



**ICK v CJ & another (Environment & Land Case 56 of 2019)  
[2023] KEELC 291 (KLR) (26 January 2023) (Judgment)**

Neutral citation: [2023] KEELC 291 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KERICHO  
ENVIRONMENT & LAND CASE 56 OF 2019  
MC OUNDO, J  
JANUARY 26, 2023**

**BETWEEN**

**ICK ..... PLAINTIFF**

**AND**

**CJ ..... 1<sup>ST</sup> DEFENDANT**

**COUNTY LAND REGISTRAR KERICHO ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. By a Plaint dated 5<sup>th</sup> December 2019 and amended on 18<sup>th</sup> November 2021, the Plaintiff herein seeks for orders for a declaration that the action by the 1<sup>st</sup> Defendant of placing a caution over land parcel No. Kericho/Kabianga/xxxx is illegal, unlawful and unjustified. To this effect therefore, an order be directed to the 2<sup>nd</sup> Defendant to remove the said caution, which was registered on 13<sup>th</sup> August 2019, forthwith. The Plaintiff further prays for damages for wrongful registration of the caution as well as for costs for the suit.
2. In opposition to the Plaint, the 1<sup>st</sup> Defendant in her Defence and Counterclaim dated 18<sup>th</sup> December 2019 and amended on the 13<sup>th</sup> October 2020 conceded that the deceased Plaintiff was her mother in law and that the suit land herein being No. Kericho/Kabianga/xxxx measuring about 24 hectares was not registered to the deceased Plaintiff but was family and/or ancestral land.
3. That her late husband SKK and his brothers were each entitled to approximately 14 acres each comprised of the suit land. That after the demise of her husband on 26<sup>th</sup> November 2016, her brothers in law kicked her and her children out of her husband’s share of the land where they had lived for six years.
4. That the acquisition of the suit property and subsequent sub division into four portions being Kericho/Kabianga/xxxx was fraudulent wherein the Plaintiff (sic) without color of right took parcel No. Kericho/Kabianga/xxxx which was her late husband’s share. That she (1<sup>st</sup> Defendant) had then



legally and lawfully caused a caution to be registered on the suit property to safeguard the beneficial interests for her and her deceased's husband's children. The rest of the averments contained in the amended Plaintiff was denied.

5. In her Counterclaim the 1<sup>st</sup> Defendant (now Plaintiff) sought for the dismissal of the Plaintiff's (now Defendant's) suit with costs, and judgment be entered in her favour in terms of the Counterclaim for orders that;
  - i. A declaration that the Plaintiff's (now Defendant's) registration of the land parcel No. Kericho/Kabianga/xxxx is encumbered by customary trust and the subsequent registration of the Plaintiff as the proprietor of the suit land did not in any way affect or dissolve the trust.
  - ii. A declaration that the 1<sup>st</sup> Defendant (now Plaintiff) is entitled to a share of the parcel of land registered under No. Kericho/Kabianga/xxxx as a widow of the Plaintiff's (now Defendant's) late son.
  - iii. The declaration that the 1<sup>st</sup> Defendant (now Plaintiff) and her children are legally entitled to a share of the parcel of land registered under No. Kericho/Kabianga/xxxx as the legal beneficiaries of the estate of the late son of the Plaintiff (now Defendant) who was the 1<sup>st</sup> Defendant's (now Plaintiff's) husband.
  - iv. A permanent order of injunction restraining the Plaintiff (now Defendant) her servants, agents, representatives, assigns and heirs from illegally evicting, uprooting, and/or chasing the 1<sup>st</sup> Defendant (now Plaintiff) from the parcel of land registered under No. Kericho/Kabianga/xxxx.
  - v. The 1<sup>st</sup> Defendant (now Plaintiff) also sought for mesne profit as well as costs of the suit.
6. Pursuant to the parties having complied with the provisions of Order 11 of the [Civil Procedure Rules](#), the matter was set down for hearing inter parties wherein, on the 21<sup>st</sup> October 2021 the court had been informed that the original Plaintiff had passed on following which an application for substitution was filed wherein by consent, the same was allowed and the representative of the deceased Plaintiff was granted leave to amend their Plaintiff so as to substitute the deceased Plaintiff with her legal administrator to her estate. The said amended Plaintiff was filed in court on 18<sup>th</sup> November 2021. The 1<sup>st</sup> Defendant's further amended Defence and Counterclaim which had been filed on the 21<sup>st</sup> February 2022 without leave of the court was struck out.
7. The hearing of the case inter parties then took off on the 21<sup>st</sup> February 2022 wherein the substituted Plaintiff Isaiah CK testified as PW1 to the effect that he was a Reverend in the Free Pentecostal Fellowship Church in Kenya and a legal administrator and son to the deceased ECN who died in September 2021.
8. He produced the Letters of administration ad Litem as Pf Exh 1 and proceeded to testify that he was aware of the suit filed by his mother which was in relation to No. Kericho/Kabianga/xxxx, land which she had inherited from his father the deceased Sigilai Arap Nyige. That she had been issued with a title on 25<sup>th</sup> May 1977. That the land measured 24 hectares and his mother and siblings had been living on the same. He named his siblings as Elijah Koech, SKK (deceased), ICK, and AK, children who had been born on the suit land and had lived on the same with their families. He confirmed that SKK (deceased) had also lived on the suit land with his family and wife who was called Beatrice Chemutai Koech and who had also passed away on 7<sup>th</sup> July 2010.



