



REPUBLIC OF KENYA



KENYA LAW
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**Mbithi & 2 others v Mbithi (Environment & Land Case E020 of 2023)
[2024] KEELC 5855 (KLR) (26 August 2024) (Judgment)**

Neutral citation: [2024] KEELC 5855 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT & LAND CASE E020 OF 2023
LN GACHERU, J
AUGUST 26, 2024**

BETWEEN

WILSON WOKABI MBITHI 1ST PLAINTIFF

STANLEY MBURU MBITHI 2ND PLAINTIFF

ROSE NYAMBURA NJOROGE 3RD PLAINTIFF

AND

GEOFFREY GICHUHI MBITHI DEFENDANT

JUDGMENT

1. The Plaintiffs herein vide a Plaint dated June 20, 2023, sought for Judgement against the Defendant for the following Orders:
 - a. A declaration that the Defendant holds the suit property being LOC.6/Kandani/737, in trust for himself and the Plaintiffs herein in equal shares.
 - b. The trust be dissolved and the Defendant be ordered to transfer to the Plaintiffs their rightful shares.
 - c. An order compelling the Defendant to execute all the consents, transfer forms and all other requisite documents to facilitate the partition, transfer and registration and in default the Deputy Registrar of this Court be mandated and authorized to execute all such documents.
 - d. Costs and interests of the suit.
 - e. Any other relief this Court may deem fit to grant.
2. The Plaintiffs' claim is that land parcel No. LOC.6/Kandani/737, (the suit property), was originally registered in the name of Mbithi Wokabi (deceased), (father to the parties herein) and the same was transmitted to the current registered owner Gichuhi Mbithi, during the land consolidation and



demarcation in the 1960s, because the said Gichuhi Mbithi, was the eldest/first born son of their father. The Plaintiffs asserted that their brother Gichuhi Mbithi, was registered as the proprietor of the suit property to hold it in trust for himself and his siblings in equal shares.

3. The Plaintiffs averred that their late father was polygamous, and was married to two (2) wives, namely, Margaret Wairimu Mbithi and Esther Wambui Mbithi. That Margaret Wairimu Mbithi, is mother to the 1st Plaintiff and the Defendant. That the children of their father's second wife Esther Wambui Mbithi were: Stanley Mburu Mbithi, the 2nd Plaintiff and Francis Njoroge Mbithi (deceased), whose wife/widow is the 3rd Plaintiff herein.
4. The Plaintiffs contended that they have conducted numerous family meetings in attempt to resolve the issues raised in the instant suit; However, the Defendant has proven unwilling to dissolve the trust existing in respect of the suit land.
5. In his witness statement the 1st Plaintiffs' stated that the parties herein attended sittings at Mariira Land Disputes Tribunal, while his mother was alive wherein, his mother Margaret Wairimu Mbithi, stated that she was the owner of the suit property, which had been gifted to her by her husband Mbithi Wokabi, and that the Defendant's rights to the suit land is limited to cultivation.
6. Further that the Mariira Land Disputes Tribunal, rendered an award which was later amended containing the following directions:
That land parcel No. LOC.6/Kandani/637, will be shared in the following manner:
 - i. Francis Njoroge Mbithi to get 0.475 Acres.
 - ii. Stanley Mburu Mbithi to get 0.475 Acres.
 - iii. Geoffrey Gichuhi Mbithi to get 0.475 Acres.
 - iv. Wilson Wokabi Mbithi to get 0.475 Acres.
7. The 1st Plaintiff also averred that the Defendant was dissatisfied with the said award of the Mariira Land Disputes Tribunal, and lodged an Appeal against the said award, before the Provincial Land Disputes Appeals Committee, which upheld the findings of the District Land Disputes Tribunal, through its decision dated April 18, 2001.
8. The 1st Plaintiff further contended that the award of the Mariira Land Disputes Tribunal, was adopted by the Court on November 9, 2001, and an amended Order was issued on July 18, 2008.
9. The 1st Plaintiff added that the Plaintiff in the proceedings before the Mariira Land Disputes Tribunal, namely Francis Njoroge Mbithi was not able to execute the Court Order dated July 18, 2008, immediately due to illness and subsequent death.
10. He added that the Plaintiffs initiated the process of subdividing the suit property in the year 2020. However, the same proved unsuccessful for the reason that the Plaintiff as per the Court Order dated July 18, 2008, had died and the suit had abated, hence the current suit seeking for the dissolution of the existing trust in respect of the suit land. The Plaintiffs urged the Court to dissolve the existing trust, and direct the Defendant to transfer to the Plaintiffs' their rightful shares.
11. The Suit is opposed by the Defendant herein through his Statement of Defence dated August 14, 2023, which was filed before the court on August 17, 2023.
12. The Defendant described the Plaintiffs' Claim as incompetent, defective, in breach of the material rules of pleadings and failing to disclose any reasonable cause of action against the Defendant.



