



REPUBLIC OF KENYA



Ethang'Atha & another v Ethang'Atha & 3 others (Enviromental and Land Originating Summons 13 of 2020) [2025] KEELC 752 (KLR) (20 February 2025) (Judgment)

Neutral citation: [2025] KEELC 752 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ENVIROMENTAL AND LAND ORIGINATING SUMMONS 13 OF 2020

CK YANO, J

FEBRUARY 20, 2025

IN THE MATTER OF LAND PARCELS NO. TIGANIA WEST/URINGU II/644; 2096 & 937

BETWEEN

AGGREY MURAGA ETHANG'ATHA 1ST PLAINTIFF

SARAH MWATHERA 2ND PLAINTIFF

AND

ERIC KINOTI ETHANG'ATHA 1ST DEFENDANT

HUMPHREY KIRAMANA 2ND DEFENDANT

MOSES NDEREBA ETHANG'ATHA 3RD DEFENDANT

WILLIAM NKUMBUKU ETHANG'ATHA 4TH DEFENDANT

JUDGMENT

1. The Plaintiffs brought this Originating Summons dated 22nd April, 2020, against the Defendants seeking the following reliefs: -
 - a. A declaration that the 1st and 2nd defendants who are registered owners of Land Parcels Tigania West/Uringu II/2096 & 937 respectively, hold the said parcels of land in TRUST for the benefit of all the heirs of Ethang'atha Mwirabua (Deceased).
 - b. An order directing the 1st and 2nd defendants who are registered owners of Land Parcels Tigania West/Uringu II/2096 & 937 respectively to distribute and transfer the said parcels of land equally (or in such portions as the court deems fit) amongst the heirs of Ethang'atha Mwirabua (Deceased) alongside the 1st Plaintiff who is ready to distribute and transfer Land Parcel No. Tigania West/Uringu II/644 which he admittedly holds in trust for the benefit of all the heirs



of Ethang'atha Mwirabua (Deceased) or in default, all the relevant transfer documents be executed by the Land Registrar, Meru North Land Registry.

- c. An order of permanent injunction restraining the defendants by themselves, their agents, assigns, heirs or anyone working on their behest from cultivating, trespassing into or otherwise interfering with the plaintiffs' quiet possession of Land Parcel No. Tigania West/Uringu II/644 pending completion of the distribution and transfer contemplated in Prayer No. 2.
 - d. That the costs of this Originating Summons be borne by the Defendants herein.
2. The Originating Summons is anchored on the Supporting Affidavit of the two Plaintiffs which are a replica of each other in content. They averred that the 1st Plaintiff and the Defendants are brothers while the 2nd Plaintiff is their late Cousin's daughter. Their late father, Ethang'atha Mwirabua (Deceased) was survived by his 9 children and nephew, Simeone Rukunga (also deceased). They deponed that the 1st Plaintiff is registered proprietor of Tigania West/Uringu II/644 measuring 5.227 Ha, while the 1st and 2nd Defendants are registered proprietors of Tigania West/Uringu II/2096 & 937 measuring 8 & 3.34 Acres respectively. They deponed that the three of them were so registered on behalf of all the heirs of the late Ethang'atha Mwirabua who acquired the parcels during his lifetime.
 3. The Plaintiffs averred that the 2nd Plaintiff and her siblings are in possession of more than half of Plot No. 644 where they have lived from time immemorial and have made enormous developments thereon. It is the Plaintiffs' case that the 3rd and 4th Defendants intruded into portion occupied by the 2nd Plaintiff and her siblings, destroyed their crops, cut down their trees and erected temporary residential structures; that they threaten to forcefully evict her and her siblings from the land rendering them destitute. They also deponed that the 1st Plaintiff attempted to distribute Plot No. 644 to the other heirs but the Defendants objected due to the inclusion of the 2nd Plaintiff and her siblings.
 4. They deponed that the Defendants have on their part refused to distribute Plot Nos. 2096 and 937 to the other heirs, using the land exclusively to everyone's exclusion, while still claiming a share of Plot no. 644. They accused the 1st and 2nd Defendants of breach of the trust upon which they hold the land for the other beneficiaries and set out the particulars of breach. The Plaintiffs expressed apprehension that the 1st and 2nd Defendants may dispose of the plots to third parties, rendering the other heirs destitute. They deponed that unless the prayers herein are issued, the Defendants will continue frustrating the rest of the heirs and depriving them of their entitlement in the suit properties.
 5. The 3rd Defendant, with the authority of his Co-Defendants swore an Affidavit dated 3rd July, 2020 in response to the Summons. He deponed that the Summons was incompetent for reason that the Plaintiffs had no capacity to lodge this suit on behalf of their deceased father without letters of administration or grant. The 3rd Defendant deponed that the claim is for division of their late father's property, which the Applicants claim is being held in trust, and thus the suit was not only incompetent, but also an abuse of court process.

