



Macharia v Macharia & 3 others (Environment and Land Appeal E013 of 2023) [2024] KEELC 3703 (KLR) (9 May 2024) (Judgment)

Neutral citation: [2024] KEELC 3703 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT AND LAND APPEAL E013 OF 2023
LN GACHERU & LN GACHERU, JJ**

MAY 9, 2024

BETWEEN

SIMON MWANGI MACHARIA APPELLANT

AND

PETER KIRIA MACHARIA 1ST RESPONDENT

ROSALINDA WARWARE NJAGI 2ND RESPONDENT

LYDIA WANJRU MACHARIA 3RD RESPONDENT

NANCY WAITHERA MACHARIA 4TH RESPONDENT

*(Being an Appeal from the Judgement of HON. S. N. Mwangi (SRM),
Delivered on 26th April 2023, in Muranga MCELC E060 OF 2023)*

JUDGMENT

1. The Appellant herein was aggrieved by the Judgement of Hon S. N Mwangi (SRM), delivered on 26th April 2023, in Murang'a MCELC NO. E060 of 2023, wherein the trial court entered Judgement in favour of the Respondents herein.
2. At the trial court, the Respondents herein were the Plaintiffs, wherein they had sought for judgement against the Defendant, the Appellant herein for orders that;
 - a. A declaration that the Defendant holds land parcel No. Loc.2/ Marira/ 185, in trust for himself and the Plaintiffs who are entitled to a share of the portion of 4.0 acres jointly and that the said trust be determined and the portion of 4.0 acres be carved out of the suit land, and the same be registered in the name of the Plaintiffs jointly;
 - b. An order of permanent injunction does issue restraining the Defendant by himself, servants, agents, assignees, or anyone claiming under him, from leasing, charging, alienating transferring,



evicting, blocking access to, wasting or in any way unlawfully interfering with the Plaintiffs peaceful occupation and possession of the Plaintiffs portion of 4.0 acres out of LR Loc. 2/ Mariira/ 185:

- c) Costs of the suit and interests thereon.
3. The matter proceeded by way of formal proof, since the Appellant's Defence though filed, was allegedly filed after close of pleadings, and the same was expunged from the court's record and thus not considered by the trial court.
4. After consideration of the evidence adduced by the single witness called by the Plaintiffs/Respondents herein, the trial court entered judgement in favour of the Plaintiffs as prayed in their Plaint dated 20th August 2021.
5. Aggrieved by that decision, the Appellant vide a Memo of Appeal dated 9th May 2023, sought for the following orders;
 - i. That the Appeal be allowed;
 - ii. That the judgement entered by the trial court on 26th April 2023, and all orders arising therefrom be set aside;
 - iii. That the Appellant be granted costs of the appeal;
 - iv. Any other orders that the court may deem appropriate to grant to ensure ends of justice is attained.
6. Brief facts of the case before the trial court; the Appellant and the Respondents are siblings and children of the late Joseph Machira Gachigua, alias Macaria Gachigua, but belonging to different houses, as the late Joseph Machira was a polygamist.
7. The Respondents belonged to the house of Hannah Njeri Macharia, the 3rd wife, whereas the Appellant belonged to the house of Serah Waithera Macharia, the 2nd wife.
8. It was pleaded that initially the suit land Loc 2/Mariira/185, measuring 3.48 ha, was registered in the name of Macharia Gachigua, the patriarch of the parties, who later gifted it to Serah Waithera Macharia, during his lifetime, but to hold in trust for herself and the Plaintiffs.
9. The Respondents further alleged that despite the land being gifted to Serah Waithera, they continued to stay and utilise the suit land, wherein they constructed their homestead thereon and have planted coffee stems and tea bushes.
10. Further that Serah Waithera died in 2004, and the Appellant secretly filed a succession cause, and the suit land was transmitted to him in the year 2015, though the late Serah Waithera was holding the suit land in trust for herself and the Respondents.
11. The Respondents also claimed that sometime in 2021, the Appellant threatened to unlawfully evict them from the suit land and thus the filing of the suit before the trial court, which suit was decided in their favour.
12. As noted earlier, though the Appellant had entered Appearance on 24th November 2021, and filed a Notice of Preliminary Objection, his Statement of Defence was filed on 21st December 2022, allegedly without leave of court, and the same was expunged from the court record, and thus not considered in the judgement. The Appellant did not adduce any evidence, at the trial court nor cross examine the available witness.



