



**Nkunja (Suing as Legal Representative of M’Ndegwa M’Kithaka)
v Kithaka & 4 others (Environment & Land Case 38 of 2019)
[2024] KEELC 14018 (KLR) (19 December 2024) (Judgment)**

Neutral citation: [2024] KEELC 14018 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE 38 OF 2019
CK YANO, J
DECEMBER 19, 2024**

BETWEEN

**JANE NKUNJA PLAINTIFF
SUING AS LEGAL REPRESENTATIVE OF M’NDEGWA M’KITHAKA**

AND

**MAINGI KITHAKA 1ST DEFENDANT
JULIUS B MARANGU MBURUGU 2ND DEFENDANT
GEORGE RUTERE MBURUGU 3RD DEFENDANT
ALEXANDER GATUMA MBURUGU 4TH DEFENDANT
TARATISIO KIRIMI MBRUGU 5TH DEFENDANT**

JUDGMENT

1. The plaintiff moved this court by way of plaint dated 22nd March, 2011 and amended on 28th October, 2022 seeking the following reliefs:
 - a. A declaration that the defendants are registered as trustees of the plaintiff to the extent of 1/3 of L.R Numbers Abogeta Upper -kiungone /499, 1643, 1644, 1645 and 1270 to the plaintiff.
 - b. An order of sub-division and transfer of 1/3 of LR Numbers Abogeta/Upper-Kiungone/499, 1643,1644, 1645 and 1270 to the plaintiff.
 - c. The E.O. of this court be empowered to sign all the necessary forms leading to subdivision and transfer as shall be directed by the court.
 - d. Costs and interests.



- e. Any further or better relief these Honourable court may deem fit to grant.
2. The plaintiff pleaded that the 1st defendant was a brother to the late M’Ndegwa M’Kithaka while the 2nd, 3rd, 4th and 5th defendants are progenies of Mburugu Kunja who was a brother to the deceased plaintiff, the late M’Ndegwa M’Kithaka.
 3. The plaintiff pleaded that at all material times L.R No. Abogeta/Upper-Kiungone/349 measuring about 16 acres and Abogeta/Upper-Kiungone/499 measuring about 3 acres was ancestral land and the late M’NDEGWA M’KITHAKA (deceased) gathered the same and left it under the care of his brother. That through unknown mistake or unlawful manipulation, the lands were registered as follow-;
 - a. L.R No. Abogeta/Upper-Kiungone/349 in the name of Mburugu Kaunja the late M’Ndegwa M’Kithaka who was already dead.
 - b. L.R No. Abogeta/Upper-Kiungone/499 in the name of Maingi Kithaka (deceased).
 4. The plaintiff averred that the 2nd, 3rd, 4th and 5th defendants sub divided the original land parcel LR. No. Abogeta/Upper-Kiungone/349 into parcel Nos Abogeta Upper Kiungone/1643, 1644, 1645, and 1270. The plaintiff stated that the defendants are holding the same in trust for the plaintiffs, and that the same is protected under Section 28 and 30 of the Registered *Land Act* Cap 300 Laws of Kenya (now repealed) and under the African Customary Laws as the land is ancestral land and therefore trust land.
 5. The plaintiff itemized the particulars of trust as follows: that the land is family and customary law land as the same initially belonged to the plaintiff’s grandfather, M’Kithaka M’Ibere and his forefathers at the time of registration, the parties’ clan directed that the late M’Ndegwa M’Kithaka be given his share of the land, the defendants are seeking to break the trust, failing to recognize the late M’Ndegwa M’Kithaka’s right on the suit lands, failing to heed the directive of clan elders, failing to transfer the deceased his share of the land, and attempting to sell the land to outsiders without considering the rights of the late M’Ndegwa M’Kithaka.
 6. The plaintiff further stated that the manner in which the defendants are dealing and intend to deal with the said family and ancestral lands are to deprive the late M’NDEGWA M’KITHAKA of his 1/3 share thereof.
 7. On 30th July, 2014, the 1st defendant filed a defence by way of an admission of the plaintiff’s claim dated 25th July, 2014. However, the 1st defendant later died and the suit against him abated.
 8. The 2nd to 5th defendants filed their joint defence dated 2nd August 2013. They also filed an amended statement of defence and a counterclaim by the 5th defendant dated 14th June 2023. In the counterclaim, the 5th defendant is seeking the eviction of the plaintiff from land parcel No. Abogeta/Upper-Kiungone 1270, an order of permanent injunction, mesne profits and costs and interests.
 9. The 2nd to 5th defendants averred that they are children of the late M’Mburugu M’Kithaka (Kaunja) who died in the forest while fighting for independence in the late 1950’s. That their mother, Julieta Igoji Mburugu did the boundary marking and gathering and with the concurrence of the clan elders, led what came to be known as land parcel No. Abogeta/U-Kiungone/349 measuring 15 acres or thereabouts registered in the name of M’MBURUGU KAUNJA. That what came to be known as Abogeta/U-Kiungone.349 as initially demarcated was 16 acres, but one (1) acre spilled into M’nanjau Gaturu’s land and was shifted to Igandene area where it was demarcated and given No. Abogeta/U-Kiungone/1270 in the name of Mburugu Kaunja.



