IN THE COURT OF APPEAL

AT NYERI

(CORAM: VISRAM, KOOME & OTIENO-ODEK, JJ.A.)

CIVIL APPEAL NO. 24 OF 2010

GEORGE MBITI KIEBIA……..…….…….. 1ST APPELLANT

ISAACK M'INANGA KIEBIA ……..…… 2ND APPELLANT

VERSUS

ISAYA THEURI M'LINTARI……...…..……. 1ST RESPONDENT

ISACK NTONGAI M'LINTARI ……..…….…….. 2ND RESPONDENT

(Appeal against the Judgment and Decree of the High Court of Kenya at Meru (Kasango, J.) dated 5th November, 2009

in

H.C.C.C. No.127 of 1997)

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JUDGMENT OF THE COURT

1. When this appeal was instituted, there were two appellants namely George Mbiti Kiebia as the 1st appellant and Isaack M'Inanga Kiebia as the 2nd appellant. The 1st appellant is deceased and his appeal has abated. The present appeal is by the 2nd appellant who is now on record as the only appellant.
2. The suit properties as per the judgment of the High Court are ***Land Reference No. Njia/Kiegoi Scheme/86*** and ***Land Reference Njia/Kiegoi Scheme/70***. ***Land Reference No. Njia/Kiegoi Scheme/86,*** is registered in the name of George Mbiti Kiebia while ***Land Reference Njia/Kiegoi Scheme/70,*** is registered in the name of Isaack M'Ianga Kiebia, the 2nd appellant herein.
3. The father to the respondents is one ***Musa M'Lintari (deceased)*** who was the elder brother to the two appellants and he died in 1990. The father to the appellants and the late Musa M/Lintari was one ***M'Kiebia Baithumbu***. All parties to this suit belong to one clan known as Athimba which clan owned a big portion of land at Njia Location, Kiegoi sub-location, Nyambene District during the time of land adjudication, consolidation and demarcation.
4. By a Plaint dated 22nd April, 1995, the respondents filed suit against the two appellants seeking declaratory orders from the High Court that the two appellants were registered proprietors of ***Land Reference No. Njia/Kiegoi Scheme/86 and Njia/Kiegoi Scheme/70***, to hold the same in

trust for the respondents by a portion measuring three acres in each parcel. The respondents also sought orders that the 1st appellant, George Mbiti Kiebia, do transfer three acres of ***Land Parcel Njia/Kiegoi Scheme/86*** to themselves and the 2nd appellant, Isaack M'Inanga Kiebia, do likewise transfer three acres of ***Land Parcel Njia/Kiegoi Scheme/70,*** to themselves.

