent's submission, **Mrs. Wangui Shaw**, urged us to disregard the submissions advanced and case law relied upon by the respondent in opposition to the appeal, for being irrelevant to the issues in controversy herein.

This being a first appeal, our duty, as stated in the case of **Selle versus Associated Motor Boat Co. [1968] EA 123** is to:

> **"....... reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that is has neither seen nor heard the witnesses and should make due allowance in this respect. 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 demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif vs. Ali Mohamed Sholan (1955), 22 E.A.C.A 270."**

We have re-evaluated and re-analyzed the record in light of the above rival submissions and principles of law relied upon by the parties. The issues that fall for our determination are as condensed above.

With regard to the first issue, the Judge after assessing and analizing the record, and making general observations on the background factors precipitating the litigation, construed **sections 28, 29** and **143** of the Act, and considering these in light of the record, made general observations on the law as follows: that title registered in the name of a proprietor vests upon such a proprietor the absolute ownership of the land, unless trust was proven against such a proprietor by a claimant; that even as a first registration, such a registration was not a bar to a claim by a beneficiary under a trust whether such a trust was registered against the title or not; and lastly, that the right of a registered proprietor would also be defeated where there was proof that such registration was acquired through fraud.

Applying the above guiding principles, the Judge rejected the appellants' claim against the respondent for the reasons that; the late **Samuel** had admitted that all those who were of age as at the time of the distribution of the estate of the late Senior Chief **Waruhiu,** inclusive of the late **David**, received their share of entitlement of the deceased's estate directly in accordance with the Kikuyu Customary Law; that for the forty (40) years that the suit property was registered under the name of **David,** neither **Samuel** nor the appellants bothered to know what **David** did with it; that no objection was raised by the appellants when the suit property was leased to the government in 1962; that **Samuel's** explanation that he assumed it was his other siblings from his mother's household who were making use of the suit property was not credible; and lastly, that **Samuel** and the appellants participated in discussions over the transfer of the suit property and that, therefore, they either willingly and knowingly abandoned or forfeited whatever beneficial rights they may have held in the suit property.

We have considered the above reasoning of the Judge in light of the record, and reiterate as correct the Judge's observations on the record that although both parties filed opposing pleadings, only the appellants tendered evidence through the late **Samuel** in support of their claim of a beneficial interest in the suit property; that the suit property was one of the five(5) resulting subdivisions of the fifty five (55) acre farm, undisputably formerly part of the estate of the late Senior Chief **Waruhiu;** that each of the resulting five (5) subdivisions were registered in the names of the first born sons of each of the five households of the late Senior Chief **Waruhiu;** and that no entry was made in the registers of the five portions for the beneficial interests of the other siblings of each of the five households of the late senior chief **Waruhiu.**

Turning to observations made by the Judge on the applicable principles of law, it is also our view that the Judge correctly observed that in law failure to note a beneficial interest against the title of an absolute proprietor is not *per se* a bar to a claim of rights of such a beneficial claimant against an absolute proprietor save that such beneficial rights are subject to proof to the required threshold of balance of probability. See **Kimani versus Gikanga** (supra), and **Mbui versus Mbui** (supra). Lastly, that the Kikuyu customary law, recognizes the "*Muramati*" land tenure system, whereby a registered proprietor holds the land as trustee for himself and the rest of the family or household.

The Supreme Court in the case of **Isack M'Inanga Kieba versus Isaaya Theuri M'Lintari & another [2018] eKLR,** expressed itself as follows on customary land rights:

> **"[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 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 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." [emphasis added].

Applying the above principles of law, to the findings of the Judge, we proceed to make findings thereon as follows; first, that the Judge failed to appreciate that, late **Samuel's** admission on oath that beneficiaries to the estate of the late Senior Chief **Waruhiu** who were of age received their share entitlement of the estate directly. The direct share related to other properties forming the bulk of the estate of the late senior Chief **Waruhiu,** other than the property forming the fifty five (55) acres farm.

Second, the Judge also failed to address her mind to the fact that the 55 acre farm from which the suit property was a sub division was family land for the benefit of all the beneficiaries of the estate of the deceased, hence its subdivision into five (5) portions representative of the five households of the late Senior Chief **Waruhiu**; that the appellants were beneficiaries to the estate of the deceased in their capacity as children of the deceased; that the appellants could have been registered as proprietors in their own right had a decision not been taken at the family level that the farm be subdivided into five (5) portions representative of the five (5) households of the deceased, and that each portion be registered in the names of the first born sons of each household to hold as trustees for themselves and the siblings of their respective households; and that the appellants claim is therefore well founded against the respondent as a beneficiary of a transfer of the suit property from the late David to himself without the consent, knowledge and participation of the appellants and in breach of late **David's** obligation as trustee for himself and the appellants' unregistered interest in the suit property.