13. The Appeal was admitted under section 79B of the Civil Procedure Act on 29th June 2023, and the Court directed that the Appeal be canvassed by way of written submissions. The parties complied as directed by the court.
14. In compliance, the parties filed their submissions through their respective Advocates. The Appellant filed his written submissions on dated 16th October 2023, through Kingangi & Mutahi LLP Advocates, and the Respondents filed their written submissions on 27th November 2023, through Kiguru Kahigah & Co Advocates, which rival submissions the Court has carefully read and considered.
15. It was the Appellant's submissions that he filed his Statement of Defence and Counter-claim, but the same was expunged from the court record by the trial court. Therefore, the trial magistrate erred in law and in fact since the Appellant had filed the application for leave to file Defence out of time on time as directed by the court.
16. On whether the trial Magistrate erred in law and in fact by disregarding the Defence filed by the Defendant(Appellant) on the basis of procedural technicality, it was submitted that issue was the basis of this Appeal.
17. The Appellant relied on Article 159(2)(d) of the *Constitution*, which states that;
“justice shall be administered without undue regard to procedural technicalities”
18. Reliance was placed too on section 3A of the *Civil Procedure Act*, which states;
“3A. Saving of inherent powers of court.
Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”
19. Further, the Appellant relied on the case of *David Bundi v Timothy Mwenda Muthee*(2022) eKLR; where the court held;
“it is my view that the law has elaborately made provisions which cushion the court from leaning on technicalities at the expense of doing justice”
20. The Appellant urged the Court to observe the cardinal principle of natural justice which states that no one should be condemned unheard. For this, the Appellant cited the case of *Sangram Singh v Election Tribunal Kotch* (AIR 1955 SC 664) where the court held;
“there must be ever present to the mind; the fact that our laws of Procedure are guided on a principle of natural justice which require that men should not be condemned unheard, that decisions should not be reached behind their back, that the proceedings that affect their lives and property should not continue in their absence and that not precluded from participating on them”.
21. It was the Appellant's further submission that by disregarding his Defence and Counter-claim, and also preventing the Appellant from cross examining the Plaintiffs/Respondents, and interrogate their evidence, the trial Magistrate successfully prevented the Appellant as a Defendant from participating in the proceedings that affect his property and life, and as such occasioned him great harm.
22. The Appellant urged the court to allow his Appeal.



23. On their part the Respondents urged the Court to dismiss the Appeal with costs. It was their submissions that the Decree being Appealed against had not been extracted, and the Court was urged to look at the legality of the Record of Appeal without the attached Decree. Further, it was submitted that the Appellant dwelt so much on the events that happened before the trial court and not on the merit of the Appeal.
24. The Respondents took the court through the different stages of this case. They submitted that the Plaintiff was filed on 25th August 2021, and the Appellant entered Appearance on 24th November 2021, but filed no Defence and/or Counter claim within the statutory period.
25. They further submitted that on 19th January 2022, the Appellant filed a Preliminary Objection dated 12th January 2022, which was heard and dismissed on 25th October 2022, and thereafter the matter was confirmed for pre-trial directions on 8th November 2022.
26. However, on 8th November 2023, the Appellant had not complied and he sought for 30 days to comply, but he was granted 14 days instead, and failure of which matter was to be set down for hearing. The same was set for mention on 22nd November 2022. Due to poor connectivity, the matter was taken out and was fixed for mention on 21st December 2022.
27. The Respondents also submitted that on 21st December 2022, the Appellant was directed to file an Application for leave to file Defence out of time, and the matter was set down for mention to confirm compliance on 10th January 2023. Come 10th January, 2023, the Appellant and / or his advocate were absent and he had not filed the said Application, and therefore the matter was set for hearing on 24th January 2023.
28. However, on 24th January 2023, the Appellant informed the Court that he had filed the Application for leave to file Defence out of time on 5th January 2023, but the trial Court declined to allow the application because the Court stamp was backdated, in a bid to mislead the court. Consequently, the matter proceeded for formal proof on the said date of 24th January 2023, and a judgment was delivered on 26th April 2023, which aggrieved the Appellant and thus this Appeal.
29. Therefore, the Respondents submitted that the Appeal emanates from the Appellant's failure to comply with Order 11 of the *Civil Procedure Rules*, as the Appellant did not bother to comply with the court's directives. It was their submissions that the trial court was correct, and acted within its discretions in allowing the matter to proceed for hearing as a formal proof. Further that Article 159(2) (d), of the Constitution cannot aid the Appellant herein, as he failed to come to court with clean hands.
30. Further, that since the Appellant was not ready to comply with Order 11 of the *Civil Procedure Rules*, the trial Court was right to expunge his documents and in directing the matter to proceed by way of formal proof. That this Appeal is an abuse of the court process, and they urged the court to dismiss it with costs to the Respondents.
31. The above is the summary of the Pleadings and evidence before the trial court, as is contained in the Record of Appeal and the original lower court file, the Memo of Appeal and the written submissions which this court has carefully read and considered.
32. This is a first Appeal, wherein the court has power to determine the said Appeal on both law and facts as provided by section 65 of the *Civil Procedure Act*. Further, as provided by section 78 of the said Act, this Court as an Appellate court has a duty to reconsider, re-evaluate, re-assess and reanalyse the evidence on record and then arrive at its own independent decision, while considering that it never saw



nor heard the witnesses as the trial court did. See the case of *Selle & Another v Associated Motor Boat Co. Ltd & Others* {1968} EA 123., where the Court held;

“...this court is not bound necessarily to accept the findings of fact by the Court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...”