9. That SKK (deceased) and BCK had been married in church on 1<sup>st</sup> March 1998, wherein after the wedding, they had lived on the suit land. He produced a marriage certificate as Pf exh 2 and a copy of the green card to the suit land as Pf exh 3.
10. That in 2018 his mother had subdivided the land into four portions for her children (his brothers) wherein one portion was given to the late SKK son EK. He proceeded to illustrate that the parcels of land had been shared to this effect;
  - i. No. Kericho/Kabianga/XXXX- given to EK.
  - ii. No. Kericho/Kabianga/XXXX- given to Himself.
  - iii. No. Kericho/Kabianga/XXXX- given to A
  - iv. No. Kericho/Kabianga/XXXX- given to EK.
11. He confirmed that Pf exh 3 at entry No. 4 was a confirmation of the subdivision.
12. That the subdivision had been done during the lifetime of his mother, on the 22<sup>nd</sup> January 2018 wherein they had been asked to each pay for their respective titles. That it was when they had gone to collect their titles from the Land Registrar that they had discovered that a caution had been placed on it by the 1<sup>st</sup> Defendant via an application dated 8<sup>th</sup> August 2019 herein produced as Pf exh 4.
13. His evidence was that his deceased mother was not aware of the caution placed on the land that she had received no notice to that effect. That they had subsequently sought for legal advice wherein Counsel had issued a demand notice to the Land Registrar via a letter dated 3<sup>rd</sup> October 2019 herein produced as Pf exh 5 and which letter had been received on 11<sup>th</sup> October 2019 but there had been no response to it. That on 25<sup>th</sup> September 2019 they had conducted a search on the land herein produced as Pf exh 6, which search had confirmed that the caution was still in existence.
14. The witness further produced a letter dated 8<sup>th</sup> August 2019 written by the 1<sup>st</sup> Defendant to his mother as Pf exh 7 and denied knowledge of any marriage between the 1<sup>st</sup> Defendant and his brother as no engagement (Koita) had ever been performed and no dowry had been paid for her hand in marriage.
15. His evidence was that his late brother S used to live on the suit land with his wife and family and that the 1<sup>st</sup> Defendant never lived with him either as a wife or house girl. That the tea plantations on the suit land were planted by S's wife B with their help. That apart from a portion of the suit land, S also had other parcels of land which had been registered in his name. It was his evidence that even before Stephen's death the 1<sup>st</sup> Defendant never went to their home to meet their mother. He sought that the court lifts the caution on the suit land so that they could get their respective portions of land.
16. In cross examination, he confirmed that the late Stephen was his elder brother and that he had five children. That they were four siblings and whereas he had two children, E had seven children, and Ambrose had four children. He further confirmed that his mother, the deceased original Plaintiff had been given the suit land in 1977 upon her marriage. That Tabelga was also his mother's name but that the same did not appear on her identity card.
17. He confirmed that his mother had been the one who had subdivided the land, which was registered in the name of Tabelga, in 2018. He also confirmed that his mother had inherited the land from his father who had died before the land had been adjudicated.



18. In re-examination, he confirmed that the certificate issued to his mother had been registered in the name of T w/o N and that E and Tabelga were one and the same person. That entry No 3 of the title deed confirmed that title had been given to EKN which names were on his mother's identity card.
19. PW2, EKK confirmed that the deceased Plaintiff ECN was their biological mother who had died the previous year and that her other name was Nyige. He confirmed that his mother had given birth to four girls and four boys. That despite all the girls being married, two were now deceased. He also confirmed that one of the boys was also deceased. That he was the first born in the family and was married just like his brothers and they all had their own families. He also confirmed that his late brother Stephen had a wife whose name was BK and who was now deceased. He confirmed that they all lived on their mother's land and that he was born in 1952 on the said land where his late brother Stephen also lived with his wife and children.
20. That he had heard about the 1<sup>st</sup> Defendant who used to work in Kabianga and was not his brother's wife. He confirmed that the 1<sup>st</sup> Defendant had placed a caution on his mother's land after his mother had sought to subdivide the same for her children. He also confirmed that as a Kipsigis, no Koita had been performed for the 1<sup>st</sup> Defendant and neither had dowry been given for her hand in marriage. He denied there having been a house built for the 1<sup>st</sup> Defendant on his mother's land and that the only house that was on the said land was his deceased brother's (S) house.
21. When questioned by the court, he confirmed that a long time ago his mother used to go by the name of Tabelga, which was before she got her identity card.
22. In cross examination, he confirmed that Tabelga was his mother's name and that she had been registered as proprietor of the suit land in 1977. That he still lived on his mother's land because a caution was placed on the same and therefore there could not be the subdivision to enable him get his own portion of land.
23. He also confirmed that it had been only the boys who had been given land by their mother. That it was true he had heard that his deceased brother lived with the 1<sup>st</sup> Defendant in another town, and that it was normal for drunkards to look for other women. That during his brother's funeral, the 1<sup>st</sup> Defendant was not mentioned. He also confirmed that although his sisters were not given any land, they had not complained.
24. PW3 Isaiah Cheruiyot Kiplagat testified that the deceased ECN was his neighbor in Kabianga, that he was 70 years old and had known her for about 50 years. That her husband's name was Arap N and that the land in question was her land. He also confirmed that E's other name was Cheptanui or Tabelga and that she had five children one by the name of SK who was deceased and who had a wife called Beatrice Koech who was also deceased, having died about 20 years ago. That he knew Stephen and Beatrice lived with their family on E's land where they had their own house. That he did not know the 1<sup>st</sup> Defendant and that she did not live on E's land. He confirmed that the land had tea plantation did not belong to the 1<sup>st</sup> Defendant as he had never seen her on that land.
25. His evidence was that he had also heard that the 1<sup>st</sup> Defendant the placed a caution on the land. He then proceeded to testify that there had been no dowry negotiations between Stephen's family and the 1<sup>st</sup> Defendant's family and neither had there been a wedding between the two.
26. On cross examination, he confirmed that although he knew that Stephen's wife had died, he did not know whether there was a subsequent wife. He confirmed that the suit land herein had not been subdivided.