Hearing & Evidence;

The Plaintiffs' Case

6. The Summons proceeded by way of viva voce evidence and hearing commenced on 22nd November, 2023. The 1st Plaintiff testified as PW1, he was sworn and adopted his witness statement dated 3rd November, 2023. He produced the documents in his list of documents as PEXb1-10 respectively.
7. PW1 was cross-examined by the 4th Defendant and testified that the 4th Defendant was not involved in the AR cases because he was in Mombasa although he paid for the case. PW1 testified that he got 3.34



Acres and he was to give half of it to the 2nd Plaintiff and share the remaining half with his brothers, but they objected because they want more shares for themselves. He testified that their late father gathered 31 Acres, none of which went to other people. PW1 admitted that he had another parcel of land belonging to their father being no. 915 measuring 4 Acres. He could not remember the parcel no. of the land he lived on. He explained that the decision to give the 2nd Plaintiff's family half of Plot No. 644 was made by their late father a long time ago. He also admitted that there are other members of the family who have no land to stay. PW1 testified that they would undertake a demarcation exercise after this case is concluded, and was adamant that they would all get 1 Acre, but told the court that he and his family were living on 1.5 Acres of land.

8. PW1 was re-examined and he added that when the 4th Defendant returned from Mombasa he had an option of where to live other than where the 2nd Plaintiff is. That the 4th Defendant was shown these options and even dug a pit latrine on one of them but still did not want them. PW1 testified that the Defendants have never made any effort to subdivide the land. PW1 testified that he went to the Land Control Board to subdivide the land, but the 4th Defendant blocked him by putting a caution on the land. He stated that the Defendants forcefully entered the land.
9. The 2nd Plaintiff testified as PW2, she was also sworn and adopted her witness statement dated 3rd November, 2023. She opted to rely on the documents produced by the 1st Plaintiff as her exhibits.
10. PW2 was cross-examined by the 2nd Defendant and testified that she is not the daughter of their late father. PW2 said that she did not know they had registered the land and so she could not file an A/R Objection. On cross-examination by the 3rd Defendant, PW2 admitted that the 3rd Defendant was her cousin. PW2 testified that the 3rd Defendant constructed on their land on which they have lived since the 1950s. She testified that in the old days, land used to be registered based on trust and no agreement was signed. She testified that the 3rd Defendant went to their land and destroyed their crops. PW2 stated that the family held a meeting on 7th October, 2023 regarding sharing of plot no. 644 between Ethang'atha and Simeone Rukunya. It was agreed that all those who contribute money towards that land would be given 1 Acre. She added that if the land is shared, it will be divided into two. She confirmed that she had bought another plot, and if she had encroached on Plot 644, a surveyor could rectify the boundary. She testified that the 3rd Defendant cut their trees, and stated that he was charged in court. PW2 conceded that she had no letters of administration for her late father.
11. PW2 was cross-examined by the 4th Defendant and testified that her father and the late Ethang'atha acquired Plot no. 644 jointly. She confirmed that no surveyor has ever gone to demarcate the boundary. She said that she was in court as the administrator of the family of Simeone Rukunya and she was claiming for Simeone's share from Ethang'atha's family. PW2 expressed willingness to share the land as per the court orders. She pointed out that the 4th Defendant and his family have other parcels of land to live on, while they only have one portion. She added that there would be no problem if the land is subdivided and everyone gets their share. She clarified that the 4th Defendant is a beneficiary of Ethang'atha while she was a beneficiary of Simeone, but that their share will come from Ethan'gatha's side.
12. PW2 was re-examined whereupon she testified that the 3rd and 4th Defendant ought to have gone to the other parcels upon their return and not plot no. 644. She told the court that before the return of the 3rd and 4th Defendant, she was occupying a small portion of Plot no. 644, which has her parents and siblings' graves. That Ethang'ata never planted trees on this portion. The rest was occupied by the Defendants' brothers as it was the portion their mother used to cultivate. She reiterated that the land was not demarcated but everyone knew the boundaries of the portions their mothers were cultivating. PW2 asserted that her case is a claim of trust.