33. Further, this court will give deference to the trial court’s decision, while also bearing in mind that in deciding the matter, the trial Court was also exercising its discretion and statutory duty as provided by the Constitution and the statutes, and cannot simply interfere with the said decision, just because the court has been moved in an Appeal. See the case of *Mbogo & Another v Shah*, [1968] EA, p.15;, where the Court held that;

“ An appellate court will not interfere with the exercise of the trial court’s 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 misjustice

34. The Court is also guided on various other decided cases; In the case of [*Abok James Odera t/a A. J Odera & Associates v John Patrick Machira t/a Machira & Co Advocates*](#) (2013) eKLR, 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”

35. See also the case of [*Peter M. Kariuki v 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”

36. Being guided as above, the court finds the issue for determination is whether the instant Appeal is merited.

37. From the available evidence, there is no doubt that the parties herein are siblings. They are step brothers and sisters, being the children of the family’s patriarch Joseph Machira Gachigua, alias Macaria Gachigua, who was a polygamist and the late Serah Waithira, the 2nd wife and Hannah Njeri Macharia, the 3rd wife and mother to the Respondents herein.

38. There is also no doubt that the suit land herein was initially registered in the name of the said patriarch Joseph Machira Gachigua in 1963. However later, the suit land was transferred to Serah Waithira Macharia in 1984, as a gift. That was during the lifetime of Joseph Machira Gachigua, and his three wives. There is no evidence of any objection by any of the wives or any of his children, the Respondents herein included.



39. It is also evident that the late Joseph Machira Gachigua, owned several parcels of land being Loc 2/ Mariira/ 1203, Loc 2/ Mariira/ 216, Loc 2/ Mariira/ T.133, Loc 18/ Gachocho/ 49 and Plot No. 2 Mariira Market, which is a fully developed plot, but belongs to Murang'a County Government.
40. Further, it is evident that Loc 2/ Mariira/ 1040, which was the initial family land was initially registered in the name of Wakiiru Macharia, the 1st wife, who died in 2006 and was buried on the said land. There was no evidence whether succession proceedings have been done over her estate. The certificate of official search produced in court was dated 10th June 1998. But the question that lingers is; who were the beneficiaries of Wakiiru Macharia's estate.
41. It is also evident that Serah Waithira Macharia, the registered owner of the suit land Loc 2/ Mariira/ 185, died in the year 2004, and was succeeded by her son Simon Mwangi Macharia, the Defendant before the trial court, or Appellant herein vide a Succession Cause No. 946 of 2013: The Estate of Serah Waithira Macharia.
42. After confirmation of grant, the suit property was transmitted to the Appellant herein as the sole proprietor. It is also evident that the Respondents had filed an Application for revocation of the said grant, but later withdrew the same and filed the suit before the trial court.
43. The Respondents were aggrieved by the fact that the Appellant was registered as the sole proprietor of the suit land Loc 2/ Mariira/ 185. They alleged that though the suit land was gifted to Serah Waithira Macharia in 1984, she was gifted to hold it in trust for herself and the house of Hannah Njeri Macharia, the mother to the Respondents. The Respondents as the Plaintiffs before the trial court had alleged that they have lived on the suit land since 1992, wherein they built their homes and have been growing various crops thereon.
44. The Appellant had opposed the Respondents' claim through filing of a Notice of Preliminary Objection 12th January 2022, which Preliminary Objection was determined against him. Further, he filed a Statement of Defence and Counter - Claim dated 16th December 2022, which was expunged from the court's record for having been filed out of time, without leave of court, and therefore the Appellant was not heard.
45. After, the case was heard through a formal proof, or ex parte, the trial court entered a judgement in favour of the Respondents, by allowing their claim as prayed in the Plaint dated 20th August 2021. It is that judgement that aggrieved the Appellant and thus this Appeal.
46. So, is the Appeal merited? The court will now re-evaluate and re-consider the available evidence and then come up with its own independent decision.
47. The claim before the trial court was a claim for customary trust, wherein the Respondents had sought for the declaration of the existence of a customary trust over suit property Loc 2/ Mariira/ 185, dissolving the same and declaring that the Respondents were entitled to 4.0 acres, out of the suit land, which measures approx. 8.6 acres or 3.48 acres.
48. As the Court pointed earlier, the parties herein are related, and they belong to the same ancestral lineage, family and clan. In the event the Respondents were to prove their claim, then the Supreme Court's decision of Isaack Kieba M'Inanga v Isaaya Theuri M'Lintari & Another SCOK NO. 10 of 2015, would apply.
49. From various courts decisions, customary trust has been defined as an encumbrance on land, which is a non -registrable rights which run with the land. These rights are overriding interests, which subsist



on the land and are recognised in the law. See section 30(g) of the Registered Land Act (Repealed) and section 28(b) of the Land Registration Act 2012, which states;