27. The Plaintiff closed his case wherein the defense case was opened by the 1<sup>st</sup> Defendant who proceeded to testify that indeed she had placed a caution on the suit land as she was protecting her rights. That the deceased's Plaintiff was her mother in law as her son was her husband and that she had been the one who had filed suit against her.
28. That she had lived with SKK as husband and wife after he had married her in a traditional ceremony in the year 2011 where S's people had given her people some 'cows' in form of money but that she could not remember how much. That they has even exchanged wedding rings.
29. That the couple had children, and the late Stephen and had given her a portion of the land parcel No. XXXX, measuring approximately 14 acres to cultivate and keep cattle wherein they had even started putting up rental houses. That they had lived on the said suit land for 6 ½ years where she had birthed him three children, Michael, Faith and Emmanuel.
30. That the deceased, S had passed away on 25<sup>th</sup> November 2016 after which she had been sent away by her brothers in law wherein she had gone back to her parent's home. That she had later gone back to her husband's brothers to seek for school fees for the children, and upon their refusal to give her, she had referred the matter to the Assistant Chief who had referred them to the Assistant Commissioner where they had been summoned and her in-laws had promised to give her some land but did not keep to their promise.
31. She had then sought for a search at the lands office where she had discovered that whereas the land had been subdivided, she had not been given any portion. That had been the reason why she had decided to place a caution on the same.
32. Her evidence was that she had lived peacefully on the land for 6 ½ years with her husband, their children and mother in law and had built a permanent house, rental houses, planted tea and kept cattle on a portion of land. That trouble started in 2016 after the death of her husband.
33. She confirmed that the tea was taken to Kuresoi tea factory for processing in her name from the year 2015. She produced the birth certificates of her children as Df exh 1 (a-c) where she confirmed that the children had been born on 23<sup>rd</sup> May 2011, 3<sup>rd</sup> November 2013, and 24<sup>th</sup> February 2017 respectively. She also produced her Stephen's funeral program as Df exh 2 and proceeded to testify that she had been named as his wife therein and their children had been included and pictures of the family had been displayed. She also produced the pay slips of the tea she had taken to the factory as Df exh 3 and a copy of the minutes of the meeting held by the Chief on 22<sup>nd</sup> December 2016, minutes of the meeting with the Assistant County Commissioner of 4<sup>th</sup> November 2018, and the minutes of the meeting with the Deputy County Commissioner of 13<sup>th</sup> December 2018 as Df exh 4(a-c).
34. In cross examination, the 1<sup>st</sup> Defendant confirmed that she was now living at her parent's home and that the late Stephen was her husband. She reiterated what she had testified in her evidence in chief stating that in their traditional ceremony there had been taking of alcohol, "Rotet" ceremony which had been performed by Mosonik who hailed from Kipengee a place near Stephen's homestead. That the ceremony had been attended to by one Joseph Chepkwony and his wife whom she could not remember her name and other people who were drinking and whom she did not know. That nobody from Stephen's family had attended the ceremony and no photographs had been taken.
35. That 'Rotet' was normally performed before the dowry and the bride price had been paid in the same month of June 2011 at their home. That during the negotiations, her brothers David and Bernard Rotich had been present but that she did not know the members from Stephen's family who were



- present because at the time she was in Nakuru and therefore did not know what had transpired during the ceremony.
36. She confirmed that Chepkorir Joyce was the name that appeared on her identity card but that her birth certificate contained the names CJK. She also confirmed that the birth certificates to her children were obtained after the death of Stephen. She further confirmed that she had no matrimonial home as the house they had lived in belonged to Stephen's first wife. That the animals had been bought by Stephen although she had also bought one goat and some chicken.
  37. She also confirmed that she and Stephen had bought the plot in Kabianga where the rental houses were built although she had no documentation to that effect. She further conceded that the suit land was registered to EC in 1970 and that it was her land and she had the right to deal with it as she pleased. That she had placed the caution during the lifetime of the Elizabeth, to protect the rights of her children but had not filed any succession cause in regard to Stephen's property.
  38. When she was referred to Df exh 4(a-c), she confirmed that the deceased Plaintiff's name was not amongst the people who had attended the meetings called by the chief but that it had been her brothers in law who had agreed to buy for her a piece of land.
  39. DW 2, DR testified that he was the 1<sup>st</sup> Defendant's brother. That the 1<sup>st</sup> Defendant was married to Stephen Koech, now deceased, wherein she had lived with him for 6 ½ years after he had been to their home in the month of May 2011 to ask for her hand in marriage.
  40. He confirmed that they had accepted the marriage and that S had visited their home for a second time where they had negotiated with the Elders for the 1<sup>st</sup> Defendant's dowry and Ksh 130,200/= had been agreed upon.
  41. He also testified that after the passing away of Stephen, they had gone to his home to condone with the family and had been at the burial ceremony wherein after his burial, the 1<sup>st</sup> Defendants brothers in law had thrown her out of her house and had asked her to live with her mother in law where she had stayed for 2 to 3 days before her brothers in law had chased her away. That at the time, she had been six months pregnant wherein as her brother, he had gone and taken her back to their parents' home from where she had delivered her child.
  42. He testified that there had been subsequent meetings where the brothers in law had promised to cater for the education of her children which promise they did not keep. Later they had again promised to buy her three acres of land, which promise they also did not keep. That it had been after the 1<sup>st</sup> Defendant had found out that there were plans to subdivide the suit land into four portions leaving her out, that she had placed a caution on the same.
  43. He confirmed that although he knew that the deceased Stephen had a car, tea plantations and plots, he did not know whether the tea was processed by the 1<sup>st</sup> Defendant or not.
  44. In cross examination, the witness confirmed that out of 10 siblings the 1<sup>st</sup> Defendant was their last born. That their parents were aged and that indeed he had attended the dowry ceremony where there were three persons and traditionally Stephen did not attend and no family member from his side turned up. He also confirmed that on that date the 1<sup>st</sup> Defendant was not at home and no photographs had been taken.
  45. DW 3, EWB was the next defence witness who had testified that the 1<sup>st</sup> Defendant was her "daughter" and who was married to S and who after the death of her husband, had been sent away from her matrimonial home where she had lived for 6 ½ years. She confirmed that at that time, the 1<sup>st</sup> Defendant



was pregnant and she had taken care of her until she had delivered. Thereafter, there had been meetings where no agreement had been reached.