The Defendants' Case;

13. The 2nd Defendant testified on oath as DW1 that all the parcels belonged to their father but they had AR Objection disputes. That they had agreed once all the cases were finalised, they would subdivide the land amongst their father's children the way the land was and not by parcel numbers. He testified that the AR objections were concluded and they obtained titles and that is when their disputes started. He said that they had gone before the chief and the Njuri Ncheke before the 1st Plaintiff came to court claiming they had refused to share the land. He testified that their late father did not gather the land jointly with anyone, and the Plaintiffs had ganged up with strangers to claim their late father's land. He claimed that they have an equal right over the land as the 1st Plaintiff and are entitled to get their own shares.
14. DW1 was cross examined by the 3rd Defendant and he testified that while the AR objections were still pending, they had agreed that everyone was entitled to the land on the ground and not according to parcel numbers. DW2 clarified that they had agreed that everyone should get a share even though some of the parcels are registered and have parcel numbers. DW1 was cross-examined by the 4th Defendant and he testified that the land would be shared amongst the 20 siblings after agreeing on the size each one is to get.
15. On cross-examination by Mr. Ouma for the Plaintiffs, DW1 testified that to his knowledge, the 2nd Plaintiff is the daughter of Simeone Rukunga, whose family lives on Simeone's land and not on Plot No. 644. He denied any knowledge that one family member of Simeone Rukunga called Isaac lives on the land. DW1 testified that he is the registered owner of plot no. 937. He explained that he objected to the subdivision shown in the application for LCB Consent. DW1 testified that they had agreed as a family to give the family of Rukunga 2 Acres which they occupy. It was his testimony that when the 3rd and 4th Defendant returned from Mombasa, they settled on Plot No. 644 but they did not construct where the 2nd Plaintiff stays. DW1 also said that he currently lives and farms on Plot No. 644, which belongs to the Ethang'atha family and they are the only ones who can determine how much the family of Simeone Rukunga gets. He however admitted that one of Simeone Rukunga's 5 children lives on the plot no. 644.
16. William Nkubuku Ethang'atha testified on oath as DW2 and stated that he agrees with the evidence of DW1 on how to share the land. DW2 told the court that the 1st Plaintiff lodged an objection on Plot no. 644 on behalf of Erick Kinoti who was ailing. He testified that when he returned from Mombasa, he asked the 1st Plaintiff about land and was informed that plot no. 644 was his father's land. He stated that they went to the Chief, who also advised them to stay on a portion of the said parcel and not chase the family of the late Rukunga away.
17. DW2 was cross-examined by the 2nd Defendant and testified that when he left for Mombasa, the 2nd Defendant had put up a house on plot no. 644 and was also helping his mother to farm on that parcel. He asserted that he had never seen the 1st Plaintiff farming on plot no. 644. That the 1st Plaintiff farmed on Plot no. 217, which they had never used. He was then cross-examined by the 4th Defendant and he stated that when he went to Mombasa, he did not know any of his father's land was divided in AR and he had no choice but to agree. He was of the opinion that they should meet as a family and share the land. He said that he is currently using a portion measuring less than 1 Acre that he was shown by the Chief when he returned from Mombasa, while the 2nd Defendant is using less than 1.5 Acres. He added that the land the Defendants and one Jennifer are using is less than 8 Acres.
18. DW2 was cross-examined by Mr. Ouma and he told the court that when he was born, the 2nd Plaintiff's family did not live on plot no. 644 but on the land of Isaac Mberia, a brother of Ethang'atha. He