10. The 2nd to 5th defendants pleaded that when they became of age, they in 1981, and after consulting the clan elders who included the 1st defendant M'ARITHI MUKUNGA among others and in a meeting held at M'ruria Muguongo's home filed Nkubu RM Succ Cause No. 20 of 1981 which was fully heard and determined and the estate of Mburugu Kaunja was distributed as hereunder.
 - i. L.R Abogeta/U-Kiungone/349
 - George Rutere (3rd defendant)- 5.23 acres
 - Alexander Gatumo (4th defendant) – 2.3 acres
 - Bernard Kinyamu - 2.2 acres
 - Jeremiah Kimathi – 2.7 acres
 - Tartisio Kirimi (5th defendant) – 1.2 acres.
 - ii. LR NO. Abogeta/U-Kiungone/1270
 - Tartisio Kirimi (5th defendant – 0.4 Ha (one acre).
11. The 2nd to 5th defendants stated that the shares of Bernard Kinyamu, Jeremiah Kimathi and Tartisio Kirimi who were then minors were to be registered in the name of Julius B Marangu to hold in trust for them.
12. The defendants averred that the orders of the succession court were implemented by having land parcel No. Abogeta/U-Kiungone/349 sub-divided and transferred as follows;
 - i. Abogeta/U-Kiungone/1643 – 4th defendant
 - ii. Abogeta/U-Kiungone/1644 – 3rd defendant
 - iii. ABOGETA/U/KUNGONE/1645 – 2nd defendant
13. It was further pleaded that Land Parcel No. Abogeta/U-Kiungone/1645 has been sub divided into Land parcel No. Abogeta/U-Kiungone/1857 to 1860 and transferred as hereunder:
 - i. Abogeta/U-Kiungone/1857 – Julius B Marangu Mburugu
 - ii. Abogeta/U-Kiungone/1858 – Julieta Igoji Mburugu
 - iii. Abogeta/U-Kiungone/1859 – Bernard Kinyamu Mburugu
 - iv. Abogeta/U-Kiungone/1860 – Tartisio Kirimi Mburugu
14. That land parcel No. Abogeta/U-Kiungone/1270 has also been transferred to Tartisio Kirimi Mburugu.
15. The 2nd, 3rd, 4th and 5th defendants further averred that the deceased plaintiff together with his proposed witnesses, namely M'Arithi Mukunga and Cyrilo M'Matae M'Ruria, were well aware of the Succession cause proceedings and the subsequent transfers and raised no issues either before, during or after the said succession proceedings and that the present suit is an afterthought and designed to deprive the 2nd, 3rd, 4th and 5th defendants of their merited inheritance from their father.
16. The 2nd, 3rd, 4th and 5th defendants denied the alleged particulars of trust or the breach thereof. It is their contention that the land parcel No. Abogeta/U-Kiungone/349 and the subsequent sub-division has never been ancestral or family land and argued that the doctrine of trust does not and cannot arise.