5. The background to the suit as stated in the Plaint is that during land adjudication process *(otherwise known as land gathering in Meru),* the Athimba Clan owned a big portion of land and it was agreed that the land was to be distributed to its members represented by households and each household was to identify a member in whose name the land was to be registered to hold the same for the benefit of members of the household/family. The respondents assert that the house of ***M'Kiebia Baithumbu,*** which had 3 sons, was allocated a piece of land currently referred to as ***Land Reference No. Njia/Kiegoi Scheme/86*** and ***Land Reference Njia/Kiegoi Scheme/70,*** which are the suit properties.
6. The respondents contend in the Plaint that the 1st appellant was registered as proprietor of ***Land Reference Njia/Kiegoi Scheme/86,*** measuring 4.05 hectares to hold one third thereof in trust for Musa M'Lintari (father of the respondents). The respondents contend that 2nd appellant was registered as proprietor of ***Land Reference No. Njia/Kiegoi Scheme/70,*** measuring 4.25 hectares to hold one third thereof in trust for Musa M'Lintari.
7. The respondents by their Plaint averred that they have lived on the suit properties since their childhood and have possessed, occupied and have extensively developed the portions they occupy. The gravamen of the respondents' claim against the appellants is that the suit properties were ancestral clan land and they are entitled to three (3) acre share of every parcel of the land pursuant to the trust which they held for the benefit of Musa M'Lintari and his descendants.
8. The appellants filed a defence and counterclaim dated 6th August 2008 pursuant to a Court Order made on 8th May, 2008, *(H.C. Misc. Civil App. No. 117 of 2007)*. In the defence, the appellants denied that they were nephews of the respondents. They further denied that the suit properties were held in trust for Musa M'Lintari and the respondents as his descendants. The appellants admitted that the respondents were in occupation of ***Land Reference No. Njia/Kiegoi Scheme/86*** but denied that they occupy the same under a claim of right. It is contended that the appellants have never been and are NOT in occupation of ***Land Reference No. Njia/Kiegoi Scheme/70***.
9. The first appellant's counterclaim against the respondents is that he is the registered proprietor of ***Land Reference No. Njia/Kiegoi Scheme/86*** measuring 4.05 hectares and the respondents are in unlawful occupation of the same and seek an order directing the 1st respondent to vacate the said parcel of land. The 1st and 2nd appellants counterclaimed that the respondents have wrongfully and unlawfully caused a caution to be registered against the suit properties and seek court orders directing the respondents to remove the caution entered against the two suit properties.
10. The trial Judge (Kasango, J.) upon hearing the parties, entered judgment for the respondents against the appellants. The Honourable Judge declared that the 1st appellant holds 3 acres of ***Land Reference No. Njia/Kiegoi Scheme/86,*** in trust for the respondents and the 2nd appellant holds 3 acres of ***Land Reference No. Njia/Kiegoi Scheme/70*** in trust for the respondents. The trial court further ordered that the said trust be terminated and to that end ordered that 3 acres be excised from ***Land Reference No. Njia/Kiegoi Scheme/70*** and be registered in the name of Henry Ntongai M'Lintari. The trial court also ordered that 3 acres be excised from ***Land Reference No. Njia/Kiegoi Scheme/86*** and be registered in the name of the 1st respondent *(Isaya Theuri M'Lintari).*
11. Aggrieved by the judgment and decree of the High Court, the appellants lodged this appeal citing 23 grounds which can be summarized as follows:

i. ***That the learned Judge erred in law and fact in allowing the suit filed by the respondents in respect of the suit property to wit of Land Reference No. Njia/Kiegoi Scheme/86 and of Land Reference No. Njia/Kiegoi Scheme/70 to proceed without letters of administration.***

ii. ***The learned Judge erred in law and fact in finding that there was a trust in favour of the respondents to the extent of three (3) acres in each parcel of land.***

iii. ***That the learned Judge erred in law and fact in failing to find that during the land demarcation process, the respondents father Musa M'Lintari was issued with Land Parcel No. Kiegoi/Kinyanga/117 whose demarcation was done in 1968 and which the deceased Musa M'Lintari allowed to be registered in the name of his other son Stephen Ngiri (brother to the respondents) who holds it in his own name and lives there to this today.***

iv. ***The learned Judge erred in failing to find that the respondent's claim was statute barred and the Judge erred in law and fact in ignoring to inquire on the assertion by the appellants that Musa M'Lintari, their elder brother and father to the respondents did not raise the issue of his share of 3 acres each in Land Reference No. Njia/Kiegoi Scheme/86 and of Land Reference No. Njia/Kiegoi Scheme/70 at the time of consolidation in 1963 or during the 60 days periods given by the Land Committee or thereafter until his death in 1990 and did not even confide the same to his immediate family which included the respondents or other clan members.***

v. ***The Honourable Judge erred in law and fact in extending the claim of the respondents to Land No. Reference No. Njia/Kiegoi Scheme/70 while the evidence on record was that the land was allocated to one clan (household) member to share with others in which case it would have been Land Reference No. Njia/Kiegoi Scheme/86 and NOT Land Reference No. Njia/Kiegoi Scheme/70.***

vi. ***The learned Judge erred in failing to find that if the three (3) sons of the late M'Kiebia Baithumbu were entitled to share Land Reference No. Njia/Kiegoi Scheme/86 and Land Reference No. Njia/Kiegoi Scheme/70, then the three brothers are entitled to share Land Parcel No. Kiegoi/Kinyanga/117.***

vii. ***The learned Judge erred in law and fact in accepting that the respondents were residing, occupying and cultivating 3 acres of Land Reference No. Njia/Kiegoi Scheme/86 without evidence of the actual acreage.***

viii. ***The learned Judge erred in law and fact in failing to address the counterclaim by the appellants.***