13. The Defendant stated that he is holding the suit land in trust for all nine (9) children of the late Mbithi Wokabi, in equal shares. He listed the aforesaid nine children of the deceased as follows:
 - i. Geoffrey Gichuhi Mbithi (Son).
 - ii. Stanley Mburu Mbithi (Son).
 - iii. Wilson Wokabi Mbithi (Son).
 - iv. Francis Njoroge Mbithi (Deceased) represented by his wife Rose Nyambura Njoroge.
 - v. Damaris Wanjira Mbithi (Deceased) represented by his son John Mbithi.
 - vi. Joyce Wanjira Mbithi (Deceased) represented by his son, Kamande Gitau.
 - vii. Grace Muthoni Mbithi (Deceased) represented by his son John Mbithi.
 - viii. Gladys Wanjiru Mbithi (Daughter).
 - ix. Rebecca Wanjiku Mbithi (Daughter).
14. Further, that it is the Plaintiffs who have frustrated his efforts to have the suit property sub-divided into nine equal shares, because they want to deny the daughters of the Mbithi Wokabi (deceased), and/or their children their rightful share of the suit property. That the present suit is meant to deny the Plaintiffs five (5) siblings their rightful share of the suit land.
15. The Defendant also sought the following Orders from this Court:
 - a. A declaration that the Defendant holds the suit property LOC.6/Kandani/737, in trust for himself and for the other eight (8) children of the late Mbithi Wokabi in equal shares.
 - b. An order for dissolution of the existing trust, subdivision of the suit property equally among all the nine (9) children of the late Mbithi Wokabi.
 - c. Costs of the suit and interest.
 - d. Any other order this Court may deem fit to grant for interests of justice for the nine (9) children of the late Mbithi Wokabi.
16. The Defendant relied on his Witness Statement dated August 14, 2023, as well as the witness statement of his witness, Gladys Wanjiru Guchu, who claimed to be sister to the Defendant, 1st and 2nd Plaintiff and sister-in-law to the 3rd Plaintiff.
17. Defence witness Gladys Wanjiru Guchu deposed that in 1966, her father Wokabi Mbithi (deceased), caused the suit property to be registered in the name of his eldest son Gicuhi Mbithi alias Geoffrey Gichuhi Mbithi, as his eldest son to hold in trust for himself and that of other eight (8) siblings. She listed the nine (9) children of her father Wokabi Mbithi (deceased), and corroborated the list of the deceased's children provided by the Defendant.
18. She further testified that the registration of Gicuhi Mbithi alias Geoffrey Gichuhi Mbithi, as the registered owner of the suit property was encumbered by customary trust, and the said registration did not in any way affect or dissolve the trust. She added that each of her siblings cultivates their respective portions of the suit land to date. She urged the Court to share out the suit property equally among the nine (9) children of her late father.
19. The suit proceeded by way of *viva voce* evidence and later written submissions, were filed by the respective parties.