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

“(g) the rights of a person in possession or actual occupation of land to which he is entitled in right only of such possession or occupation, save where inquiry is made of such person and the rights are not disclosed”

50. Further, it is evident that registration of a person as a registered owner does not extinguish customary trust or preclude him from holding an interest in trust for another. In the case of Kanyi v Muthiora (1984) KLR 712, the Court stated that;

“The registration of the land in the name of the Appellant under the Registered Land Act (Cap 300) did not extinguish the respondents rights under Kikuyu Customary Law and neither did it relieve the Appellant of her duties or obligations under section 28 as trustee.....The trustees referred to in section 28 of the Act could not be fairly interpreted and applied to exclude a trustee under Customary law, if the Act had intended to exclude Customary law rights it would have been clearly so stated.”

51. The Respondents claim was on existence of customary trust, and it is settled that the onus of proving customary trust lies on the party claiming existence of such trust, which has to be proved through evidence. See the case of Juletabi African Adventure Ltd & Another v Christopher Michael Lockley (2017) eklr, 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 intentions of the parties. The intention of the parties to create a trust must be clearly determined before a trust can be implied.’”

52. In the case of Njenga Chogera v Maria Wanjiru Kimani & 2 others (2005) eklr, the court quoted with approval the holding in the case of Muthuita v Muthuita (1982-88) 1 KLR 42, where the Court of Appeal held that customary trust is proved by leading evidence.

53. Further, in the case of Peter Ndungu Njenga v Sophia Watiri Ndungu (2000) eklr, the court held;

“the concept of trust is not new. In case of absolute necessity, but only in case of absolute necessity, the court may presume a trust. But such presumption is not to be arrived at easily. 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 is implied”

54. From the above decisions, the Respondents who were Plaintiffs before the trial court had the onus of calling sufficient evidence to prove existence of the claimed customary trust. In the event the Respondents would have wished the court to imply existence of such customary trust, then the intention of the parties, to create the trust must have been made clear. The parties herein are the patriarch, Joseph Machira Gachigua, Serah Waithira Macharia and Hannah Njeri Macharia the mother to the Respondents. The existence of intention would only be proved by calling of evidence.

55. Further, it is evident that the suit land was transferred to the late Serah Waithira Machira, the mother to the Appellant in 1984, as a gift. This was indeed a gift *inter vivos*, and it is evident that with the



registration of the suit land in the name of Serah Waithira, the gift *intervivos* became complete, and *prima facie*, the suit land became an absolute property of the said Serah Waithira as is provided by Section 27 of the *Registered Land Act* Cap 300 Laws of Kenya (repealed).

56. As an absolute property of Serah Waithira then after her demise, it was a free property available for distribution to her beneficiaries. However, as provided by Section 28 of the said repealed Act, the absolute ownership can be defeated as provided by the Act. Instances that can contribute to defeat of an absolute proprietor's right, are prove of existence of overriding interests, customary trust being one of them.
57. The above position finds its root in Section 30 of the Registered Land Act(repealed), which section has been replicated in section 28(b) of the *Land Registration Act*, 2012, which states;
- “ 28. 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—
- (b) trusts including customary trusts;
58. Therefore, the Respondents needed to call sufficient evidence to prove that there was indeed existence of customary trust in their favour, which trust needed to be dissolved and the suit land be distributed as claimed in their *Plaint*.
59. Having re-evaluated and re-considered the available evidence, did the Respondents prove on the required standard, the existence of such trust? When the late Joseph Machira Gachigua transferred the suit land to Serah Waithira, his 2nd wife in 1984, was there an intention to create a trust for herself and the house of Hannah Njeri Macharia?
60. As this Court re-evaluate and re-analyse the evidence that was available before the trial court, it will be guided by the holding of the Supreme Court in case of *Isack Kieba M'inanga v Isaaya Theuri M'Lintari* (*Supra*), where the court held;
- “ 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. what is essential is the nature of the holding 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 occupation of the land.”
61. The Respondents claimed in their *Plaint* and evidence that the suit land was initially registered in the name of their father the late Macharia Gachigua, on 1st July 1963, but on 4th December 1984, he transferred the suit land in the name of the Appellant's mother Serah Waithira Macharia, to hold it in trust for herself and the Respondents.
62. This claim was opposed by the Appellant, though his Defence was expunged from the court's record. Even without the Defence of the Appellant, was the available evidence sufficient to prove existence of a trust?
63. From the witness statement of Peter Kuria Macharia, which was adopted as his evidence in chief, and who was the only witness it is evident that the parties' father, the late Joseph Macharia, who was a polygamist had three wives, several children and owned several parcels of land. From the Green card of the suit land, it is clear that the same was transferred to Serah Waithira, on 4th December 1984, as



a gift. Nothing else was noted on the register such as the family of Hannah Njeri was entitled to 4.0 acres out of this suit land.