- testified that the 2nd Plaintiff's family currently stays on plot no. 644 and 937. He explained that they wanted to share the land but disagreed on the acreage each was to get. That in addition, the 2nd Plaintiff wanted to get 1 Acre for the money she paid towards the case, and also wanted Simeone's entitlement. He testified that the 2nd Plaintiff's family live on 8 Acres, but he clarified that he stays outside the 8 Acres. DW2 testified that Simeone Rukunga is buried between Plot nos. 644 and 937.
19. The 4th Defendant also testified on oath as DW3, and stated that when the land was being demarcated, they were asked to select one person to represent them. That they initially chose Erick Kinoti, but he became unwell and they changed to the 1st Plaintiff. He testified that when he returned from Mombasa, he put up his house next to the 1st Defendant's fence and the 3rd Defendant constructed next to him. He testified that he was charged and imprisoned for what he thought was cutting trees, but he later found out it was not about the trees but ownership of the land. It is DW3's testimony that the Area Chief later intervened, and everybody got some space of about 1 Acre, with the Chief ensuring that they had not displaced anybody. He later conducted a search of the suit property and found that the land was registered in his brother's name, so he lodged a caution fearing that the land may be sold.
 20. On cross-examination by the 2nd Defendant, DW3 testified that he did not know the parcel number of the plot that he and the 3rd Defendant live on. He also does not know where plot no. 937 is. He was also cross-examined by the 3rd Defendant and testified that he asked his brother and was shown where to live. Further, that that they assumed that demarcation would eventually be done.
 21. He was then cross-examined by Mr. Ouma and he testified that he constructed on plot no. 644 because the other parcels were fully occupied. He admitted that the family of Simeone Rukunga lives on plot no. 644 and he was informed that it is where he was buried. DW3 testified that when they met as a family to discuss sharing the land, the 1st Plaintiff wanted 3 Acres, and at another meeting he demanded 5 Acres. DW3 proposed that the family of Simeone Rukunga be given 2 Acres. He confirmed that he objected to the Plaintiff's mode of distribution shown in the Application for LCB Consent. DW3 testified that the 1st Plaintiff should also share parcel no. 915, and further, that he would have no objection if his brothers agreed to share out all the parcels in their names.
 22. The Defendants then called DW4, Winfred Nthamari, a joint witness who testified on oath and adopted her witness statement dated 7th March, 2024 as her evidence-in-chief.
 23. DW4 was then cross-examined by Mr. Ouma and she testified that she shared a mother with the Defendants. She testified that she knew Simeone Rukunga, but they were not related to him, and that he used to live in the forest. The 2nd Plaintiff was asked to stand up in court and DW4 testified that she has only heard of her and did not know her or any other children of Simeone. She testified that her father only had one parcel of land which had not been subdivided. He testified that plot no. 644 is in the name of the 1st Plaintiff and he lives on it alongside all of them. DW4 testified that when their father died, the family asked the 1st Plaintiff and the 3rd Defendant to stand in for the family and ensure land was not taken away. DW4 testified that her brothers returned from Mombasa and settled on Plot no. 644 because it was their father's land. DW4 testified that plot no. 644 is registered in the names of the 1st Plaintiff and 4th Defendant, but it is family land.
 24. DW4 was re-examined by the 2nd, 3rd and 4th Defendant separately, and in summary her testimony was that Simeone Rukunga was not related to Ethang'ata. That the 1st Plaintiff and the Defendants were her brothers, and they were all children of Ethang'ata. She testified that the 4th Defendant had not been settled because of the 1st Plaintiff. She confirmed that they had met severally to discuss the issue of their land, but they had not reached any agreement.



Submissions:

25. At the end of DW4's testimony, the Defendants closed their case and the court directed parties to file written submissions. The Plaintiffs filed their submissions dated 10th December, 2024. The Defendants filed joint written submissions dated 13th December, 2024.