The Plaintiffs' Case

20. PW1, Wilson Wokabi Mbithi testified that he comes from Kandani area, and the 2nd Plaintiff is his step-brother while the 3rd Plaintiff is the wife of his late step-brother, Francis Njoroge Mbithi(deceased). He stated that he is one of the Plaintiffs and is representing the three Plaintiffs in the matter. He further stated that the Defendant Geoffrey Gichuhi Mbuthia, is his biological brother as they share both parents.
21. He adopted his Witness Statement dated October 16, 2023. as his evidence in Chief as well as his list of documents dated June 21, 2023, which were produced as Exhibits 1-8. He further testified that the Plaintiffs commenced the present suit against the Defendant for failure to comply with the terms of the award rendered by the Marira Land Disputes Tribunal.
22. He also stated that the said award was subsequently adopted as an Order of the Court, requiring the Defendant to share out the suit property equally. It was his further testimony that there was an Appeal against the said award, but the award was upheld on Appeal. Further, that the appellate Court directed the Defendant to file an Appeal at the High Court. He added that his step-mother was deceased at that time.
23. PW1 further stated that the Mariira Land Disputes Tribunal subsequently amended the award, and the same was adopted by the Court on October 28, 2002. He added that the amended award did not reflect the decision of the said Mariira Land Disputes Tribunal, leading to PW1 and his siblings to seek the assistance of the Court wherein, the Court issued an order dated July 18, 2008.
24. PW1 further testified that Francis Njoroge Mbithi died in year 2010 without having been given the full order capturing the terms of the award of the tribunal.
25. He stated that the Plaintiffs have come to Court seeking the Court to adopt the award of the tribunal. He urged the court to dissolve the existing trust in respect of the suit land, and to compel the Defendant to execute all the consent and transfer forms. He also stated that he was seeking for costs of the suit.
26. It was his testimony that the acreage of the suit property is 1.9 Acres, and that one of the parties in the present suit resides on the suit land. He stated that the all the parties in the suit use the suit property. He further testified that he lives in Kandani area, on the separate parcel of land from the suit property.
27. On cross-examination by Mr. Kimani for the Defendant, PW1 stated that his father was Mbithi Wokabi, who was married to Esther Wambui and Margaret Wairimu.
28. He further stated that he belongs to the house of Margaret Wairimu, who was the mother to the following:
 1. Geoffrey Gichuhi (Defendant and registered owner of the suit land).
 2. Damaris Wanjira Mbithi (deceased, without children of her own).
 3. Agnes Muthoni Mbithi (deceased and mother to three (3) children).
 4. Gladys Wanjiru (alive).
 5. Wokabi Mbithi (PW1).
29. PW1 further stated that his father's other wife, Esther Wambui gave birth to the following children:
 1. Joyce Wanjira(deceased,with three (3) children).



2. Rebecca Wanjiku (alive).
 3. Stanley Mburu Mbithi (alive).
 4. Gitau Mbithi (deceased).
 5. Francis Njoroge Mbithi (deceased and husband to Rose Nyambura Njoroge).
30. It was PW1's testimony that his late father Mbithi Wokabi sired ten (10) children, and that the Defendant was registered as the proprietor of the suit property to hold the same in trust for himself and his siblings. He added that the suit land is subject to a customary trust.
31. He urged the Court to share out the suit property in conformity with the terms of the award of the Land Disputes tribunal. Further, he urged the Court to share out the suit land among the four (4) sons of the deceased, two of whom are deceased namely; Francis Njoroge and Gitau Mbithi, as provided for in the Land Disputes Tribunal's award dated May 8, 2002.
32. PW1 urged the Court to dissolve the trust in respect of the suit property and share it out according to the terms of the said award. Further, he stated that he owns two (2) Acres of land elsewhere and that each son of his father owns two (2) Acres, of land distinct from the suit land.
33. Further, that the daughters in his father's house were not allocated land, apart from one of them, namely, Wanjira. He stated that Gladys, was not the beneficiary of any parcel of land from their father. That whoever is be without land among his sisters should follow up the issue with their brothers who will have been allocated the suit land.