46. That the 1<sup>st</sup> Defendant's biological mother was very old and could not attend the meeting. She confirmed that there had been a meeting at the Chief's office, wherein after they had been sent to the District Officer's office and later to the District Commissioner's office. It was at this stage that Stephen's people, particularly the deceased Plaintiff, had agreed to purchase three acres of land for the 1<sup>st</sup> Defendant and to be sending her Ksh 2,000/= per month, monies which she had sent for the first two months and subsequently stopped.
47. That they had found land in Bureti, but when St's people did not keep their promise, the 1<sup>st</sup> Defendant had placed a caution on the suit land so that the same could not be subdivided. Subsequently the matter was filed in court by the deceased Plaintiff.
48. She confirmed that the deceased, S had two wives at the time of his death and that the 1<sup>st</sup> Defendant was the youngest wife who had even been recognized in his eulogy. She confirmed that the children born to both Stephen and the 1<sup>st</sup> Defendant were recognized by Stephen's people.
49. In cross examination the witness reiterated that Stephen and the 1<sup>st</sup> Defendant were married traditionally where they had tied a bracelet on each other. That the land the 1<sup>st</sup> Defendant cautioned belonged to Stephen's father although she did not know its registered proprietor. She confirmed that although she was illiterate yet the title to the suit land was registered to E who was S's mother. That the caution had been placed during the lifetime of E and that she had been the one who had advised the 1<sup>st</sup> Defendant to place the said caution on the land.
50. PW4 Michael Kibii Langat's evidence was that he was a retired Chief of Kabianga location. He confirmed that the 1<sup>st</sup> Defendant was married to the late Stephen and that she had been kicked out of her matrimonial home where she had been residing for 6 years. That she had been living in Kabarsowoch village with her husband before his demise.
51. That he did not know why she had been kicked out but that when she had gone to him to complain, he had summoned Stephen's family to his office but they did not turn up. He had then convened another meeting at Stephen's home wherein the deceased Plaintiff Elizabeth was present. The meeting was not finalized and he had handed the issue over to the Assistant County Commissioner. Stephen's family at the time had sought for time to decide on what to do. That the Assistant County Commissioner had then referred the matter to the Deputy County Commissioner where Stephen's family had promised to buy land for the 1<sup>st</sup> Defendant. He confirmed that at this subsequent meeting, the deceased Plaintiff was not present. When referred to Df exh 4(c) he confirmed that he had chaired the meeting whose secretary Mr. Chepkwony had passed away.
52. In cross examination, the witness confirmed that the suit land was registered to the deceased EC and that all these happening occurred during her lifetime. That when the promise was made to the 1<sup>st</sup> Defendant to buy her a piece of land, the said Elizabeth was not present. He also confirmed that Stephen and the 1<sup>st</sup> Defendant lived on Elizabeth's land. That he also knew that Stephen had his own property but was not aware of any pending succession cause in relation to Stephen's Estate. That there was no dispute regarding Stephen's property but the dispute herein was in regard to Elizabeth's property. He also stated that he was not aware that the 1<sup>st</sup> Defendant had registered a caution over the suit property.



53. He confirmed that S had a first wife called Z but could not remember when they got married although they had their matrimonial home on E's land where subsequently, the 1<sup>st</sup> Defendant had lived although he did not know how she was married to Stephen.
54. The 1<sup>st</sup> Defendant closed her case and since the 2<sup>nd</sup> Defendant neither entered appearance or filed pleadings, their case was also marked as closed. Parties were then directed to file their written submissions to which I shall herein summarize as follows;