Plaintiff's Submissions;

26. For the Plaintiff, Counsel started with an extensive background of the case and then submitted on three issues. The first issue is whether the suit parcels are held in trust, and Counsel argued that none of the parties herein claimed absolute ownership of the suit parcels of land. He submitted that the totality of the testimonies is that the suit properties are held in trust for the benefit of the heirs of the late Ethang'ata Mwirabua and the late Simeone Rukunga. Counsel for the Plaintiff also submitted on whether the heirs of the late Simeone Rukunga are entitled to a portion of the suit property. On this, Counsel submitted that according to the evidence, the property was acquired/gathered jointly. Further, that the Defendants admitted that the family of the late Simeone Rukunga has been living on land parcel no. Tigania West/Uringu II/644. Counsel prayed that the court finds the heirs of Simeone Rukunga are entitled to a 5 Acre portion of the plot no. 644. Finally, Counsel submitted on costs, arguing that under Section 27, costs follow the event, and prayed that the Defendants be condemned to pay costs of this suit.

Defendants' Submissions;

27. The Defendants on their part, submitted that the 1st Plaintiff, as well as the 1st and 2nd Defendant hold the suit lands through deceit since their registration was not blessed by the other beneficiaries. They submitted that a trust is donated by a living person. The Defendants submitted that the 2nd Plaintiff is not related to the Defendants but is only known to the 1st Plaintiff. They submitted that the 1st Plaintiff's Affidavit is full of falsehoods while the 2nd Plaintiff's Affidavit raises more questions than answers. They argued that the alleged trespass and destruction of property should have been reported to the police. On the injunction, the Defendants submitted that the ingredients for granting an injunction are set out in the case of *Giella vs Cassman Brown & Co. Ltd.* (1973) E.A. 358. The Defendants however urged that the Plaintiffs had not met the thresholds for grant of the injunction sought.
28. The Defendants cited the case of *Thomas Mugira & 9 Others vs Joseph Mutuma & 4 Others* (2012) eKLR and *Nosieta (Mombasa) Ltd & Another vs Mrs. Halima Bakri Ramadhan*, arguing that they are in danger of being dispossessed of land they had inherited and enjoyed since birth. The Defendants argued that the OS is legally and factually unmerited. It was submitted that as the family of Ethang'ata Mwirabua, their intention was to consolidate their late father's property and share through succession. They accused the 1st Plaintiff of interfering with their father's parcels of land during his time at the Survey Office in Meru. The Defendants submitted that their late father gathered only one parcel of land which gave rise to all the parcels owned by the brothers. The Defendants prayed that the Originating summons be dismissed with costs.

Analysis and Determination:

29. The Court has carefully read and considered the pleadings by the parties, the evidence adduced, the rival written submissions, authorities cited and the relevant provisions of law and finds that the issues for determination are;
- i. Whether the Plaintiffs have made a case for existence of a trust over the suit properties;



- ii. Whether the Plaintiffs are entitled to the orders sought in the Originating Summons;
 - iii. Who shall bear the costs of this suit?
30. The undisputed facts from the pleadings and the evidence of the parties herein are that the 1st Plaintiff and the Defendants are brothers. They are all children of the late Ethang'atha Mwirabua. The parties all agree that the suit properties are to be shared amongst his children, and it would appear that they have held several meetings to discuss on the mode of distribution to the 20 children of the said Ethang'atha Mwirabua, but are yet to reach an agreement. What is in dispute is whether the 2nd Plaintiff, who is the child of Simeone Rukunga, is entitled to a share of that property. Simeone Rukunga, per the Plaintiffs, was a brother of the late Ethang'atha Mwirabua. The Defendants dispute that the land was acquired jointly by Ethang'atha Mwirabua and Simeone Rukunga.

a. Whether the Plaintiffs have made a case for existence of a trust over the suit properties

31. The dispute herein relates to land, being the suit properties herein, registered in the name of the 1st Plaintiff as well as the 1st and 2nd Defendants. The Plaintiffs lodged the summons claiming an interest over the suit property arising out of a trust. From the facts of this case, it is clear that what the Plaintiffs seek is the declaration of a customary law trust over the suit parcels of land. A customary law trust in land refers to a registration of one person as proprietor of land on behalf of a larger group that could either be a family, a clan or community. Interests in land arising from customary law trusts are recognized under the provisions of section 28(b) of the [Land Registration Act](#), which provides that:-