12. At the hearing of this appeal, the appellant was represented by learned counsel ***Messrs Andrew Wandabwa*** while the respondents were represented by ***J. O. Ondieki*** respectively. Written submissions were filed in this matter with leave of the Court. As stated above, the appeal by the 1st appellant abated and the instant appeal was argued on behalf of the 2nd appellant. We have observed that 23 grounds of appeal were cited in the memo of appeal. This reminds us the dicta by the Chief Justice Hon. Dr. Willy Mutunga in his concurring judgment in the Supreme Court case of ***Gatirau Peter Munya – v- Dickson Mwenda Kithinji & 3 Others, Supreme Court Petition No. 2B of 2014*** where he stated at paragraph 249 that we must depart from the current practice in which 30 grounds of appeal are cited but the appellant proffers cogent evidence for 3. In the present appeal, the appellant argued the grounds of appeal in five thematic headings as follows:

i. ***That the learned Judge erred in ignoring the fact that the respondent's father had been given another portion of land being LR. No. Njia/Kiegoi/117;***

ii. ***The learned Judge unduly relied on the elder's minutes;***

iii. ***The learned Judge erred in holding that the respondents' had been in possession of both parcels of the suit properties;***

iv. ***The learned Judge erred in holding that there was a trust, which had been proved on the required standard on balance of probability;***

v. ***The learned Judge erred in relying on the claim that Plot 70 was ancestral land.***

13. Counsel for the appellant submitted that the 2nd appellant was the registered as proprietor of Plot 70 for himself and not in trust for the respondents. That the Honourable Judge erred in holding that the respondents had been in possession of both parcels of the suit properties while the evidence on record was to the effect that both respondents reside on ***Parcel No. 86*** and even their deceased father Musa M'Lintari resided on ***Parcel No. 86*** and not ***Parcel No. 70***. Counsel submitted that the trial court erred in finding that a trust had been proved on a balance of probabilities. It was submitted that there was no proof that at the point of registering the appellant as the registered owner of ***Plot No. 70***, the intention was that he would be trustee for their deceased brother and his descendants the respondents. This Court was urged to note that the evidence on record militates against an implied or constructive trust because Isaya Theuri M'Rintari (PW 1), testified he did not understand how the land was given to the appellants as he was a child and Henry Ntongai M'Lintari (PW 2), testified that land "*was being given by each household getting 10 acres and one person is to represent the family*" and Benard M'Muraa (PW 4), testified that "*the shamba was given to a specific person for such person to hold for others*". Counsel for the appellant posed the question that if it is true ten acres were being given to one person to hold for the family, how come they have twenty acres in the names of two persons to hold for the family and why are the twenty acres in the name of the two appellants and not in the name of their elder brother Musa M'Lintari? What was the incapacity he suffered that hindered the registration in his name? Counsel urged this Court to consider that if it were true that there was a trust over the suit properties, how come the respondents and their father occupied ***Parcel No. 86*** and never occupied ***Parcel No. 70***?
14. The appellant submitted that the learned Judge erred in relying on the fact that ***Land Parcel No. 70*** was ancestral land. It was submitted that upon adjudication being completed, the land ceased being trust land and the process of consolidation extinguished any customary rights or ancestral claims over the suit property. Counsel submitted that the possessory rights protected under ***Section 30 (g)*** of the ***Registered Land Act*** (now repealed) relate to rights of a person in possession and occupation of land. It was submitted that the respondents were in occupation of ***Parcel No. 86*** and not ***Parcel No. 70*** and consequently, no possessory rights exist for protection as overriding interest over ***Parcel No. 70***. It was submitted that the first requirement for a trust is the existence of a legal person; that the clan is an amorphous social description and no ownership documents or records were shown to prove the existence of the clan as a legal entity; that there was no evidence of a trust and of its terms and the circumstances set out lacked the certainty required of trusts (***Knight –v- Knight, [1840] 49 ER 58***). Counsel submitted that the respondents testified they were children when the land parcels were being given in 1962 and did not understand how the land was given to the appellants. He submitted that this item of evidence was proof that the respondents could not prove that a trust existed over the suit properties.
15. The appellant submitted that the learned Judge erred in unduly giving weight to the concept of ancestral land when the evidence on record shows that the land was a "*special area*" designated for the planting of tea and this negated the notion that this was normal ancestral land to be passed on to generations. That it was common ground that ***Plot 70*** was grazing land available for use not only by members of the Athimba clan in addition to several other clans. The appellant submitted that in the instant case, the normal ancestral land was ***Land Parcel No. Kiegoi/Kinyanga/117*** which was given to the respondents' father. It was submitted that the trial court erred in ignoring the fact that the respondents' father, the late Musa M'Lintari, was given ***Land Parcel No. Kiegoi/Kinyanga/117*** and the trial court ignored the official search tendered in evidence to this effect. That the trial court erred in failing to determine the ownership of ***Land Parcel No. Kiegoi/Kinyanga/117*** and the genuineness of title to this property. That under ***Section 112*** and ***119*** of the ***Evidence Act***, the burden of proving that the respondents' father and brother did not own ***Land Parcel No. Kiegoi/Kinyanga/117*** lay with the respondents and they failed to discharge it. That the appellant's testimony that ***Plot 70*** was a "*special area*" designated for planting tea was unchallenged and the ten acre demarcation was per person and not for land adjudication under the ***Land Adjudication Act, Cap 284*** which applied to areas of trust land. Counsel further submitted that the respondents' father the late Musa M'Lintari during his life time never challenged the decisions and determinations made under the Land Consolidation Act and consequently, the respondents have no right to challenge the decisions and determinations made pursuant to the land adjudication and consolidation process (See ***Ambale – v- Masolia, 1986 KLR***