**Plaintiff's written submissions.**

55. The Plaintiff framed his issues for determination as follows:
- i. Who can lodge a caution against title to land and whether the 1<sup>st</sup> Defendant was justified in lodging a caution.
  - ii. Whether the suit land is encumbered by customary trust.
  - iii. Whether the Plaintiff is entitled to the reliefs sought.
  - iv. Whether the Counterclaim is merited.
  - v. Who should bear the costs of the suit?
56. On the first issue for determination, the Plaintiff relied on the provisions of Section 71 of the [Land Registration Act](#) (herein referred to as the "Act") to submit that the said provided for the lodging, of a caution by a person who had claim of right, whether contractual or otherwise, to obtain an interest in any land lease or charge capable of creation by an instrument registerable under the Act, or who was entitled to a license or who had presented a bankruptcy petition against the proprietor of any registered land, lease or charge .
57. The Plaintiff further relied on the decided case in [Tolelinyng Lomongoni vs. Chemoru Tolelinyng](#) [2018] eKLR, [Lepapa Ole Moshosho v Land Registrar Kajiado & Another](#) [2019] eKLR and [Maria Ngangi Gwako v, Charles Mwenzi Ngangi](#) [2014] eKLR among other authorities, to submit that since the 1<sup>st</sup> Defendant, in her pleadings and testimony had presented a case of beneficial interest, having been married to the late Stephen as a justification for registering a caution, that her claim did not fall within the interests enumerated under Section 71 of the Act and the caution ought not to have been considered by the 2<sup>nd</sup> Defendant.
58. That the Black's Law Dictionary 10<sup>th</sup> Edition defined 'beneficial interest' as a right or expectancy in something (such as a trust or an estate) as opposed to legal title to that thing.
59. On the second issue for determination as to whether the suit land was encumbered by customary trust, the Plaintiff submitted that their understanding of the 1<sup>st</sup> Defendant's case as brought out in her evidence and that of her witnesses was simply that she was a daughter-in-law of the registered owner; that the suit property was family land; and as such she was a beneficial owner who was out to protect family property through a caution. That however upon perusal of the 1<sup>st</sup> Defendant's defence and Counterclaim they noted that there were no particulars of trust, customs or applicable customary law had been pleaded apart from a prayer for declaration of customary trust. Reliance was placed on the case in [Mathew Kariuki Amos v Joseph Kariuki N'iru & 3 Others](#) [2019] eKLR and the Supreme Court holding in [Isack Minanga Kiebia v Isaaya Theuri M'lintari & Another](#) [2018] eKLR to submit that trust, including customary trust was a question of fact which ought to be proved by evidence as provided for by Section 107, 108 and 109 of the [Evidence Act](#). That the 1<sup>st</sup> Defendant, had not demonstrated how the deceased Plaintiff came to own the property. The history of the registration of



- the suit land had not been availed by the 1<sup>st</sup> Defendant and although she claimed that the suit property was fraudulently registered in the name of the deceased Plaintiff, no evidence had been adduced to substantiate her claims and no particulars of the alleged fraud had been given. The 1<sup>st</sup> Defendant did not thus establish the ingredients of a customary trust.
60. The Plaintiff also submitted that the 1<sup>st</sup> Defendant had not demonstrated that she was a family member of the deceased Plaintiff. The Plaintiff denied there having been a marriage between her and her late son, Stephen. The evidence brought out during the hearing was that the late Stephen was married to Beatrice Koech and a certificate of marriage produced as Pf exh 2.
  61. That even through the 1<sup>st</sup> Defendant claimed to have been married under Kipsigis Customary Law, no witnesses were presented to prove this claim. An allegation was made that dowry had been paid in form of cash, yet there were no minutes produced, no relative accompanied the late Stephen to the 1<sup>st</sup> Defendant's home to negotiate dowry as is required under Kipsigis Customary Law. Further, there was no demonstration that a "ratet ceremony" had taken place. No witnesses were called to corroborate her testimony. That the birth certificates produced in court did not aid the 1<sup>st</sup> Defendant either. That issues to marriage were not proof of marriage. That in any event, all the certificates were issued after the death of the late Stephen Koech. The onus was on the 1<sup>st</sup> Defendant to demonstrate that she was a family member either as a daughter or otherwise. She did not discharge this burden.
  62. The Plaintiff further submitted that this being the Environment and Land Court, its jurisdiction was to determine issues of use, occupation and title to land and therefore for a proper determination on whether the 1<sup>st</sup> Defendant was a widow, different proceedings ought to be filed in an appropriate forum, being the Family division of the High Court.
  63. That the 1<sup>st</sup> Defendant could not be registered as a proprietor on the suit land instead of the deceased Plaintiff because she was not a direct beneficiary of the family of the deceased Plaintiff and was not a child of the deceased Plaintiff.
  64. That although the 1<sup>st</sup> Defendant had claimed to have developed the property with the late SK, it had been admitted that the house which she allegedly lived in had been constructed by the late SK and his wife BK. There was no evidence tendered of the tea plantation either. The Plaintiff submitted that the 1<sup>st</sup> Defendant had not demonstrated that the suit property was encumbered by a customary trust. That the 1<sup>st</sup> Defendant further needed to prove that the land was actually ancestral land as was held in the case of *Susan Mumbi Waititu v Mukuru Ndata & 4 Others* [19 of 2007] eKLR
  65. On the issue as to whether the Plaintiff was entitled to the reliefs sought, it was their submission that in their amended Plaintiff, they had sought for a declaration that actions by the 1<sup>st</sup> Defendant of placing a caution over land parcel No. Kericho/Kabianga/1290 was illegal, unlawful and unjustified. That they had ready submitted that the 1<sup>st</sup> Defendant's claim as a beneficiary was not recognized under Section 71 of the Act as an interest registerable and therefore, she could not lodge the said caution. That the 2<sup>nd</sup> Defendant who did not even testify and give the reasons for registering the caution had thus erred in having the caution registered. That the lodging of a caution and having it registered as against the title were two different processes as a caution could be lodged and a Registrar could decline to register it. The Plaintiff sought that the court do issue an order directed at the 2<sup>nd</sup> Defendant to forthwith remove the caution registered against land parcel No. Kericho/Kabianga/1290 on the 13<sup>th</sup> August 2019.
  66. The Plaintiff submitted that having proved that the deceased Plaintiff was the registered owner of the suit property, and that the caution was registered during her lifetime as per Pf exh 3 (green card) and Pf exh 6 (certificate of official search) her (estate) interest, privileges and appurtenances were protected under Section 25 and 26 of Land Registration the Act.