“28. Overriding interests

Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register—

- (a) ...
- (b) trusts including customary trusts;”

32. That aside, Section 5(1)(d) of the [Land Act](#) recognises customary land rights as a form of land tenure. A customary law trust is proved by leading evidence on the history of the suit property and the relevant customary law on which the trust is founded (see *Njenga Chogera vs Maria Wanjira Kimani & Others* (2005) eKLR). The Plaintiffs therefore had to establish the existence of a trust on which their case could be hinged.
33. The Supreme Court of Kenya in the case of *Kiebia vs M'lintari & another (Civil Case 10 of 2015)* (2018) KESC 22 (KLR) (5 October 2018) discussed the requirements needed to establish the existence of a customary trust in land. The Supreme Court held that:-

“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 vs Kinuthia*, that what is essential is the nature of the holding of the land and intention of the parties. If the said holding is for the benefit of other members of the family, then a customary trust would be presumed to have been created in favour of such other members, whether or not they are in possession or actual occupation of the land. Some of the elements that would qualify a claimant as a trustee are:

1. The land in question was before registration, family, clan or group land
2. The claimant belongs to such family, clan, or group
3. The relationship of the claimant to such family, clan or group is not so remote or tenuous as to make his/her claim idle or adventurous.
4. The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances.”

34. The first requirement is to demonstrate that the land in question was before registration family, clan or group land. According to the Defendants herein, the suit property was gathered by the late Ethang’ata Mwirabua, who was the father of the 1st Plaintiff and the Defendants. It has come out in evidence that before adjudication, the members of the two families all lived on the land as a family. The late Ethang’atia Mwirabua had three wives and was survived by 20 children. These children lived and farmed on the portions that belonged to their respective mothers. The Plaintiffs even add that the late Simeone Rukunga, who is the 2nd Plaintiff’s father, is said to have acquired the suit lands jointly with Ethang’atia Mwirabua.
35. The Defendants are adamant that the 2nd Plaintiff is not entitled to the suit properties because she is not a daughter of Ethang’atha, but belongs to the family of Simeone Rukunga. The Defendants also denied any knowledge of the contributions made by the late Simeone Rukunga in acquiring the land. DW4 even testified that Simeone Rukunga lived in the forest, however, pressed under the weight of cross-examination, the Defence witnesses all conceded that the 2nd Defendant and her family do live on a portion of plot no. 644. But whether or not contribution of the late Simeone Rukunga towards acquiring the lands could be proved, the fact is that he was living on the suit lands by virtue of the fact he belonged to the family.
36. In any event, it has not been shown that the late Ethang’atha Mwirabua exclusively purchased the suit property. Since there is no proof that it was purchased, the issue of contribution, whether financial or otherwise, from his brother cannot arise. Additionally, there is no law that requires a party to prove any form of contribution before claiming customary land rights or, to be specific, a customary law trust in land. Even the Supreme Court in *Kiebia vs M’lntari* (Supra) did not list contribution as one of the elements required to prove a customary law trust.
37. Furthermore, there has been no indication of where the two families lived before moving to the suit properties herein. And since, as already stated, there has been no claim that the late Ethang’atha Mwirabua purchased the land, I am convinced that the land was ancestral land that the two brothers were already living on. From my understanding of the facts, the land was allocated to Ethang’atha Mwirabua, who had he not died would himself presumably have been registered as proprietor either alongside or in trust for his brother and family. The 2nd Plaintiff’s father was buried on plot no. 644. I am convinced that the two families of Ethang’atha Mwirabua and Simeone Rukunga have been in joint



occupation since their fathers' time, going back to a time before the adjudication and demarcation of the land into the distinct parcels that exists today and registered in the names of the brothers. This satisfies the requirement that the land must have been family land before registration.