64. Though customary trust is an encumbrance on the land or overriding interest, which need not to be noted on the register, it is clear that the initial registered owner, Joseph Machira Gachigua, transferred the land to his 2nd wife Serah Waithira, as a gift, during his lifetime and if he had intention of the suit land being shared by Serah Waithira and Hannah Njeri, his two wives equally, there was nothing that would have prevented him from subdividing the said land into two equal shares and having each portion registered in the name of each of the wives, Serah Waithira Macharia and Hannah Njeri Macharia.
65. It is noteworthy, that land parcel No Loc 2/ Mariira/1040, was registered in the name of his 1st wife Wakiiru Macharia. After the demise of Wakiiru Macharia in 2006, it is not clear whether succession cause was done and how this parcel of land was distributed. Equally, there were other parcels of land registered in the name of the late Joseph Machira Gachigua, who passed on in 1995. Has distribution been done of the said parcels of land? Was the Appellant herein entitled to a share thereon as a beneficiary? All these questions have no answers from the available evidence.
66. Further, the Respondents alleged that their father moved them and their mother Hannah Njeri Macharia to suit land in 1992, and they have been utilising and have developed 4.0 acres of the said land and thus their claim.
67. The court observed earlier, that it is settled that customary trust is proved by facts, through calling of evidence. The late Joseph Machira had three wives. Two of them are deceased, but there was no evidence that Hannah Njeri, the mother to the Respondents is also deceased. If she is still alive, why was she not called as a witness to support the Respondents' claim? It is trite that if a party fails to call a relevant witness, the presumption is that such witness would have given evidence detrimental to his/her case. See the case of *Bukenya & Another v Uganda* (1972) E.A 549, Where the Court held;

“where the evidence called is barely adequate, the Court may infer that the evidence of uncalled witness would have tended to be adverse to the prosecution”
68. Failure by the Respondents to call their mother, Hannah Njeri Macharia, the 3rd wife to the late Joseph Machira to confirm that indeed, the suit property was transferred to Serah Waithira, as a gift to her but to hold in trust for herself and the family of Hannah Njeri, did not aid the Respondents case.
69. Further, the Respondents alleged that in 1992, their father moved them from Loc 2/ Mariira/ 1040, to the suit land and they have lived thereon all that time. The Respondents needed to call witnesses to support that claim, such other their other relatives, neighbours and even the local or area administration to confirm that indeed these two families have shared the suit property from 1992, so that from that evidence, this court to imply a trust.
70. It is evident and very clear that customary trust is proved by facts and evidence, and intention to create such trust should be very clear and obvious. There was no such evidence of such intention to create a trust. What is clear is that the late Joseph Machira gifted the suit land to Serah Waithira, which gift inter vivo was completed, when the suit land was registered in the name of Serah Waithira Macharia in 1984.
71. With the registration of the suit land in favour of Serah Waithira as a gift, such registration was prima-facie evidence that Serah Waithira held the land absolutely, with all rights and privileges appurtenant thereto. After the demise of Serah Waithira, the suit land became a free property for distribution to the beneficiaries of her estate, and if the Respondents had an issue with how the land was distributed, then they should have challenged it through the succession proceeding, but not through a claim for customary trust. There was no evidence that such trust had been created.