The Defence Case

34. DW1 Geoffrey Gichuhi, adopted his Witness Statement dated August 14, 2023, as his evidence in chief, as well as his List of Documents, which he produced as D Exhibit 1.
35. In cross exam, by the Defendant, he affirmed that he is the son of Mbithi Wokabi, and that none of his sisters has ever said that she wanted land from their father. Further that one cannot give away land to a deceased sister. It was his further testimony that Gladys, one of his sisters does not want a share of the suit land, as she had not requested DW1 for the same. That neither did Rebecca, the other sister requests for land, and therefore, the suit land should be shared among his brothers.
36. DW1 added that the suit property had been distributed by his late father, and his mother had said that the suit property was allocated to her by their father (her husband), and he did not question her further on the same. It was his further testimony that a deceased person cannot be the beneficiary of a parcel of land.
37. DW2, Gladys Wanjiru Guchu, testified and adopted her Witness Statement as her evidence in chief. She stated that Mbithi Wokabi, was her father as well of the other parties in the suit. She added that her father had two (2) houses/wives, and a total of nine (9) children, of whom one (1) is deceased.
38. DW2 testified that all of her siblings including herself were allocated a portion of the suit land each, and that she cultivates her designated portion of the suit property. It was her further testimony that the suit land is sub-divided into nine (9) portions. She stated that her sisters who are married have allowed the unmarried sisters to cultivate the former's parcels of the suit land.
39. DW2 further stated that each of her siblings is entitled to his/her respective portion of the suit property, and that she does not possess any other piece of land elsewhere. It was her testimony that she utilizes her late mother's portion of the suit land, and urged the Court to share out the suit property among the



nine (9) children of her father, who are already utilizing the suit property. It was her further testimony that the children of her deceased sisters are utilizing the suit land, and therefore, the Court should find in favour of the Defendant.

40. On cross-examination by Wilson Wokabi Mbithi, DW2 asserted that she is a biological sister to the 1st Plaintiff, and that the suit land belongs to the family of the late Mbithi Wokabi (her father). Further, that her prayer for a portion of the suit property is directed to the Defendant, who is the registered proprietor of the Suitland, as the same is the subject of a customary trust.
41. Further, that she lives on a separate parcel of land from the suit property, but utilizes a section of the suit land as she is not married. She added that she is the daughter of Maragaret Wairimu, as is the 1st Plaintiff. She testified that Rebecca is married, and hence is not a party to the suit. It was her further testimony that Rebecca is entitled to inherit from their father's estate.
42. DW2 stated that their late father would not have anticipated that the 1st Plaintiff would grab the suit land from the rest of his siblings. It was her further testimony that her sister Rebecca, has given over to DW2 her designated portion of the suit property for farming. She reiterated that she is unmarried.
43. She added that Wanjira was allocated a portion of the suit land by their father, which portion was being utilized by their mother and father. She stated that Wanjira is deceased and became the beneficiary of a portion of the suit property on account of having given birth to a baby boy named after their father Mbithi Wokabi.
44. DW2 further testified that her father did not deny her land, and asserted that title to the suit land belongs to Mbithi Wokabi, who sired four (4) daughters. It was her further testimony that the portion of the suit land which she utilizes previously belonged to her mother. She added that her father did not leave behind a written document capturing his wishes in regard to the suit property.
45. It was DW2's further testimony that a section of the suit land is not being utilized because the 1st Plaintiff has prevented the same from happening. She stated that no survey work was done in respect of the suit property. She added that the late Mbithi Wokabi, never hated any of his wives.
46. DW2 asserted that the 1st Plaintiff was allocated a separate property and the title deed thereof. She reiterated the averment that the portion of the suit property which she is utilizing comprises part of her family's land; and therefore, the same belongs to all her siblings without exception. She added that one (1) Acre, from the suit land which used to be utilized by her mother and father should be utilized by or reserved for the daughters in the family.
47. It was DW2's further testimony that Francis Njoroge died a while ago. She added that the matter had been adjudicated by the Land Disputes Tribunal, and was subsequently referred to the Appeals tribunal in Nyeri. It was her further testimony that parties were directed to lodge an Appeal before the High Court if they were dissatisfied with the decision of the tribunal.
48. Thereafter, parties filed and exchanged written submissions.
49. The 1st Plaintiff filed his written submissions on February 16, 2024, in person. He enumerated the children of his father, Mbithi Wokabi, from his two (2) wives, and stated that the parties in the suit are siblings with the exception of the 3rd Plaintiff, who is their sister-in-law by virtue of marriage to their brother Francis Njoroge (deceased). It was submitted that the suit property was registered in the Defendant's name to hold the same in trust for himself and his siblings.
50. The Plaintiffs reiterated the averments made in the witness statement of the 1st Plaintiff to the effect that numerous family meetings have been conducted in vain by the parties to the suit in attempt to resolve