38. The second requirement is that the claimant must establish that he belongs to such family, clan, or group. On this issue, the parties are in agreement that the 1st Plaintiff and the Defendants are brothers. The 2nd Plaintiff is their cousin as she is the daughter of their uncle, Simeone Rukunga who was the nephew of the late Ethang'atha Mwirabua. There can be no doubt therefore that the Plaintiffs and the Defendants have established that they belong to one family.
39. The relationship between the Defendants and the Plaintiffs is not so remote or tenuous as to make their claim idle or adventurous, and thus meets the third requirement in *Kiebia vs M'lintari* (Supra). That being the case, it follows that any of the parties herein had a right to be registered in the place of the 1st Plaintiff or the 1st and 2nd Defendants. They would have been entitled to be registered as owner or other beneficiary of the land, but was prevented by some intervening circumstances.
40. I note that there is no express agreement that the 1st Plaintiff and the 1st and 2nd Defendants be registered as proprietors of the suit properties. However, there seems to have been a previous understanding that they would stand in for the family in reclaiming the land by lodging the AR Objections. What strengthens my belief is the letter dated 2nd June, 2010 by the 4th Defendant to the Land Adjudication and Settlement Officer. The 4th Defendant wrote selecting the 1st Plaintiff as his representative an AR hearing scheduled for 3rd June, 2020. Indeed, the copies of title and Green cards produced by the Plaintiffs show that the suit lands are registered in the names of the 1st Plaintiff (Plot No. 644) and Moses Ndereba Ethang'atha (Plot No. 937). Parcel No. 2096, as can be gathered from the copy of Adjudication record, was in the name of Eric Kinoti Ethang'atha. Moreover, it appears that even after realising that the land was registered in the names of some of their brothers, the other family members did not object and in fact, they have continued to reside on and use the suit properties as family land.
41. There was no consensus on whether the family of the late Simeone Rukunga still lives on the suit properties or not. With regards to the fact of occupation, the Supreme Court in the *Kiebia vs M'lintari & Another* (Supra) held that:-

“53. We also declare that, rights of a person in possession or actual occupation under Section 30(g) of the Registered *Land Act*, are customary rights. This statement of legal principle, therefore reverses the age old pronouncements to the contrary in *Obiero v. Opiyo* and *Esiroyo v. Esiroyo*. Once it is concluded, that such rights subsist, a court need not fall back upon a customary trust to accord them legal sanctity, since they are already recognized by statute as overriding interests.

54. In the foregoing premises, it follows that we agree with the Court of Appeal's assertion that “to prove a trust in land; one need not be in actual physical possession and occupation of the land.” A customary trust falls within the ambit of the proviso to Section 28 of the Registered *Land Act*, while the rights of a person in possession or actual occupation, are overriding interests and fall within the ambit of Section 30(g) of the Registered *Land Act*. Although the Respondents herein were not in possession or actual occupation of Parcel No. Njia/Kiegoi Scheme 70, both the High Court and Court of Appeal were entitled to enquire into the circumstances of registration, to establish whether a trust was envisaged. Since the two superior courts were satisfied that indeed



elements of a customary trust in favour of the Respondents pertaining to the parcel existed, we see no reason to interfere with their conclusions.”

42. From the totality of the evidence and going by the above analysis, I am therefore satisfied that the suit lands herein are held by the 1st Plaintiff, the 1st Defendant and the 2nd Defendant in trust for not only the family of the late Ethang'atha Mwirabua, but also that of Simeone Rukunga.

b. Whether the Plaintiffs are entitled to the orders sought in the Originating Summons;