17. The 2nd to 5th defendants further averred that it is the plaintiff who sits on, occupies and works on the family land, to wit Abogeta/U-Kiungone/810 measuring 2.4 ha (6 acres) or thereabouts which parcel of land they stated was bought from family resources from one MUTUAMBUGU. The 2nd, 3rd, 4th and 5th defendants averred that their mother, Julieta Igoji M^uMburugu, would pluck coffee planted by her husband, Mburugu Kunja on land parcel No. Abogeta/U-Kiunguno/499 and market it through the deceased plaintiff's number which proceeds the deceased plaintiff would pay to Mutuambugu. They stated that their mother's two ewe were also taken by the plaintiff and sold to boost the payments of Mutuambugu. That when their grand father (and father to the deceased plaintiff) M^uKithaka Kaunja M^uIbere died in the 1970s, he was buried on the family land, parcel No. Abogeta/U-Kiungone/810.
18. The 2nd, 3rd, 4th and 5th defendants averred that Jane Nkuene Ndegwa Kaunja, the now legal representative of her deceased father M^uNdegwa Kithaka, was too young at the time land gathering, demarcation and adjudication was done at Abogeta area to appreciate or understand what was going on. They contend that the clamour and motivation to file the present suit was fired by the 5th defendant's request in September 1997 to the deceased plaintiff to purchase his land parcel No. Abogeta/U-Kiungone/1270 failing which it would be disposed to any willing buyer. That Jane Nkuene M^uNdegwa Kaunja then just married in Embu pushed her father (deceased plaintiff) to file the present suit. They prayed that the plaintiff's suit be dismissed with costs.
19. In his counterclaim, the 5th defendant pleaded that he is the registered proprietor of all that land parcel known as Abogeta/U-Kiungone/1270 measuring 0.4 Ha (one acre) or thereabout and became so registered as pleaded above. That the plaintiff and her siblings are in occupation thereof as was their deceased father and have remained in such occupation to-date without the consent or concurrence of the 5th defendant. That despite notice to vacate from the said land, the plaintiff and her siblings, agents and/or assigns have adamantly declined and/or refused to vacate therefrom, hence the filing of the counterclaim herein.
20. The plaintiff filed a reply in response to the 2nd to 5th defendant amended statement of defence and a defence to the 5th defendant's counterclaim dated 30th June 2023 wherein she reiterated the contents of the amended plaint and denied the counterclaim. The plaintiff averred that the 5th defendant is registered as trustee of the plaintiff to the extent of 1/3 of L.R Numbers Abogeta/U/Kiungone/1270. The plaintiff prayed for the dismissal of the 2nd – 5th defendants amended statement of defence and the 5th defendant's counterclaim.
21. At the hearing, Jane Nkuene Ndegwa, the plaintiff herein testified as P.W 1. She adopted her witness statement dated 18th October, 2022 as her evidence in – chief. She also produced a copy of register for LR No. ABOGETA/U – KIUNGONE/499, 1643, 1644, 1645, and 1270 as Pexh. 1(a) – e respectively, minutes of clan elders as P exh. 2, Limited Grant Ad Litem as D exh 3, and an order dated 25th October, 2018 in Meru CMCC No. 75 of 2011 as P exh 4. She was also cross – examined and re-examined.
22. PW 1 testified that her late father M^uNdegwa M^uKithaka had eight children, 5 sons and 3 daughters. That the 1st defendant is her uncle (brother to her father), while the 2nd to 5th defendants are her cousins being the children of her uncle, Mburugu M^uKithaka who was the first born in her grandfather's family, while the plaintiff's father was the last born. She stated that their grandfather was M^uKithaka M^uIbere who passed on in 1969 had two parcels of land Nos. 349 and 499 which he obtained from Mkwa/ Mutegi clan.
23. 1 stated that before their grandfather died, he directed that his two parcels be distributed equally among his 3 sons namely M^uNdegwa M^uKithaka, M^uMburugu Kithaka and Maingi Kithaka as the same was ancestral land. P.W 1 stated that her father who was the last born was a businessman at Samburu from



around 1968 to 1997, but would visit home at least once a year. That he died in the year 2011 while the 2nd – 4th defendant's father died in the 1950s.