67. The Plaintiff relied on the provisions of Section 75 of the *Land Registration Act* to seek for general damages of Ksh 1,000,000/= for the wrongful registration of caution against the property citing the decision in the case of *Allan George Njogu Residences Limited v National Bank of Kenya Limited* [2013] eKLR.
68. On the issue as to whether the 1<sup>st</sup> Defendant's Counterclaim was merited, the Plaintiff submitted that since they had already demonstrated that the 1<sup>st</sup> Defendant did not prove the existence of a customary trust, or that she was married to the late SK the deceased Plaintiff could therefore not be compelled to share her property. Reliance was placed on the decided case in *Jemutai Tanui v Juliana Jeptepkeny & 5 Others* ELC No. 44 of 2013 (formerly Eldoret HCC No. 60 of 2012). That further in the case of *Mumbi Waititu* (supra), the superior court had held that children should not be allowed to compel their parents to share out their property according to their whims and idiosyncrasies.
69. The Plaintiff then submitted that under Kipsigis customary law, which I believe Counsel is affiliated, property ownership was patrilineal and that the 1<sup>st</sup> Defendant could only claim land from the father of the late Stephen Koech. Additionally, the Kipsigis customary law did not envisage a situation where one could claim land from his/her mother.
70. On the last issue as to who would bear the costs to the suit, the Plaintiff submitted that it was trite law that costs followed the event. That they had demonstrated why their suit was merited and why the 1<sup>st</sup> Defendant's Counterclaim was ripe for dismissal and therefore they ought to be awarded costs of the main suit and Counterclaim.

#### **1<sup>st</sup> Defendant's submission.**

71. Upon summarizing the facts of the case, the 1<sup>st</sup> Defendant framed her issues for determination as follows:
  - i. Whether the 1<sup>st</sup> Defendant is entitled to the shares under imminent trust property.
  - ii. Whether the caution can be removed when the proprietor is deceased?
  - iii. Whether the Plaintiff is entitled to the reliefs sought?
72. On the first issue for determination, it was the 1<sup>st</sup> Defendant's submissions while placing reliance on the definition of the Black's Law Dictionary, 9<sup>th</sup> Edition that defines trust, and the provisions of Section 28 of the *Land Registration Act*, that since the 1<sup>st</sup> Defendant was in occupation of the suit property by virtue of the fact that she was a widow to one of the sons of the deceased, the Court should therefore find that the registration of the deceased Plaintiff was subject to the overriding interests as stipulated in Section 28(b) of the *Land Registration Act*.
73. That it was trite law that once a party alleging customary trust proved that it was the intent of the parties or family members that the parcel of land would be registered in trust for other family members, then the court ought to render its decision on the intent. That it was not the duty of the court to infer trust and that a determination on the existence of trust was on a case by case basis. Reliance was placed on the finding by the Supreme Court in *Isack Kieba* case (supra).
74. That it had been the 1<sup>st</sup> Defendant's case that her deceased mother in law, observing that her daughter in law had been allocated a land, took away the said land and chased her out of the matrimonial property. She disagreed with the proposition that the portion of land allocated to her mother was to be held as a life interest, arguing that should that have been the case, Section 35 of the Law of Succession provided for distribution of an estate on an intestate who died leaving behind a spouse and children. That since



the 1<sup>st</sup> Defendant was the widow of the late son of the Plaintiff now the deceased, that the Plaintiff held the land in trust for her and her children.

75. That Section 28 of the *Land Registration Act* made it very clear that unless the contrary was expressed in the register, all registered land was subject to various overriding interest without them being noted on the register, and one such interest was a trust including customary trust. That the 1<sup>st</sup> Defendant was therefore entitled to a share of the estate under imminent trust being the daughter in-law to the deceased Plaintiff because she was married to the Deceased's son the late SKK (Freeman) wherein they had been blessed with issues of the said marriage and were living together peacefully in their matrimonial home.
76. That the 1<sup>st</sup> Defendant had proved her case on a balance of probabilities that she had the legal possession of the suit property and as such her proprietary rights had to be protected by the Honorable Court.
77. On the second issue for Determination, the 1<sup>st</sup> Defendant submitted that the caution placed was regular and legal so as to protect her interest. That the Plaintiff ought to give her her husband's share so that there could be peace and harmony in the family. That the court should decline the request for withdrawal of the caution until the land matter was resolved between the family so that the 1<sup>st</sup> Defendant could sign the transfer forms to enable her obtain title to the suit land. She based her submissions on the provisions of Section 71(3) and (4) and Section 73 of the *Land Registration Act*.
78. It was their submission that the caution could only be removed by the cautioner if she wished and in this case she did not wish to have it removed as it protected her rights. Reliance was placed in the decided case of *Simon Kimemia Muthondu -vs Moses Mugo Maringa* [2017] eKLR to submit that before the removal of the caution, the court ought to take into account the circumstances and justification for which it had been lodged, the interests of the person lodging it and what prejudice will be caused to the other party if it is removed.
79. On the last issue for determination, the 1<sup>st</sup> Defendant submitted that she had proved their case against the Plaintiff on a balance of probability and therefore was entitled to the reliefs sought. That the court was clothed with inherent powers to grant reliefs as it may deem fit and just. The 1<sup>st</sup> Defendant also sought for costs and interest of the suit at court's rates.

#### **Determination.**

80. I have carefully and anxiously considered the Plaintiff's claim against the Defendants, the 1<sup>st</sup> Defendant's defence and Counterclaim against the Plaintiff, the evidence, submissions as well as the applicable law and the authorities herein cited. I find the matters arising for determination thereto as being;
  - i. Whether the suit land is encumbered by customary trust.
  - ii. Whether the 1<sup>st</sup> Defendant was justified in lodging a caution
  - iii. Whether the Counterclaim is merited.
  - iv. Who will bear the costs of the suit?
81. This is a case where the Plaintiff's claim against the 1<sup>st</sup> Defendant is that her action of registering, a caution over land parcel No. Kericho/Kabianga/ on 13<sup>th</sup> August 2019 was illegal, unlawful and unjustified and therefore they seek orders from this court directing her to remove the said caution. They also seek payment of damages for wrongful registration of the caution as well as for costs for the suit.