Thirdly, the Judge also failed to address her mind to the doctrine on the *Muramati* Kikuyu customary law land tenure system and its implication on the reason for subdividing the 55 acre farm into five portions as indicated above, hence in our view, erroneously rejected the appellants' uncontroverted assertions that the suit property was their share entitlement for their mother's household; and that the late **David** as the undoubted 1st born son of their mother's household was registered as such a *Muramati* in trust for himself and the appellants.

When using the alleged lack of interest or inaction for a period of close to forty (40) years as a factor militating against the Judge's rejection of the appellants' claim of a beneficial interest in the suit property, the Judge failed to appreciate that the late **Samuel's** uncontroverted evidence that there were family negotiations to try and resolve the issue amicably and that it was only after those negotiations fell through that the suit was filed. The Judge failed to appreciate that there was nothing either from the text on the case book on customary law by **Eugene Cotran** or the case law she had considered, which provides for a time limit within which a party can move to assert a Customary Law land right against a "*muramati*".

Both the High Court and the Court of Appeal have expressed themselves on this issue. **Isaac Lenaola, J (**as he then was), in **Peter Gitonga versus Francis Maingi M' Ritari & another versus M'Ikiara [2007] eKLR,** held *inter alia* that a trust can be created under customary law save that the circumstances surrounding registration must be looked at to determine the purpose of the registration; and that there is no need for the words "trustee" to have been inscribed on a registered proprietors title for the trust to be recognized, while **C.N. Mbugua, J.,** in **James M'Ngaruthi Muguna M' Rintari [2017] eKLR,** upheld a claim for a customary land right trusts over clan land registered in the name of a member of the clan, and also reiterated that all registered land is subject to trusts including customary trusts.

Turning to the Court of Appeal, in **Macharia Kihari versus Ngigi Kihari [1994] eKLR,** the Court was categorical that the limitation period prescribed in **section 20(2)** of the Limitation of Actions Act, does not apply to a trust coming into existence under customary law and that:

> **"under customary law, the land even after the right of action has accrued, is held in trust even for decades before any step is contemplated for a formal transfer or division, and further that "limitation does not apply in customary law."**

In light of the case law assessed above, we hold that the Judge fell into error when she applied the period of inaction attributed to the appellants as a factor contributing towards the rejection of their claim of a beneficial interest in the suit property.

It is also evident from the record that, the Judge also used the uncontroverted evidence that members of one of the five (5) households of the late Senior Chief **Waruhiu,** who had likewise benefited from the resulting subdivision of the 55 acre farm successfully thwarted an attempt by the registered proprietor of their portion to transfer that portion to a 3rd party as a ground for rejecting the appellants' claim allegedly for their failure to diligently take a similar action to protect their interests. Our view is that, instead of the Judge using this evidence to defeat the appellants' claim against the respondent, she should have applied it to buttress the appellants claim as it accorded with the Judge's own observations both on the facts and the applicable principles of law at the outset of her assessment of the evidence on the record that failure to note a beneficial interest against the title held under absolute proprietorship was not a bar to such a claim on the one hand, and on the other hand; that the fifty five (55) acre farm was undoubtedly part of the estate of the late Senior Chief **Waruhiu**; and that the resulting five (5) subdivisions of the said farm went to benefit the five (5) households of the late Senior Chief **Waruhiu** which in itself went to entrench the beneficial claims by the members of each household against the first born sons of each household in their capacity as the registered proprietors of the respective five (5) portions.

As for the Judge's finding that the appellants knowingly and willingly participated in the consultations between the late **David** and the respondent, and that they also consented to the transfer of the suit property from the late **David** to the respondent; **Samuel's** uncontroverted testimony was that he stumbled over the fact of the transfer of the suit property from the late **David** to the respondent, while in the course of administering **David's** estate. This was in the 1990s when he learned that the said transfer had infact been effected way back on 17th October, 1980. It is appreciated that the respondent had deposed so in his replying affidavit in opposition to the appellants' application for an interim injunction. He had also averred to that effect in his defence. The above position notwithstanding, it is our view that the content of that replying affidavit became spent the moment the appellants' application for interim injunction was compromised by consent. The respondent had replicated the assertions in the said spent replying affidavit in his defence, but gave no evidence in support of that pleading.