- the issues before the Court. It was submitted that this Court needs to dissolve the trust in accordance with the terms of the Mariira Land Disputes tribunal award, and share out the suit land among the four (4) sons of the deceased Mbithi Wokabi.
51. It was further submitted that the parties herein filed a case with the intention of adopting the tribunal award, which award was adopted and subsequently amended on July 18, 2008 vide Murang'a LDT Case No. 131/2001. The Plaintiffs Submitted that the Plaintiff in Murang'a LDT Case No. 131/2001, namely Francis Njoroge, died before executing the Court order in the suit and the same subsequently abated, thus, leading them to lodge the instant suit.
 52. The Plaintiffs identified one (1) issue for determination being; whether the Plaintiffs have proved the existence of a customary trust in respect of the suit land. It was their submission that a customary trust was created in the suit land at the registration of the Defendant as the proprietor thereof. They added that out of the total acreage of 1.9 Acres of the suit property, the Defendant holds 1.425 Acres, in trust for the Plaintiffs.
 53. The Plaintiffs cited the provisions of Section 28 (b) of the Registered Land Act to anchor the proposition that a customary trust is one of the overriding interests that subsists on the title without being noted in the register.
 54. They referred to page 20 of the list of documents being the proceedings of the Mariira Land Disputes tribunal, and submitted that their late mother, Margaret Wairimu stated that the land belonged to her personally, and the rights of her sons to the same were limited to cultivation. It was their further submissions that in the suit before the tribunal, the Plaintiffs were able to demonstrate the existence of a customary trust in respect of the suit land.
 55. Reliance was placed in the decision of the Court in the cases of Njenga Chogera V Miana Wanjira Kimani & 2 Others [2005] eKLR, citing the holding in Muthuita V Muthuita [1982 - 88] 1 KLR 42, to buttress the argument that 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.
 56. The Plaintiffs urged the Court to declare that a customary trust exists in respect of the suit land, and to sub-divide the same as per the terms of the tribunal award.
 57. The Defendant filed written submissions on February 20, 2024 through the Law Firm of Githiga Kimani & Co Advocates. The Defendant set out the Plaintiffs' prayers in the suit and the prayers contained in his Statement of Defence dated August 17, 2023. He also listed the deceased's ten (10) children from two (2) wives.
 58. Reliance was placed in the decision of the Court in the case of Isaack Kieba M'Inanga V Isaaya Theuri M'Lintari & Another [2018] eKLR concerning the elements which qualify an Applicant as a trustee of land under the applicable customary law.
 59. The Defendant identified two (2) issues for determination as follows:
 - (i) Whether the suit property should be shared equally among the four (4) brothers or among all the nine (9) children of the late Wokabi Mbithi.
 - (ii) Who should bear the costs of the suit?
 60. The Defendant submitted that he had adduced sufficient evidence to demonstrate and prove existence of a trust in respect of the suit land. He urged the Court to dissolve the said trust and share out the suit land among all nine children of the late Mbithi Wokabi, in equal shares.