72. With the above analysis of the available evidence, this court finds and holds that the trial court erred in both law and fact in holding that the suit land which had been gifted to Serah Waithira Macharia, was held in trust for herself and the family of Hannah Njeri Macharia, who are the Respondents herein. The Court cannot hold that this suit land could have been registered in the name of Hannah Njeri, but due to some factors, it was registered in the name of Serah Waithira.
73. The Supreme Court of Kenya, in the case of *Isack Kieba*, held that not all claims of customary trust are deserving. This is one such a claim. The Respondents did not inform the Court how the other parcels of land belonging to Late Joseph Machira Gachigua were distributed, and whether the Appellant got any shares thereon. This is a Court of law and Equity, and Equity dictates that no man should be condemned unheard.
74. Having found as above, the Court will now turn to the grounds of Appeal as enumerated in the Memo of Appeal, which can be summarized as to whether the trial Magistrate erred in law and fact in rejecting the Appellant's Application for leave to file Defence and Counter claim out of time.
75. From the court record, it is evident that after, the Appellant as the Defendant, filed the Notice of Preliminary Objection, and the same was dismissed, he was supposed to file his Defence as provided by Order 7 of the *Civil Procedure Rules*, and as directed by the court on 8th November 2022. The trial court had further directed that failure to file the Defence as stipulated, the said trial court would proceed with the hearing of the case by way of formal proof on 21st December 2022.
76. Further, it is evident from the court record that the Appellant did file his Defence and Counter- claim dated 16th December 2022, on 21st December 2022, but the trial court declined to admit the said Defence and Counter- claim on the basis that it was filed after pleadings were closed, and without leave of the court. The Appellant was directed to file a formal Application for leave to file Defence out of time. The said Defence and Counter-claim was expunged from the court record. The matter was to be mentioned on 10th January 2023, to confirm compliance and probably for further directions.
77. However, on 10th January 2023, the counsel for the Appellant was not present in open court to confirm filing of the Application for leave to file Defence out of time. The trial court set the formal proof hearing for 24th January 2023.
78. Come 24th January 2023, Mr Kahiga Advocate, appearing for the Plaintiffs (Respondents herein), was ready to proceed with one witness. Mr Kamau Advocate, holding brief for Mr King'ang'i for the Appellant, as the Defendant informed the court that the Defendant had filed an Application dated 5th January 2023, for leave to file Defence and Counter- claim out of time. The counsel for the Respondents, as Plaintiffs objected to the hearing of the said Application on the basis, that the said application was not filed by 10th January 2023, as directed by the court on 21st December 2022.
79. The trial court concurred with counsel for the Respondents/ Plaintiffs and held that though the Application had receiving stamp of 6th January 2023, the said Application had not been put in the court file contrary to the norms of good practice. But the question would be, whose duty was it to put the Application in the file? Was it the litigants or the Registry staff? The obvious answer is the Registry Staff, and failure put it in the court file could not have been attributed to the Appellant herein, who was a party to the suit.
80. Indeed, the court record shows that the Application dated 5th January 2023, was received in the Court's Registry on 6th January 2023, as the receiving stamp is very prominent at the face of pleading, with an indication that hearing is on 24th January 2023, and signed O.C. Among the prayers sought was;



the defendant be granted leave to file his statement of defence and counter-claim out of time, and the defence dated 16th December 2022, be deemed as duly filed.

81. The trial court observed that the Appellant, as the Applicant for the said Application did not come to court with clean hands, since the said hands were tainted with backdating of the receiving stamp at the Registry. It is not very clear where the trial court got this informing of backdating the receiving stamp, since stamps are ordinarily affixed by the Registry and not the litigants. Was there an Affidavit sworn by the Registry staff that the Receiving Stamp on the Application was backdated? This allegation goes to the integrity of the happenings at the Court's Registry, which then should have been blamed on the individuals at the Court Registry and not the Litigant.
82. Without evidence of such backdating of the receiving stamp, this court finds that it was not proper for the trial court to have made such a sweeping statement without backup evidence. There was a signature O.C at the top of the Application. Was the said signature disputed by the Court Registry staff or the In charge of the Civil Registry? Without such evidence, then the holding of the trial court cannot stand or go unchallenged.
83. After the trial court denied the Appellant audience, or opportunity to prosecute the said Application, the matter proceeded for formal proof, and only one witness gave evidence being PW1, Peter Kuria Macharia, who was the 2nd Plaintiff. The Appellant as the Defendant did not cross exam the witness, and thus the Appellant did not give his side of the story or ventilate his case, and thus was condemned unheard.
84. After the formal proof, the trial court gave a Judgement date for 25th April 2023, but on 3rd April 2023, the Appellant filed an application for review of the orders issued on 10th January 2023, that the matter proceed for formal proof. He also urged the court to allow the Application date 6th January 2023, and arrest delivery of the judgement slated for 25th April 2023.
85. The above Application was heard on 17th April 2023, and the Ruling was delivered the same date as the impugned Judgement. The trial court rejected the said Application too, and proceeded to deliver the Judgement, wherein she allowed the Respondents/ Plaintiffs suit in toto.
86. However, in the earlier findings of this court as an Appellate court, it has found and held that there was no sufficient evidence to support a claim of customary trust, and that the trial court erred in both law and fact when it found and held as it did. The Supreme Court in the case of Isaack Kieba, held that each case has to be decided on its own circumstances, and this court find and holds that the circumstances of this case do not support a claim for customary trust.
87. Even if the circumstances of the case would support, a customary trust, did the trial Magistrate err in law and fact in failing to allow the Appellant file his Defence?
88. The matter proceeded for formal proof, because the Appellant Defence was expunged from the court record, and he was not allowed to prosecute the Application dated 6th January 2023, for leave to file Defence and Counter-claim out of time. Since the Appellant did not deny service, then the Judgement entered was regular default Judgement.
89. Being a regular default judgement, as provided by Order 10, rule 11, of the Civil Procedure Rules, the court may set aside or vary such Judgement and any consequential decree or order upon such terms. Further under section 3A of the Civil Procedure Act, the court has unfettered discretion to issue such terms that are necessary and just, for the end of justice to be met, and also ensure there is no abuse of the court process. The trial court too had such discretion, which discretion has to be exercised judiciously.