In **CMC Aviation Ltd Vs. Cruisair Ltd** (No1) [1978]. KLR 103 at page 104, **Madan JA** observed as follows:-

> ***"the pleadings contain the averments of the the parties concerned. Until they are proved, or disproved, or there is admission of them or any of them by the parties, they are not evidence and no decision could be founded upon them. Proof is the foundation of evidence. As stated in the definition of "evidence" in section 3 of the Evidence Act, evidence denotes the means by which an alleged matter of fact, the truth of which is submitted to investigation, is proved or disproved. Averments are matters the truth of which is submitted for investigation. Until their truth has been established or otherwise they remain unproven. Averments in no way satisfy, for example, the following definition of "evidence" in Cassell's English Dictionary, p.394:***
>
> ***Anything that makes clear or obvious, ground for knowledge, indication or testimony; that which makes truth evident, or renders evident to the mind that it is truth.***
>
> ***The pleadings in a suit are not normally evidence. They may become evidence if they are expressly or impliedly admitted as then the admission itself is evidence. Evidence is usually given on oath. Averments are not made on oath. Averments depend upon evidence for proof of their contents."***

Applying the above observations to the reasoning we have given above, it becomes clear that the Judge was in error in amending pleadings which had not been adopted as evidence.

Turning to the appellants' allegation of fraud against the respondent, we take no issue with the Judge's appraisal of the law on the standard of proof for allegations of fraud as that is the correct position in law. In rejecting the appellants' claim, the Judge cited: failure of the appellants to adduce credible evidence in support of the said allegation; consent to the transaction between the late **David** and the respondent**;** the court's earlier finding that the late **David** was not a trustee for the appellants over the suit property, that the late **David** being a first registered proprietor, his indefeasible rights in the suit property in terms of **section 143** of the Act entitled him to deal with the suit property as he deemed fit; and lastly, that the respondent was a *bona-fid*e purchaser for value of the suit property.

We have considered the above findings in light of the record. We reiterate our earlier finding that the late **Samuel's** more probative testimony on lack of consent and knowledge of the transaction between the late **David** and the respondent with regard to the transfer of the suit property from the late **David** to the respondent was uncontroverted. The moment the appellants pleaded and gave evidence alluding to lack of knowledge and consent for the transfer of the suit property from the late **David** to the respondent, they discharged their part of the burden of proof and thus shifted that burden to the respondent to disprove those assertions, a position the respondent never discharged as he never tendered evidence in support of his defence. We therefore find no basis for the Judge's holding that, the appellants had not proved allegations of fraud against the respondent.

Turning to the issue of the appellants' claim being statute barred, it is not in dispute that the respondent raised objection to the appellants' claim to that effect by way of a preliminary objection dated 15th May, 2008. The said preliminary objection was canvassed by way of oral submissions resulting in a merit ruling delivered by the Judge on 4th June, 2008. When dismissing the respondent's Preliminary Objection, the Judge rendered herself *inter alia* as follows:

> ***"It is important to note that the defendant has yet to file a defence and in the circumstances, there is no specific denial of the issues of trust and fraud, which have been raise and particularly by the plaintiffs. The court is thus faced with the unfortunate situation where the defence counsel raised issues of fact from the bar, a situation which negate the whole purpose of raising Preliminary Objection. The Preliminary Objection cannot therefore live. I dismiss it with costs".***

The said ruling was never appealed against. The respondent filed his defence subsequent to that ruling in which he never raised the issue of limitation.

In **Odd Jobs versus Mubia** [1970] EA476, it was held *inter alia* that:-

"A Court may base its decision on an unpleased issue if it appears from the cause followed at the trial that the issue has been left to the Court for decision."

In light of the above guiding principle, we find no basis for the trial Judge going out of her way to raise the issue of limitation *suo motu* that was not stated or canvassed and then use it against the appellants' claim. It is a glaring error on the face of the record which cannot be allowed to stand and we reverse it.

The above finding notwithstanding, we also wish to add that in light of the case law assessed above, on the effect of the statute of limitation on customary law trusts, even if such a period of limitation had been pleaded and considered by the Judge as she did, the finding would not have survived on appeal for the reason that time of limitation does not run against a customary law trust claim, whether such a trust is noted on the register or not.

The upshot of all the above reasoning is that we find merit in this appeal. It is accordingly allowed as prayed. We set aside the Judgment of the trial court dated 20th April, 2011, dismissing the appellants' claim, and substitute it with an order allowing the appellants' claim against the respondent as prayed in their plaint before the High Court.

Dated and Delivered at Nairobi this 8th day of March, 2019.

P.N. WAKI

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JUDGE OF APPEAL

R.N. NAMBUYE

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JUDGE OF APPEAL

S. GATEMBU KAIRU FCIArb

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.