82. The 1<sup>st</sup> Defendant in her amended defence and counter claim is adamant that she will not remove the caution as she was protected her interest and that of her children having lived on the parcel of land for six years. That the registered proprietor of the suit land, who was her mother in law and was now deceased, held the land in trust as the land was family and/or ancestral land. That her late husband SKK and his brothers were each entitled to approximately 14 acres each comprised of the suit land. She further sought for injunctive orders restraining the Plaintiff (sic) (now Defendant) her servants, agents, representatives, assigns and heirs from illegally evicting, uprooting, and/or chasing her from the parcel of land, for mesne profit as well as costs of the suit.
83. It was not in contention that the deceased Plaintiff Elizabeth Cheptanui alias T w/o N had inherited the land from her husband also deceased S Arap N.
84. There was also consensus that the suit land measuring 24 hectares was registered in the name of the deceased Plaintiff EC alias T w/o N who had been issued with a title on 25<sup>th</sup> May 1977.
85. There was also no dispute that Elizabeth Cheptanui alias Tabelga w/o Nyige was the mother to EEK, SKK (deceased), ICK, and AK.
86. Evidence which was not disputed was to the effect that the Stephen Kipkemboi Koech also lived on the suit land and had his family and that his wife was called Beatrice Chemutai Koech who had also passed away.
87. That before her demise, in September 2021, EC had sought to subdivide the suit land into 4 portions and transfer the same to her children wherein the portion meant for the late SKK was to be given to his son EK.
88. It is also not lost that upon learning of the subdivision, the 1<sup>st</sup> Defendant placed a caution on the whole suit land claiming that she was also a the wife to the late SKK and had lived on the land for six (6) years. That deceased Plaintiff thus held the land in trust for her and her children.
89. What is disputed is whether or not the 1<sup>st</sup> Defendant was a wife to the deceased Stephen Kipkemboi Koech because no Koita had been performed for her and neither had dowry been given for her hand in marriage.
90. It is also in contention as to whether the suit land herein was encumbered by customary trust.
91. On the first issue as to whether the suit land is encumbered by customary trust, I find that the provisions of Section 25 of the [Land Registration Act](#) do not relieve a proprietor of any duty or obligation to which she is subject to as a trustee.
92. The overriding interests alluded to in Section 25 are set out in Section 28 of the [Land Registration Act](#) which provides as follows :-

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

- a. spousal rights over matrimonial property;
- b. trusts including customary trusts ;
- c. rights of way, rights of water and profits subsisting at the time of first registration under this Act;
- d. natural rights of light, air, water and support;



- e. rights of compulsory acquisition, resumption, entry, search and user conferred by any other written law;
- f. leases or agreements for leases for a term not exceeding two years, periodic tenancies and indeterminate tenancies;
- g. charges for unpaid rates and other funds which, without reference to registration under this Act, are expressly declared by any written law to be a charge upon land;
- h. rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription;
  - i. electric supply lines, telephone and telegraph lines or poles, pipelines, aqueducts, canals, weirs and dams erected, constructed or laid in pursuance or by virtue of any power conferred by any written law; and
- j. any other rights provided under any written law.

93. It will be noted that trusts are among the overriding interests provided for in Section 28 above, and for which a proprietor holds land subject to, as provided in Section 25 above. A trust is essentially a situation in which one person holds property on behalf of, or for the benefit of another. Trusts are of different types and can be created in a variety of ways (See for example Hansbury & Maudsley, Modern Equity, 10 Edition, Chapter 4)
94. The nature of the trust that the 1<sup>st</sup> Defendant was alluding has not been disclosed either in her defence, Counterclaim or evidence. She merely pleaded that since she was the deceased's Plaintiff's daughter in law having married her son under the Kpsigis customary law, that the deceased Plaintiff held the suit land in trust for her and her children.
95. No evidence was led by the 1<sup>st</sup> Defendant of any customary law that applied to the parties herein which infused a trust between the parties to enable the Court delve into whether a customary trust exists, and if so, the rights given under that custom as is provided for under section 28(b) of the [Land Registration Act](#).
96. Indeed the Supreme Court of Kenya, while faulting the decisions in *Obiero v Opiyo*, and *Esiroyo v Esiroyo*; held as following in the case in Isaac M'inanga Kiebia (Supra)

Flowing from this analysis, we now declare that a customary trust, as long as the same can be proved to subsist, upon a first registration, is one of the trusts to which a registered proprietor, is subject under the proviso to Section 28 of the Registered [Land Act](#). Under this legal regime, (now repealed), the content of such a trust can take several forms. For example, it may emerge through evidence, that part of the land, now registered, was always reserved for family or clan uses, such as burials, and other traditional rites. It could also be that other parts of the land, depending on the specific group or family setting, were reserved for various future uses, such as construction of houses and other amenities by youths graduating into manhood. The categories of a customary trust are therefore not closed. It is for the Court to make a determination, on the basis of evidence, as to which category of such a trust subsists as to bind the registered proprietor.

Each case has to be determined on its own merits and quality of evidence. It is not every claim of a right to land that will qualify as a customary trust. In this regard, we agree with



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

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

In the foregoing premises, it follows that we agree with the Court of Appeal's assertion that "to prove a trust in land; one need not be in actual physical possession and occupation of the land." A customary trust falls within the ambit of the proviso to Section 28 of the Registered *Land Act*, while the rights of a person in possession or actual occupation, are overriding interests and fall within the ambit of Section 30(g) of the Registered *Land Act*.