24. PW 1 testified that sometime in the 1970's when her father was away in Samburu, her cousins Julius B Marangu Mburugu, George Rutere Mburugu and Alexander Gatumo Mburugu had parcel No. Abogeta/U-Kiungone/349 measuring 6.12 Ha uprocedurally and fraudulently registered in the name of their father. That the said land would later be subdivided into Abogeta/U-Kiungone/1643, 1644, 1645, and 1270 and shared among Julius B. Marangu Mburugu, George Rutere Mburugu, Alexander Gatumo Mburugu, Taratisio Kirimi Mburugu among others wherefore transfer was done around 1983. That parcel No. Abogeta/U/Kiungone/1645 would later be further subdivided. That Parcel No. Abogeta/U-Kiungone/499 was registered in the name of Maingi Kithaka. According to P.W 1, land parcel Abogeta/U-Kiungone/499 and 349 being ancestral land ought to have been distributed among the 3 brothers and that the failure to share the same to her father was and is in breach of customary trust. That the said parcels could not be disposed of to third parties and any alienation or disposition of the same as intimated by Taratisio Kirimi Mburugu was null and void. She stated that she lives in parcel No. 349 which was part of No. 1270. P.W 1 is therefore praying for her father's 1/3 share of parcel No. Abogeta/U-Kiungone/499 and Abogeta/U-Kiungone/1643, 1644, 1645 and 1270.
25. When she was cross examined by Mr. Arithi, learned counsel for the 2nd – 5th defendants, P.W 1 stated that she is about 65 years old and got married in Runyenje in 1984, in Embu County, but lives in Igandene, which is parcel No. 1270. That she came back after her husband passed in 1990. P.W 1 stated that the suit parcel of land was gathered by her grandfather who died in 1969 before titles were issued, so the titles were not issued in his name. She stated that her grandfather used to live in parcel No. 349 before he passed on. That her father who died in the year 2011 was also living on parcel No. 349 and was buried on parcel No. 1270 which is part of parcel No. 349 but had no development thereon.
26. PW 1 admitted that she lives in parcel No. 810 and that her father never claimed the suit land for over 50 years because he was away in Samburu before he came back in 1986. She maintained that parcel No. 349 was in the name of her grandfather and that it was not first registered in the name of the 2nd – 5th defendants' father in 1970. She stated that she was not aware that the land was to be sold and her father given the first option to buy.
27. PW 1 stated that she was aware that parcel No. 349 was distributed in Nkubu SRMC succession cause No. 20 of 1981 to the 2nd – 5th defendants. That her father was left out intentionally. She stated that she got to know the proceedings at Nkubu Law Court when this case was filed. That they saw the succession cause proceedings at Nkubu in 2011, but never challenged it.
28. PW 2 was Lawrence Kimathi Maingi. He is a cousin to the plaintiff and 2nd to 5th defendants. He adopted his statement dated 23rd June 2023 as his evidence in chief and was cross-examined and re-examined. His father was the late Maingi Kithaka who was the 1st defendant herein and who died on 28th November, 2015. He stated that their grandfather had two parcels numbers 349 and 499 which he obtained from Mkwa clan. That the said parcels were to be shared equally among the three families as the same was ancestral land.
29. PW 2 stated that parcel No. 499 is owned by his father and is measuring 3 acres and is where he was buried and that is where P.W 2 is settled in. That parcel 349 is 14 acres. P.W 2 is aware of another parcel No. 810 but did not know its acreage. He denied acting in collusion with the plaintiff.
30. Julius Brown Mburugu testified as D.W 1. He adopted his statements dated 17th September, 2019 and 13th June 2023. He also produced the proceedings in Nkubu RM Succ cause No. 20 of 1981 and



copies of register of LR No. Abogeta/U-Kiungone/1857, 1958, 1859, 1860 and 810 as D. exhibit 1-6 respectively.

31. D.W 1 is the 2nd defendant herein. He stated that the deceased plaintiff and the 1st defendant were his paternal uncles while the 3rd, 4th and 5th defendants are his brothers. His grandfather was Kaunja M’Kithaka who had 3 sons, namely M’Mburugu (who was father to D.W 2) M’Ndegwa (the deceased plaintiff) and John Maingi (the 1st defendant who is also deceased). He stated that his mother who is also deceased was Julieta Igoji.
32. D.W 1 stated that he was born in 1949 on parcel No. 499. That at that time, the entire family was living on that land. He stated that in around 1952, there was an emergency in Kenya and his father went to the forest to fight for independence. He stated that his father had planted coffee on parcel No. 499. D.W 1 testified that in 1953, they were put in a concentration camp in Kionyo which is about 7 kilometres from Gumbira, and left the camp around 1955/1956. That his father never came back as he died in the Mt. Kenya forest while fighting for independence.
33. D.W 1 stated that around 1959/1960, there was land demarcation and consolidation in their area and the land that was available was No. 499 and 349. He stated that parcel No. 349 was in a cold place close to the forest and not suitable for planting coffee or any other cash crop while parcel No. 499 was in a warmer place. He stated that his Mukwa/Mutegi clan decided that parcel No. 499 be given to John Maingi, the 1st defendant while the deceased plaintiff and the 2nd defendant’s father were to be settled on parcel No. 349. That the deceased plaintiff did not want to settle there because it was cold and he could not plant coffee. That the clan decided that the plaintiff gets land elsewhere he wanted and would be bought using proceeds from Parcel 499 and the cows of their grandfather. That those proceeds were used to purchase parcel No. 810 from one Mutuambugu. D.W 1 stated that he witnessed it because he would accompany his mother while taking coffee to Kieru factory which was near Nkubu, about 10 kilometres away. That the coffee would be sold through the plaintiff’s number and eventually, land parcel No. 810 was paid for and registered in the name of the plaintiff and that is where the family of the plaintiff settled. That parcel No. 499 was registered in the name of John Maingi Kithaka (the 1st defendant) while parcel No. 349 was registered in the name of M’Mburugu (the father to the witness). D.W 1 stated that the deceased plaintiff is the one who was guiding the clan members on the location of the land, ownership and registration. That the 3 parcels of land were registered on the same day on 2nd February, 1970.
34. D.W 1 testified that parcel No. 1270 came about when the boundary of parcel No. 349 was being done and one acre extended to a tea plantation owned by one Nanjau Gataru. That parcel No. 1270 borders parcel No. 810. D.W 1 stated that parcel No. 1270 was initially in the name of his father, but is now in the name of his brother, the 5th defendant. He stated that when they attained the age of majority, they sought permission from clan members to do succession and were allowed, and they filed Nkubu RMCSUCC case No. 20 of 1981 which was 11 years after the registration of the land parcels. That the deceased plaintiff never raised any objection, and all the parcels of land were transferred to them as beneficiaries of Mburugu. That the plaintiff never challenged the succession until they filed this suit over 30 years later. He stated that none of the plaintiff’s family members has ever occupied parcel No.349. That when their grandfather died, he was buried in parcel No. 810 and so to the deceased plaintiff. That the suit parcels are far apart, except 810 and 1270. D.W 1 stated that the plaintiff started using parcels No. 1270 around the year 2000 when he planted tea. He stated that the plaintiff promised to buy land elsewhere to give to the 5th defendant, but failed to do so.
35. D.W 2 was Taratisio Kirimi Mburugu, the 5th defendant herein. He adopted his statement dated 30th July, 2014 as his evidence in chief and was cross examined and re-examined.