90. Article 48 of the Constitution guarantees every person access to justice, in addition, under Article 50(1) of the Constitution, every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body. Such person can be guaranteed such access to justice and a fair hearing if he /she is allowed to ventilate her case in court.
91. The ultimate goal and purpose of the justice system is to hear and determine disputes fully. It follows that no person who has approached the court seeking an opportunity to ventilate their grievances fully should be locked out, unless for very good reasons. Article 159 of the Constitution obligates the court to administer justice without undue regard to technicalities. The main aim of the court is to do justice, but not to discipline erring litigants and/ or their counsels.
92. In the case of *Kamlesh Mansukhalal Damki Patni v Director of Public Prosecution & 3 Others* [2015]eKLR, the Court of Appeal articulated that:
- “It must be realized that courts exist for the purpose of dispensing justice. Judicial officers derive their judicial power from the people, or as we are wont to say in Kenya, from Wanjiku, by dint of Article 159 (1) of the Constitution which succinctly states that “judicial authority is derived from the people and vests in, and shall be exercised by the courts and tribunals established by or under this Constitution.” Judicial officers are also state officers, and consequently, are enjoined by Article 10 of the Constitution to adhere to national values and principles of governance which require them whenever applying or interpreting the Constitution or interpreting the law to ensure, inter alia, that the rule of law, human dignity and human rights and equity, are upheld.
93. Further, the Court of Appeal in the above case emphasised as follows; “For these reasons, decisions of the courts must be redolent of fairness and reflect the best interests of the people whom the law is intended to serve. Such decisions may involve only parties inter se (and hence only parties’ interests) and while others may transcend the interest of the litigants and encompass public interest. In all these decisions, it is incumbent upon the court in exercising its judicial authority to ensure dispensation of justice as this is what lives up to the constitutional expectation and enhances public confidence in the system of justice.”
94. In addition, the Court of Appeal concurred with the sentiments of the learned Judge of the High Court and held that:
- “It suffices to comment that a court of law should be hesitant at closing the door to the corridors of justice prior to a litigant being heard on his complaint. So far the applicant did not have a chance to file a defence. He sought to set aside that default judgment and that application was dismissed on a date he contends the same was not due for hearing and when he had no notice....”
95. Being guided as above, this court finds note that it is imperative that unless for very good reasons, a litigant should not be removed from the seat of justice and should be allowed his day in court. Indeed, the Appellant herein filed his Defence out of time, and as directed by the Court, he filed his Application to be allowed to file Defence and Counter -claim out of time. The trial court did not allow him to prosecute the said Application since the court went on to hold that the Application was not filed on or before 10th January 2023, and the receiving Stamp was back dated.



96. However, the trial Court had directed the Appellant to file the formal Application, which he did, but the trial court held that it was not filed within the timeline given and as stated earlier by this court, there was no such evidence of backdating the Receiving Stamp, and the said statement indeed imputed bad faith on the part of the Registry staff. How could they allow backdating if indeed, it occurred?
97. The Appellant had alleged that his former Advocate failed to file Defence on time, and thus the mistake of his former counsel should not be visited on him. In the case of *Winnie Wambui Kibinge & 2 Others v Match Electricals Limited* (2012) eKLR, the court held that:
- “...it does not follow that just because a mistake has been made a party should suffer the penalty of not having his case heard on merit...”
98. The parties herein are related, and it is evident that after the suit was filed, the Appellant filed a Notice of Preliminary Objection, which was later dismissed. From the said objection, it is clear that the Appellant was keen to defend the suit. The main concern of the court should be to administer justice, much as there is emphasis on the need to expedite prosecution of matters before courts.
99. In the case of *Patel v East Africa Cargo Handling Services Ltd* (1974) EA 75, the Court held follows:
- “The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules. I agree that where it is a regular judgement as is the case here the court will not usually set aside the judgement unless it is satisfied that there is a defence on the merits. In this respect defence on merits, does not mean in my view, a defence that must succeed, it means as Sheridan J. put it “a triable issue” that is an issue which raises a prima facie defence and which should go to trial for adjudication.”
100. Indeed, it is not in doubt that the Appellant had filed a Defence, which Defence and Counter-claim dated 16th December 2022, was expunged, by the trial court for failure to file and application for leave to file the said Defence out of time. Given that the parties had spent a considerable amount of time arguing the Notice of Preliminary Objection, and given that the Appellant’s Defence and Counter-claim had been accepted by the Registry, the trial court had discretion to allow the said Defence and Counter-claim, as the Appellant had been involved in the prosecution of Preliminary Objection, and was represented by a counsel.
101. See the case of *Richard Nchapai Leiyangu v IEBC & 2 Others* (2013) eKLR, where the court opined that:
- “We agree with the noble principles which go further to establish that the courts’ discretion to set aside ex parte judgement or order for that matter, is intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice”
102. Since the trial court insisted that the Appellant should file a formal Application for leave to file the Defence out of time, and since there was an Application already filed on 6th January 2023, the tenets of fair hearing should have guided the trial court to allow the prosecution of the said application. Failure of the counsel to appear on 10th January 2023, should not have been visited on the Appellant, as mistakes



of an Advocate should not be visited upon his client. See the case of *Lee G. Muthoga -v- Habib Zurich Finance (K) Ltd & Another*, Civil Application No. Nair 236 of 2009 where it was held that:

“It is widely accepted principle of law that a litigant should not suffer because of his Advocate’s oversight.”