.....It is now clear that customary trusts, as well as all other trusts, are overriding interests. These trusts, being overriding interests, are not required to be noted in the register. However, by retaining the proviso to Section 28 of the Registered *Land Act* (now repealed), in Section 25 of the *Land Registration Act*, it can be logically assumed that certain trusts can still be noted in the register. Once so noted, such trusts, not being overriding interests, would bind the registered proprietor in terms noted on the register. The rights of a person in possession or actual occupation of land, as previously envisaged under Section 30 (g) of the Registered *Land Act*, have now been subsumed in the "customary trusts" under Section 25 (b) of the *Land Registration Act*. Thus under the latter Section, a person can prove the existence of a specific category of a customary trust, one of which can arise, although not exclusively, from the fact of rightful possession or actual occupation of the land.

97. From the above holding, I find that the 1<sup>st</sup> Defendant herein has not established that the suit land had been reserved for family or clan uses, such as burials, building houses, cultivating, and other traditional rites or amenities and/or any valid claim to the suit property based on customary trust that subsisted at the time of first registration and which trust was rooted in customary law and was binding upon the deceased Plaintiff as the registered proprietor of the said suit land.
98. Indeed the evidence on record was that the deceased Plaintiff was the sole and absolute proprietor of L.R No. Kericho/Kabianga/XXXX, I find that the suit land having been registered to the deceased Plaintiff on the 25<sup>th</sup> May 1977, it was thus governed by the repealed Registered *Land Act*, Cap 300 which then constituted the deceased Plaintiff as an absolute proprietor and conferred on her all rights, privileges and appurtenances thereto, free from all other interests and claims, which rights, privileges and appurtenances were not liable to be defeated except as provided in the Act. The current land regime is set out in the *Land Registration Act*, Act No. 3 of 2012, and the *Land Act*, Act No. 6 of 2012. The rights of a proprietor are set out in Section 26 of the *Land Registration Act*, which provides as follows:-

The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all Courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or



endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

- (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
- (b) Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

99. From the above provision of the law, it is clear that the deceased Plaintiff herein having been registered as the proprietor of the suit land, she became the absolute and indefeasible owner of the said property and she could do anything she wanted to do with it and her registration/ title could only be challenged as provided by Section 26(1) (a) & (b) of the [Land Registration Act](#) 2012. In the instance case, none of the two scenarios have been pleaded. There is therefore no law that I am aware of that allows a child to demand land from their parent(s) during the life time of her/his parent(s)
100. This then brings me to the second issue for determination which is whether the 1<sup>st</sup> Defendant was justified in lodging a caution. The Answer, having found as above, would definitely be in the negative. Section 71 of the [Land Registration Act](#) provides for the registration of a caution to land by a person claiming the right to obtain an interest in land capable of creation by an instrument registerable under the statute. Further, a person can lodge a caution claiming entitlement to a license or by a person who has presented a bankruptcy petition against the proprietor. It is the Land Registrar who is mandated to register a Caution.
101. The parameters on who should register a caution is well stated in Section 71 of the [Land Registration Act](#) as stated above. In the current scenario, the 1<sup>st</sup> Defendant alleged to be the daughter in law to the deceased Plaintiff/proprietor of the suit land and registered caution on the suit land while claiming beneficial interest therein in registering the caution against the aforementioned parcels of land. The Black's Law Dictionary 10<sup>th</sup> Edition defines 'beneficial interest' as follows:
- “A right or expectancy in something (such as a trust or an estate), as opposed to legal title to that thing”.
102. From the evidence presented before me, as well as the legal provisions cited above, I note the 1<sup>st</sup> Defendant's claim for beneficial interest does not fall within the ambit of section 71 of the [Land Registration Act](#). In the case of *Maria Ngangi Gwako v Charles Mwenzi Ngangi* [2014] eKLR, the Court was specific that a caution can only be lodged by a person, who claims a right to obtain an interest in land, lease or charge which is capable of creation by a registrable instrument.
103. In the case of [Dinara Properties Limited v Malcedian Properties Limited & Another](#) [2018]eKLR, the Court held that;
- “.....The Applicant has demonstrated that it is the registered proprietor of the suit property and that the Respondents have no basis for continuing to have the caution lodged against the said title.’
104. In the instant case I find that, owing to the evidence submitted herein, the 1<sup>st</sup> Defendat therefore had no justification in lodging a caution on the suit land No. Kericho/Kabianga/1290.



105. The 1<sup>st</sup> Defendant had a duty to justify the lodging of the said caution as was held in the case of Maria Nganga (supra), where the Court held that:-

“When a caution is objected to by a proprietor of land affected thereby, the onus is upon the cautioner to justify the lodging of the said caution and the need for it to remain in place.....

In the absence of any reasonable cause shown by the Respondent as to why the said caution should not be removed, the application for the removal of the same must succeed”.

106. Section 73(1) of the *Land Registration Act* further states as follows:-

“A caution may be withdrawn by the cautioner or removed by order of the court or, subject to subsection (2), by order of the Registrar”.

107. Since the court has found that the 1<sup>st</sup> Defendant who is the cautioner, had no basis for lodging the said caution, the Court herein directs the Land Registrar, Kericho (2<sup>nd</sup> Defendant herein) to withdraw the caution lodged by the 1<sup>st</sup> Defendant on 13<sup>th</sup> August 2019 over Land parcel No. Kericho/Kabianga/XXXX, within 30 days upon delivery of this judgment.

108. All said and done in the end I find in favour of the Plaintiff's case and proceed to dismiss the 1<sup>st</sup> Defendant's defence and Counterclaim in its entirety. I shall not award damages as sought by the Plaintiff but award cost of the main suit and Counterclaim.

It is so ordered.

**DATED AND DELIVERED VIA TEAMS MICROSOFT AT KERICHO THIS 26<sup>TH</sup> DAY OF JANUARY 2023.**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**