36. D.W 2 stated that he is the son of M'mburugu M'Kithaka (deceased) and was born in 1968. That his father passed away in 1963. He stated that in 1981, his brother filed Nkubu RMC succession cause No. 20 of 1981 in respect of the estate of their late father in which it was determined that land parcel No. 349 be subdivided into land parcel Nos. Abogeta/U-Kiungone/1643, 1644 and 1645 which were transferred to the 4th defendant, the 3rd defendant and the 2nd defendant herein. That the 2nd defendant's share included that of Benard Kinyamu, Jeremiah Kimathi and the 5th defendants' since they were minors then. That the land was later transferred to them when they attained the age of majority.
37. D.W 2 stated that when they were marking the boundaries of their land, an acre overshoot the boundary into the land of one M'Nanjau Gataru tea plantation and was taken to Gampira, but later shifted to Igandene and is today parcel No. Abogeta/U-Kiungone 1270. D.W 2 stated that he is the registered owner of land parcel No. Abogeta/U-Kiungone/1270 which is separate and distinct from all other family land. He stated that the plaintiff encroached into his said land without authority and that he has been trying unsuccessfully to evict him therefrom. The 5th defendant urged the court to issue eviction orders against the plaintiff for occupying his land without any colour of right.
38. Upon conclusion of the defence case, the court directed the parties to file and exchange written submissions. The plaintiff filed submissions dated 14th October, 2024, through the firm of Maitai Rimita & Co. Advocates while the 2nd to 5th defendants filed theirs dated 12th November, 2024 through the firm of Kiautha Arithi & co. Advocates.
39. The plaintiff's advocates gave a summary of the pleadings and the evidence adduced by the parties and identified the issues for determination to be whether L.R. No. Abogeta/U-Kiungone/349, 499 and 1270 are ancestral lands, whether the plaintiff has been utilizing parcel of land No. Abogeta/U-Kiungone/1270 and whether the plaintiff is entitled to the reliefs sought.
40. It was submitted on behalf of the plaintiff that land parcel Nos. Abogeta/U-Kiungone/349 and 499 were ancestral lands. That indeed the defendant's father and the deceased plaintiff are brothers and the parties are related by blood. That it was also confirmed by P.W 2 that L.R No. Abogeta/U-Kiungone/499 is utilized by his family alone, but a share of it ought to be given to the plaintiff. That the 2nd – 5th defendants on the other hand are in exclusive use and occupation of L.R No. Abogeta/U-Kiungone/349. That these parcels were to be shared amongst the 3 brothers. The plaintiff's counsel relied on the case of Issack Kieba M'Inanga Vs Isaaya theuri M'Lintari & another [2018]Eklr in which the Supreme Court elaborated the principles to be met in customary trusts, and Ngugi Vs Kamau & another (environment and Land court Case 36 of 2020 [2022] KEELC 2261 (KLR)
41. It was pointed out that the plaintiff testified that the suit lands were ancestral lands that were gathered and left in the care of their father M'Ndegwa M'Kithaka. That the first registration over parcel No. Abogeta/U-Kiungone was in the name of M'Mburugu Kaunja. It was submitted that that registration was only after a customary trust was present on the land in issue and can therefore not be a basis to deny that a customary trust existed. It was submitted that there is evidence that Abogeta/U-Kiungone/1270 came from Abogeta/U-Kiungone/349 and that the plaintiff's family has been utilizing this portion of land. That even when parcel 349 was subdivided into other portions of land, the customary trust was still present. It was further submitted that even assuming that the succession cause No. 20 of 1981 distributed parcel No. Abogeta 349, the same was void as the customary trust was still present. The plaintiff relied on the case of Ngugi Vs Kamau & another (supra) and urged the court to find that the suit lands are customary lands and the defendants hold 1/3 of the suit lands in trust for the plaintiff.