103. Further, as the Appellant had already filed the Application for leave to file Defence out of time, the trial court should have allowed the prosecution of the said Application and thereafter be guided on the principles of setting aside a regular default judgement.

These principles are;

- i. The intended defence raises triable issues.
- ii. No prejudice to the Plaintiff
- iii. There is explanation for the failure to file a defence on time.
- iv. Alternatively, and without prejudice, the court to impose terms for setting aside the regular default judgment.(See the case of *Abdalla Mohammed & Another v Mbaraka Shoka* (1990) eKLR, where the Court of Appeal held as follows: -

“The tests for the correct approach in an application to set aside a default judgment are; firstly, whether there was a defence on merits; secondly whether there would be any prejudice; and thirdly, what is the explanation for any delay”

104. The Court of Appeal in the case of *Job Kilach v Nation Media Group Ltd, Salaba Agencies Ltd & Michael Rono* (2015) eKLR in defining what a triable issue is observed that:

“A bona fide triable issue is any matter raised by the Defendant that would require further interrogation by the court during a full trial. The Black's Law Dictionary defines the term “triable” as, “subject or liable to judicial examination and trial.” It therefore does not need to be an issue that would succeed, but just one that warrants further intervention by the Court.”

105. Further, in the case of *Lalji t/a Vakkep Building Contractors v Casousel Ltd* (1989) KLR Nyarangi, JJA, Platt JJA and Kwach, Ag JA) held:

“A trial must be ordered if a triable issue is found or one which if fairly arguable is found to exist”

106. This Court has considered the Defence and Counter- claim as filed by the Appellant, which Defence was later expunged by the trial court, and finds that indeed, the said Defence raised triable issues, and should have been allowed, so that the Appellant could have ventilated his case too.

107. In the case of *Jomo Kenyatta University of Agriculture and Technology v Musa Ezekiel Oebal* (2014) eKLR, CA 217/2009, the Court of Appeal stated that the object of clothing the court with discretion to set aside judgment obtained ex parte has been pronounced in many decisions and stated as follows:

“To avoid injustice or hardship resulting from accident; inadvertence or excusable error; not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice.....” See *Shah v Mbogo & Another* (1967) EA 116.



Further in the case of *Sebei District Administration v Gasyali & others* (1968) EA 300 Sheridan J remarked:

“The nature of the action should be considered. The defence if one has been brought to the notice of the court, however irregularly, should be considered, the question as to whether the plaintiff can reasonably be compensated by costs for any delay occasioned should

be considered and finally, I think, it should always be remembered that to deny the subject a hearing should be the last resort of the court”

108. Having found that the Appellant, whose counsel was in court when the trial court directed the matter to proceed for formal proof, was denied an opportunity to ventilate his case, and thus was condemned unheard, the court finds and holds that the trial court erred in law and fact in declining to allow the Appellant to prosecute his application for leave to file his Defence out of time. See the case of Kamlesh Pattni (*supra*) where the court held;

“It suffices to comment that a court of law should be hesitant at closing the door to the corridors of justice prior to a litigant being heard on his complaint. So far the applicant did not have a chance to file a defence. He sought to set aside that default judgment and that application was dismissed on a date he contents the same was not due for hearing and when he had no notice.....”

109. Being guided as above by the Court of Appeal decisions, and having found that the Respondents as Plaintiffs at the trial court did not avail sufficient evidence to prove existence of customary trust, as the suit property was transferred to Serah Waithira in 1984, during the lifetime of Joseph Machira Gachigua, and thus the gift was completed, this Court as an Appellate court finds and holds that the Appeal herein is merited.

110. For the above reasons and having reconsidered and re-evaluated the available evidence as contained in the Record of Appeal, and having come up with its own independent conclusion,

this court proceeds to interfere with the trial court’s decision in its judgement dated 26th April 2023, allows the said Appeal dated 9th May 2023, with costs of the Appeal and at the trial court to the Appellant herein.

111. This appeal is allowed accordingly and the Judgement of the trial Court delivered on 26th April 2023, is set aside entirely with cost to the Appellant.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANGA THIS 9TH DAY OF MAY, 2024.

L. GACHERU

JUDGE.

Delivered online in the presence of; -

Absent - Appellant

Mr Gitau Kahiga for the Respondents

Joel Njonjo - Court Assistant