61. On the issue of costs, it was submitted that the Defendant is entitled to costs of the suit, as costs follow the event pursuant to the provisions of Section 27 of the Civil Procedure Act.
62. This court has considered the Pleadings herein, the available evidence as adduced by the parties, the rival written submissions, cited authorities and the relevant provisions of law, and finds the issues for determination are;-
 - i. Whether the suit land is subject of a customary trust under the Kikuyu Customary Law?
 - ii. Whether the Plaintiffs entitled to the Orders sought?
 - iii. Who should bear the costs of the suit?

i). Whether the suit land is subject of a customary trust under the Kikuyu Customary Law?

63. The Plaintiffs and the Defendant have all agreed that the suit land is subject to a customary trust. The Plaintiffs are seeking for the dissolution of the said customary trust, followed by an order of sub-division the suit property among the four sons of the late Mbithi Wokabi, from his two wives. The Defendant, on the other hand, while seeking for dissolution of the said customary trust, has prayed for the suit land to be shared out equally among all the children of Mbithi Wokabi (deceased), without exception.
64. The responsibility of establishing the existence of a customary trust in respect of the suit property fell on the Plaintiffs pursuant to the provisions of Sections 107, 108 and 109 of the Evidence Act, notwithstanding that the same was not controverted by the Defendant. In the case of Charter House Bank Ltd (Under Statutory Management) vs Frank N. Kamau (2016) eKLR, the Court held as follows on the issue of burden of proof:

“...of the we would therefore venture to suggest that before the trial court can conclude that the plaintiffs case is not controverted or is proved on a balance of probabilities by reason defendants failure to call evidence , the court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence by the defendant... where the defendant has subjected the plaintiff or his witnesses to cross examination and the evidence adduced by the plaintiff is thereby thoroughly discredited, judgement cannot be entered for the plaintiff merely because the defendant has not testified. The plaintiff must adduce evidence, which in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities, it proves the claim. Without such evidence, the plaintiff is not entitled to judgement merely because the defendant has not testified.”

65. Further, the Court of Appeal in Juletabi African Adventure Limited & another v Christopher Michael Lockley [2017] eKLR, held as follows:

“It is settled that the onus lies on a party relying on the existence of a trust to prove it through evidence.”

66. Further, in the case of Kanyi vs 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.”

67. In the case of *Kamau v Thiga (Environment and Land Appeal No. 5 of 2021)* [2022] KEELC 2839 (KLR) (21 July 2022) (Judgment), the Court reasoned as follows:

“The legal burden of proving the existence of the trust rests with the one who is asserting a right under customary trust. To discharge this burden, the person claiming must [prove] that: -

- (1) the suit properties were ancestral clan land;
- (2) during adjudication and consolidation, one member of the family was designated to hold on behalf of the family;
- (3) the registered persons were the designated family members who were registered to hold the parcels of land on behalf of the family. In essence, one had to lay bare the root of the title to create the nexus or link of the trust to the title holder and the claimant.”

68. The Supreme Court in the case of *Isack M'inanga Kieba V Isaaya Theuri M'lintari & another* [2018] eKLR, set out the elements that need to be proven to establish a customary trust as follows:

“Each case has to be determined on its own merits and quality of evidence. It is not every claim of a right to land that will qualify as a customary trust. In this regard, we agree with the High Court in *Kiarie v Kinuthia*, that what is essential is the nature of the 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 possession of the land. Some of the elements that would qualify a claimant of as a trustee are:

1. The land in question was before registration, family, clan, or group land.
2. The claimant belongs to the such a 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”.