42. It was submitted that having established that a customary trust was present, the plaintiff is entitled to the prayers sought in the amended pleadings and the court was urged to allow the suit as prayed for in the amended pleadings dated 18th October, 2022.
43. In their submissions, learned counsel for the 2nd to 5th defendants also summarized the pleadings and the evidence adduced. It was submitted that trust, being a matter of evidence, no evidence has been led to satisfy this court that the plaintiff is entitled to a 3rd share of parcel No. Abogeta/U-Kiungone.349 (as it then was) and 499.
44. Learned counsel for the 2nd to 5th defendants identified the issues for determination to be whether the plaintiff is entitled to a share of land parcel Nos. Abogeta/U-Kiungone/449, 1643, 1655, 1645 & 1270 under customary trust, whether the plaintiff is entitled to claim the said land parcels under customary trust the same having been transmitted to the 2nd to 5th defendants by transmission vide Nkubu PMCC Succession cause No. 20 of 1981, whether the plaintiff is entitled to claim a share of land parcel No. Abogeta/U-Kiungone/499, 1643, and 1645 in light of the fact that the suit against the 1st and 3rd defendants abated due to non appointment of legal representatives and parcel No. 1645 having been subdivided into land parcel Nos. Abogeta/U-Kiungone.1857, 1858, 1859, and 1860, whether the 5th defendant is entitled to the prayers in the counterclaim, and who bears the costs of the suit.
45. On the first issue, it was submitted on behalf of the 2nd to 5th defendants that matters of customary trust must be supported by evidence. That the court will not presume. The 2nd to 5th defendant's counsel relied on the case of Kieba Vs Isaaya M'Lintari & another (supra) and submitted that from the evidence on record, the plaintiff has not proved that he is in law entitled to 1/3 share of land parcel NOS. ABOGETA/U-KIUNGONE/499, 1643, 1644, 1645 or 1270. That what has clearly come out from evidence on record is that each of the 3 sons of Kithaka M'Ibere is settled on his own land parcel. That the plaintiff is on land parcel No. Abogeta/U-Kiungone/810 (6 acres). The 1st defendant on land parcel 499 (3 acres) and Mburugu Kaunja (Kithaka) on land parcel No. 349 since subdivision of land parcel No. Abogeta/U-Kiungone/1643, 1644, 1645 and 1270, all totaling to 16 acres. That these families have peacefully lived on their respective parcels of land situated several kilometres from each other for well over 54 years. That this is how the clan elders intended them to live and they obliged. It is contended that it is not clear why the plaintiff went to court in 2011, 41 years after the respective registration of the parcels of land in their names. That it would appear that it is because of envy since Land Parcel No. Abogeta/U-Kiungone/349 (as it originally was) is 15 acres and Abogeta/U-Kiungone/1270 one acre. It is submitted that the zone where land parcel No. Abogeta/U-Kiungone/349 (as originally registered) has now become pricy due to tea crop inter alia that does well unlike in the late 1950's when it was not there when the deceased plaintiff rejected the same. It is their submissions that envy is not a basis for establishing customary trust.
46. On the second issue, it was submitted that the 2nd to 5th defendants got registered over their respective parcels of land by transmission after filing Nkubu PMCC Succ cause No. 20 of 1981. That as narrated by D.W 1 & D.W 2, the self-same clan elders who guided the settlement and registration of the 2nd to 5th defendants father as the owner of land parcel No. Abogeta/U-Kiungone 349 had consulted and okayed at filing of the said succession cause. That infact, the 1st defendant was in court during the confirmation of the grant as demonstrated in the grant produced as an exhibit by D.W 1. That the only reason the deceased plaintiff was not present was because he was working out of town in Maralal, but was aware and gave his blessings to the transaction, and that is the reason that succession cause grant has never been challenged to-date. It is also submitted that if the deceased plaintiff had any claim against the 2nd to 5th defendants, then the same should have come or should come through a successful challenge to Nkubu PMCSuccession No. 20 of 1981. That the plaintiff cannot seek to side step the succession



proceedings and grant which still remain valid and seek to sneak his way into the 2nd to 5th defendants bequest without unsettling the succession decree. The 2nd to 5th defendants advocate relied on EMBU ELC no. 6 OF 2019 (Elijah Njeru Mugo & Another Vs Njeru Samwel M’rwingo)