43. The Plaintiffs have sought a declaration that the 1st and 2nd defendants hold Land Parcel Nos. Tigania West/Uringu II/2096 & 937 respectively in trust for the benefit of all the heirs of Ethang'atha Mwirabua. Flowing from the foregoing discussion, the Plaintiff have proved the existence of the trust and have succeeded in this venture.
44. Secondly, the Plaintiffs seek an order directing the 1st and 2nd defendants to distribute and transfer the said parcels of land equally, or in such portions as the court deems fit, amongst the heirs of Ethang'atha Mwirabua (Deceased). The 1st Plaintiff even expressed willingness to distribute and transfer Land Parcel No. Tigania West/Uringu II/644 which he admits he holds in trust for the benefit of all the beneficiaries. In default, the Plaintiffs ask that all the relevant transfer documents be executed by the Land Registrar, Meru North Land Registry.
45. This court has already found that the 1st and 2nd Defendants hold Land Parcel Nos. Tigania West/Uringu II/2096 & 937 respectively in trust for themselves and the other beneficiaries of the trust. The 1st Plaintiff has admitted that he holds plot No. 644 in trust for himself and the other beneficiaries. From the facts and testimony tendered in this court, it appears that the family has been subjected to wrangles arising out of the fact that the suit lands are yet to be subdivided. Some of these wrangles have resulted into criminal charges and even convictions. The ends of justice in this case can only be met if the trust is revoked and the suit properties herein are subdivided into equal shares and registered in the names of each of the beneficiaries under the trust, including the family of the late Simeone Rukanga.
46. The Plaintiffs also sought a permanent injunction restraining the Defendants from interfering with the suit property. A permanent injunction fully determines the right of the Parties before the Court and is normally meant to perpetually restrain the commission of an act by one party in order for the rights of another to be protected (see *Kenya Power & Lighting Co. Limited vs Sheriff Molana Habib* (2018) eKLR). For a permanent injunction to issue, there must be compelling factors that would warrant the granting of such an order against the Defendants. No such compelling reason has been established to warrant the issuance of an order of permanent injunction.
47. In any event, since the Defendants have an interest in the land as beneficiaries of the trust herein declared, they cannot be restrained from use of the suit property. More so because it has come out clearly that the Defendants reside on the land and cultivate on their respective portions. Granting the order of permanent injunction will be tantamount to permanently evicting them from the suit property, yet they have a valid claim thereon. An order of permanent injunction cannot in the circumstances be issued against the Defendants.

c. Who shall bear the costs of this suit?

48. On the issue of costs, the general rule is that costs follow the event as provided under Section 27 of the *Civil Procedure Act* (Cap. 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. Any departure from this general rule can only be for good reasons as was explained by the Supreme Court in *Jasbir Singh Rai & Others vs Tarlochan Rai*



& Others [2014] eKLR, and may include instances where the matter was a public interest litigation among other justified reasons.

49. However, not only do costs follow the event, but they are also at the discretion of the Court, and on this discretion, the Supreme Court in *Jasbir Singh Rai & Others (Supra)*, held that:-

“(22) Although there is eminent good sense in the basic rule of costs – that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases. The relevant question in this particular matter must be, whether or not the circumstances merit an award of costs to the applicant.”

50. I have considered the fact that this is a dispute among family members, and more specifically, brothers and a cousin. There is need to foster good relations between the family, especially considering that there have already been instances of violence related to the land herein. For this reason, the court will exercise its discretion and direct that each party do bear its own costs in this suit, in hopes that it will foster healing among the parties herein.

51. In the end I find that the Plaintiffs have proven their case and I enter judgement in their favour as follows:-

- a. A declaration be and is hereby issued that the 1st and 2nd defendants who are registered owners of Land Parcels Tigania West/Uringu II/2096 & 937 respectively, hold the said parcels of land in TRUST for the benefit of all the heirs of Ethang'atha Mwirabua (Deceased).
- b. An order be and is hereby issued directing the 1st Plaintiff, the 1st Defendant and the 2nd Defendant who are registered owners of Land Parcels Tigania West/Uringu II/644, 2096 & 937 respectively to distribute and transfer the said parcels of land equally amongst the heirs of Ethang'atha Mwirabua (Deceased) and the heirs of the late SIMEONE RUKUNGA.
- c. The 1st Plaintiff, the 1st Defendant and the 2nd Defendant to execute all documents necessary so as to effect the subdivision and transfer of the suit properties as ordered herein and in default the Deputy Registrar of the Court to execute the requisite documents in place of their stead.
- d. Each party to bear their own costs.

52. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT ELDORET ON THIS 20TH DAY OF FEBRUARY, 2025 VIDE MICROSOFT TEAMS.

HON. C. K. YANO

ELC, JUDGE

In the presence of;

No appearance for the plaintiffs.

No appearance for the Defendants.

Court Assistant – Laban.