69. The Court of Appeal in the case of *Mbothu and others v Waitimu & 11 others* 1980 KLR 171, stated as follows:

“The law never implies; the Court never presumes a trust but in case of absolute necessity. The courts will not imply a trust save in order to give effect to the intention of the parties. The intention of the parties to create a trust must be clearly determined before a trust will be implied”.

70. In the case of *Mukangu v Mukangu* (ELC Case No 88 of 2015) [2022] KEELC 14787 (KLR) November 16, 2022) Judgment, the court held that the manner, character and the elements to found



a customary trust as set out by the Supreme Court of Kenya in *Isack M'inanga Kieba V Isaaya Theuri M'lintari & Another* [2018] eKLR, require that a party must ascertain that the land in question was before registration family land; the claimant belongs to that family; the relationship with the family was proximate; the claimant would have been the registered owner save for some intervening circumstances and that the claim was directed at the registered owner, a member of the family.

71. From the available evidence, it is not in doubt that the suit land is registered in the name of the Defendant and belonged to Mbithi Wokabi (deceased), the father to the parties herein excluding the 3rd Plaintiff who is a daughter-in-law to the deceased.
72. The Court has perused the record of the proceedings culminating in the award of the Mariira Land Disputes Tribunal dated August 14, 2001. The Court refers to the statement made by the Margaret Wairimu, a wife to the deceased Mbithi Wokabi, and mother to the 1st Plaintiff, and the Defendant in the context of the said proceedings to the effect that the suit land was allocated to her by the deceased, and that she invited her co-wife Esther Wambui, to enter into and cultivate the same together with her.
73. The Court is satisfied that on the strength of the evidence tendered by the Plaintiffs herein, there is sufficient basis to conclude that the suit land was family land at the time of its registration in the name of the Defendant. In the premises, the Court holds and finds that the Plaintiffs have been able to prove the existence of a customary trust in respect of the suit property.

ii). Are the Plaintiffs entitled to the Orders sought?

74. From the record, it is evident that the matter before the Court has been the subject of protracted litigation. In the proceedings before the Mariira Land Disputes Tribunal, the Plaintiff thereon was Francis Njoroge Mbithi (now deceased), with the Defendant in the present suit in the role of the Defendant. The Final Orders of the Court (Resident Magistrate's Court Murang'a) dated December 18, 2001, upholding the award of the tribunal stated as follows:
 1. The award of Maragwa District Land Disputes Tribunal is adopted [as] the Judgment of this court.
 2. That land parcel No.Loc.6/Kandani/737 be shared equally between the two wives of the deceased.
 3. That costs be in the cause”.
75. The amended award of the Mariira Land Disputes Tribunal issued on May 8, 2002, upholding the award of the said Tribunal dated August 14, 2001, was adopted as an order of the Court (Senior Resident Magistrate's Court – Muranga – Hon. G.K. Mwaura) dated October 31, 2002, as follows:
 1. That the Land Disputes Tribunal at Mariira do amend the award they made on August 21, 2002, such that the eastern side of Land Parcel No.Loc.6/Kandani/737, be registered in the name of Francis Njoroge Mbithi, and the western side be registered in the names of Geoffrey Gichuhi Mbithi, and Wilson Wokabi Mbithi, in equal shares.
 2. That the executive Officer be and is hereby authorized to sign all relevant documents related to the sub-division of land parcel No.Loc.6/Kandani/737, on behalf of the Defendant.
 3. That No orders as to costs.”
76. On record is a further Order of the Court (Resident Magistrate's Court – Murang'a – Hon. J. Gathuku) dated July 18, 2008, which reads as stated below:



1. That the amended Mariira Land Disputes Tribunal award is adopted as Judgment of this court.
 2. That Mbithi Wokabi's children who will benefit to share this land parcel No.Loc.6/Kandani/737, as follows:
 1. Francis Njoroge Mbithi 0.475 Acres.
 2. Stanley Mburu Mbithi 0.475 Acres.
 3. Geoffrey Gichuhi Mbithi 0.475 Acres.
 4. Wilson Wokabi Mbithi 0.475 Acres.”
77. In all the proceedings referred to above, the Plaintiff was Francis Njoroge Mbithi (now deceased), while the Defendant herein was the Defendant. In the subject suit, the Defendant argued and submitted that he has been willing to share out the suit property among all the nine (9) children of his late father Mbithi Wokabi. However, his efforts have been frustrated by the Plaintiffs who wish to exclude their sisters from getting any share of the suit land.
78. Having determined that the suit land is the subject of a trust under the Kikuyu customary Law, the Court will next consider whether the Plaintiffs are entitled to a share of the suit property pursuant to the terms of the award of the Mariira Land Disputes Tribunal, as adopted by the court and which shared out the suit property among the four (4) sons of the deceased, that is two sons from each wife, with each son getting 0.475 Acres; or, whether all children of the deceased are entitled to an equal share of the suit property.
79. In the case of *Ruingi & another (Suing on their own behalf and on behalf of Kenneth Wagatu Kimani, Simon Kagece Kimani, Peter Gichuri, Susan Waceke and Teresia Wanjiku) v Waruingi & 4 others* (Environment and Land Case Civil Suit 570 of 2011) [2022] KEELC 14742 (KLR) (10 November 2022) (Judgment), the Court held as follows:
- “under Kikuyu Customary Law, only unmarried daughters or daughters who were married but divorced and came back home were entitled to ancestral land owned by their fathers.”
80. In the book “*The restatement of African Law* Vol. 2” by Eugene Cotran at page 8, the learned author has given the following opinion:
- “Inheritance under Kikuyu customary law is patrilineal. The pattern of inheritance is based on the equal distribution of [a] man's property among his sons, subject to the proviso that the eldest son may get a slightly larger share. Daughters are normally excluded, but may also receive a share if they remain unmarried.”
81. In the instant suit, the Defendant urged the Court to dissolve the trust in respect of the suit land, and share out the same to all the nine (9) children of the deceased. The Plaintiffs, on the other hand, urged the Court to share out the suit property among the four (4) sons of the late Mbithi Wokabi. However, none of the married daughters came out clearly to claim a share of the suit land through customary trust.
82. The Court in adopting the tribunal's award, shared out the suit land among the four (4) sons of the deceased Mbithi Wokabi, equally with each of them getting 0.475 Acres. The Court notes that the said tribunal disregarded the interests of the unmarried said daughters of the deceased, who were entitled to a share of their father's land pursuant to the Kikuyu Customary Law.



83. The Court is also cognizant of the fact that all male offspring of the deceased are beneficiaries of separate parcels of land from the suit property from the deceased wherein, each son was the recipient of 2 Acres of land. It is on the latter properties that they reside, as they use the suit land only for cultivation.
84. Be that as it may, the Court notes that no Appeal was lodged against the decision of the Court adopting the amended award rendered by the Mariira Land Disputes Tribunal on October 31, 2002. The Court finds and holds that it is not sitting as an appellate Court against the said amended award of the tribunal, which was adopted as an Order of the Court on July 18, 2008. Consequently, this Court is not moved to disturb the said award or the resultant Court Order adopting the same.
85. Therefore, this Court finds and holds that prayers No. (a), (b) and (c) of the Plaintiffs' Plaint dated June 20, 2023, are merited. For the above reasons this court allows the said prayers entirely.
86. Further, this court finds and holds that the Defendant's prayers as set out in his Statement of Defence dated August 14, 2023, are found not merited. Consequently, the said prayers are hereby dismissed entirely.
87. On the issue of costs, this court finds and holds that this being a dispute involving the same family and is a land dispute between members of the same family, then it directs each party to bear its own costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 26TH DAY OF AUGUST, 2024.

L. GACHERU

JUDGE

Delivered online in the presence of:

Joel Njonjo – Court Assistant

Plaintiffs in persons all present

Mr Githiga Kimani for the Defendant