47. On the third issue, it is submitted that it is agreed and on record that the 1st defendant died on 28th November, 2015 while the 3rd defendant died on 24th February, 2015. That no legal representatives were appointed in respect of each of them before the expiry of one (1) year. The 2nd to 5th defendants’ counsel cited the provisions of Order 24 Rule 4(1) and (3) of the Civil Procedure Rules 4(1) &(3) of the Civil Procedure Rules and submitted that as a consequent, land parcel Nos. Abogeta/U-Kiungone/499 and 1644 are not subject to challenge since the suit against the proprietors thereof abated respectively at the expiry of one year after the owners thereof died. That similarly, land parcel No. Abogeta/U-Kiungone/1645 was on 31st August 1993 subdivided into parcel Nos. Abogeta/U-Kiungone/1857, 1858, 1859 and 1860 in confirmation of the grant in Nkubu Pmcc succ No. 20 of 1981. That parcel No. Abogeta/U-Kiungone/1645 does not exist and therefore no orders can be given over the same. It is submitted that the court does not act in vain.
48. Regarding the fourth issue, it is submitted that the evidence by D.W 2 and indeed P.W 1 has demonstrated that the deceased plaintiff and his family are in possession and occupation of land parcel No. Abogeta/U-Kiungone/1270. That it is against the interests and legal rights of the 5th defendant. Learned counsel for the 2nd to 5th defendants cited Section 24(a `) of the Land Registration Act and urged the court to find that the 5th defendant’s counterclaim has been proved on a balance of probabilities and the same should be granted. That the deceased plaintiff and successors in title assigns/family members have denied the 5th defendant enjoyment and user of the same for a long time and should not be allowed to continue trampling on his rights as protected by the law.
49. On the issue of costs, it was submitted that the same will follow the event unless the court otherwise orders in terms of Section 27 of the Civil Procedure Act. It was submitted that though the parties are related, this is a suit that the plaintiff has brought out of self greed and refused to negotiate with the 2nd to 5th defendants for an out of court settlement. That in the process, he has caused the 2nd to 5th defendants unnecessary costs and therefore the suit should be dismissed with costs.
50. As relates to the counterclaim, it was submitted that the 5th defendant has been kept out of his one (1) acre, Abogeta/U-Kiungone/1270 for well over 54 years. That if his counterclaim succeeds, he should be awarded costs of the same.
51. Having read the facts as set out in the pleading and having analyzed the evidence adduced by the parties together with the written submissions filed and the authorities, I find that the issues for determination are-;
- i. Whether the plaintiff has proved trust.
 - ii. Whether the 5th defendant has proved his counterclaim.
 - iii. Who meets the costs of the suit and the counterclaim?
52. On the first issue, the plaintiff’s case is that LR no. Abogeta/U/Kiungone/349 measuring about 16 acres and LR. No. Abogeta/U-Kiungone/499 which is measuring about 3 acres was ancestral land. The plaintiff pleaded that her late father M’Ndegwa M’Kithaka (deceased) gathered the land and left it under the care of his brother Mburugu Kaunja (deceased) who was the father of the 2nd to 5th defendants. That through unknown mistake or unlawful manipulation land parcel No. Abogeta/U-Kiungone/349 was registered in the name of Mburugu Kaunja (deceased) while LR. No. Abogeta/U/Kiungone/499 was registered in the name of Maingi Kithaka. It is the plaintiff’s case that the 2nd to 5th



defendants subdivided the original land parcel LR. No. Abogeta/KIUNGONE/349 into parcel Nos. Abogeta/U-Kiungo/1643, 1644, 1645 and 1270. The plaintiff claimed that the defendants are holding the suit parcels of land in trust for the plaintiff. According to the plaintiff, the land was customary land that belonged to the parties' grandfather, M'Kithaka M'Ibere (deceased) and his forefathers at the time of registration. The plaintiff accused the defendants for breaching the alleged trust by failing to recognize the right of M'Ndegwa M'Kithaka on the land.

53. Customary trust was well explained by the Supreme Court in the case of Isaack Kieba M'Inanga Vs Isaaya theuri M'Lintari & another (supra) where it held as follows-;

“ Each case has to be determined on its own merits and quality of evidence. It is not every claim of a right to land that will qualify as a customary trust. In this regard, we agree with the High court in Kiarie 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 customary trust would be presumed to have been created in favour of such other members, whether or not they are in possession or actual occupation of the land. Some of the elements that would qualify a claimant as a trustee are-:

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

54. In the case of Mbui Mukangu Vs Gerald Mutwiri Mbui C.A No. 281 of 2000, the Court of Appeal stated that customary trust is a concept of intergenerational equity where the land is held by one generation for the benefit of succeeding generations. The court also held that possession and occupation are key elements in determining the existence of a customary trust.

55. In the present case, it is not in dispute that the parties are related. The family patriarch was the late M'Kithaka M'Ibere (deceased) and he had three sons, namely Mburugu Kaunja Kithaka, Maingi Kithaka and Ndegwa M'Kithaka. The plaintiff is the daughter of Ndegwa M'Kithaka while the 2nd to 4th defendants are sons of Mburugu Kithaka (deceased). Maingi Kithaka who was the 1st and 3rd defendant herein died during the proceedings in the suit and have never been substituted.

56. It is important to examine the root of the suit parcels of land to determine whether trust exists. The legal burden to prove the existence of a trust rests with the one who is asserting a right under customary trust. In this case, it is the plaintiff who must discharge that burden. This is because trust is a question of fact which must be proved, and can never be implied by the court.

57. From the evidence on record, all the 3 parcels of land L.R No. Abogeta/U-Kiungone/499, 349 and 810 were registered on the same day that is 2nd February, 1970 in the names of Mburugu Kaunja Kithaka, Maingi Kithaka and Ndegwa M'Kithaka respectively. Land parcel No. Abogeta/U-Kiungone/1270 was also registered in the name of Mburugu Kaunja. Clearly, it is clear from the evidence on record that each of the 3 sons of the late Kithaka M'Ibere had themselves registered as owners of their respective parcels of land after gathering, consolidation and eventual registration. Later on, the family



of Mburugu Kaunja filed Nkubu PMC succession cause No. 20 of 1981 and shared and distributed the deceased's land parcel No. Abogeta/U-Kiungone/349 amongst the beneficiaries of the estate of the deceased. There is no evidence adduced by the plaintiff to show that they challenged that succession cause. Following the land gathering, consolidation and eventual registration of each of the parcels of land in the names of the 3 sons of the family patriarch, Kithaka M'Ibere, and his children (and their successors) having settled and lived in their respective parcels all these years, it is my finding that the plaintiff has not led sufficient evidence to prove trust. This is because each of the parties parents had their own parcels registered in their respective names from the onset, and none can be said to have been holding land in trust for the other. For those reasons the plaintiff's claim must fail.

58. The second issue is whether the 5th defendant has proved his counterclaim and whether he is entitled to the reliefs sought.
59. The 5th defendant is the registered proprietor of LR. No. Abogeta/U-Kiungone/1270. It is evident that the plaintiff is in occupation of the said parcel of land measuring one acre. The same was admitted by the plaintiff in her evidence. The plaintiff's land is L.R NO. ABOGETA/U-KIUNGONE/810.
60. It is trite law that the registration of a person and certificate of title held by such person as proprietor of a property is conclusive prove that such person is the owner of the property and is entitled to enjoy all the rights pertaining to such land. (See section 24 of the [Land Registration Act](#)). This court having found that the plaintiff is the proprietor of LR. No. Abogeta/U-Kiungone/810, and the plaintiff having failed to establish trust on the other suit parcels of land, I find that there is no reason why the plaintiff should remain in possession of LR. No. Abogeta/U-Kiungone/1270 that lawfully belongs to the 5th defendant.
61. From the evidence on record, it is my finding that the 5th defendant has on a balance of probabilities proved his counterclaim.
62. Accordingly, and in light of the above findings, I hereby enter judgment in the following terms:-
 - a. The plaintiff's suit is dismissed.
 - b. The 5th defendant's counterclaim is hereby allowed in terms of prayers (a) and (b) thereof.
 - c. The plaintiff is directed to vacate from LR. No. Abogeta/U-Kiungone/1270 within 90 days, in default she be evicted therefrom with the assistance of the court's bailiffs and under the supervision of the officer commanding station (OCS) Nkubu police station.
 - d. Considering that the parties to this case are closely related, I order that parties bear their own costs.
63. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MERU THIS 19TH DAY OF DECEMBER, 2024

In the presence of

Court assistant – Tupet

Mwendwa for plaintiff

Kiautha Arithi for 2nd – 5th defendant

C.K YANO

JUDGE