241). On the official search tendered in evidence, it was submitted that the Judge erred in finding that there was overwriting on the search document whose authenticity and genuineness was never proved. It was submitted that by virtue of ***Section 109*** of the ***Evidence Act,*** the burden of proof as to the authenticity of the official search rested with the respondents who never challenged the search document. That the learned Judge erred and fell in error in shifting the burden to prove the genuineness of the official search to the appellants; that the Judge should have relied on ***Section 83*** of the ***Evidence Act*** to presume the genuineness of the search document. The appellant faulted the learned Judge for relying on minutes of the clan meetings submitting that minutes of a clan meeting cannot convey and transfer any interest in land.

16. The respondents in their written submissions opposed the appeal and supported the findings and determinations by the trial Judge ***(Kasango, J).*** On abatement of the appeal following the death of the 1st appellant, the respondents' submitted that the judgment appealed against is one and cannot be separated; that the evidence which was adduced before the trial court did not distinguish which evidence related to the 1st appellant and which was for the 2nd appellant; that the issues and cause of action against the two appellants are enjoined and woven and if the appeal against the 1st appellant abated then the entire judgment and appeal for all parties abated. Counsel submitted that the respondents' case is founded on customary law by virtue of being members of the same family who originally owned the suit properties before registration. It was submitted that the respondents reside on ***Parcel No. 86*** and cultivated ***Parcel No. 70***; that there is no dispute that both parcels of land were initially clan land prior to registration in the names of the two appellants.
17. The respondents submitted that the suit properties having been clan land were registered in the name of one member of the family to hold in trust for the other members. It was submitted that it did not matter who was registered as proprietor so long as he was a representative of that family. That the 2nd appellant, Isaac M'Inanga Kieba, was a member of the Committee involved in the demarcation of the parcels of land and this explained how he came to be registered as the representative of the family. On the contention that the land was a *"special area"*, it was submitted that any *"special area"* must be gazetted and the suit properties have never been gazetted as *"special area"*. On the official search tendered in evidence by the appellants, the respondents supported the holding by the trial court that the official search had alterations/cancellations which were not explained and appellants failed to produce an official search without alterations or to call the Land Registrar to testify in the matter. It was submitted that it is the appellants who tendered in evidence the official search and the burden was on them to prove its genuineness and authenticity; that a party who produces a document must prove it is genuine. On the issue of trust, the respondents submitted that trust was proved by the following facts: (a) there were several clan meetings attended by the appellant and other clan elders and minutes of these meetings are on record (b) prior to registration, the suit properties were ancestral clan land used for grazing; (c) at the time of consolidation and demarcation, one member from each family was to hold the parcel in trust for other family members (d) there was no evidence on record to show that the respondents' father was given clan land elsewhere and no document was produced to prove the same.
18. As this is a first appeal, it is our duty to analyze and re-assess the evidence on record and reach our own conclusions in the matter. It was put more appropriately in ***Selle -vs- Associated Motor Boat Co., [1968] EA 123,*** thus:

> *"**An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif vs. Ali Mohamed Sholan (1955), 22 E. A. C. A. 270).***

This Court further stated in ***Jabane – vs- Olenja, [1986] KLR 661, 664:***

664, thus:

> "***More recently, however, this Court has held that it will not lightly differ from the findings of fact of a trial Judge who had had the benefit of seeing and hearing all the witnesses and will only interfere with them if they are based on no evidence, or the Judge is shown demonstrably to have acted on wrong principles in reaching the findings he did – see in particular <u>Ephantus Mwangi -vs- Duncan Mwangi Wambugu</u> (1982-88) 1 KAR 278 and <u>Mwanasokoni vs. Kenya Bus Services</u> (1982-88) 1 KAR 870."***

19. In the instant case, the trial Judge expressed herself on the credibility and demeanour of the witnesses who testified as follows:

> ***"I had the opportunity to observe the witnesses in this case and I form the opinion that the plaintiffs and their witnesses were credible and honest witnesses. To the contrary, I found the defendants were not credible and contradicted not just themselves but also each other".***

20. On our part, we have re-evaluated the evidence and note that the appellant and the respondents although being related, have fallen out. In paragraph 2 of the Statement of Defence and Counterclaim, the appellant deny being related to the respondents. The appellant has not been able to explain how he came to be registered as proprietor of ***Land Parcel No. 70***. He did not purchase the land and the evidence shows that ***Land Parcel No.70*** was clan grazing land. The concept of special area as raised by the appellant was not proved in relation to the suit properties neither is what legal limitations existed in relation to a special area shown. The suit properties are registered under the now repealed ***Registered Land Act, Cap 300*** of the ***Laws of Kenya***. The appellant contend that his title to ***Land Parcel No. 70*** is absolute, indefeasible and free from trust. A plethora of judicial authorities show that there is nothing in the ***Registered Land Act*** which precludes the declaration of a trust in respect of registered land. ***Section 28*** provides that:

> ***"28. The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject –***
>
> ***(a) …..***
>
> ***(b) unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 not to require noting on the register.***

Section 30 *of the* ***Registered Lands Act*** *provides:*

> ***30. 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 them being noted on the registers:***

a. **……..;**
b. **……..;**
c. **……..;**
d. **……..;**
e. **…….**
f. **…….;**
g. ***the rights of a person in possession or actual occupation of land to which he is entitled in right***

only of such possession or occupation, save where inquiry is made of such a person and the rights are not disclosed.

21. One of the overriding interests under ***Section 30 (g)*** is the right of the person in possession or actual occupation of the registered property. We shall deal with possession and occupation of ***Land Reference No. Njia/Kiegoi Scheme/70*** by the respondents to determine if they do have any overriding possessory rights.
22. There is uncontested evidence on record that the respondents were born on ***Land Reference No. Njia/Kiegoi Scheme/86*** and have been in possession and occupation of this parcel of land. The uncontroverted evidence also shows that the father to the respondents the late Musa M'Lintari died in 1990 and was buried on this parcel of land. There is evidence on record that prior to the registration of the late George Mbiti Kiebia, *(1st appellant)* as proprietor of ***Land Parcel No. 86***, the said parcel was ancestral clan land. The 1st and 2nd respondents having been born on ***Land Reference No. Njia/Kiegoi Scheme/86*** are still in possession and occupation of the parcel. It is the respondent's contention that they occupy the land as part of ancestral clan land based on their customary rights. The trial court on this issue stated:

> ***"From the evidence it is clear that the defendants (appellants) got registered as proprietors of the suit properties whilst the plaintiffs (respondents) and other members of the family were in occupation of both parcels of land. It was accepted that the father of both defendants who was the grandfather of the plaintiffs was then alive when they got the said registration… The 2nd defendant was one of the Committee members involved in demarcation of parcels of land. In my view, the part he played would well explain how both he and the 1st defendant got registered as owners of those parcels of land and they got the registration whilst the family members were occupying the land. They did not tell the court whether they disclosed to those family members that they had obtained registration. Plaintiffs exhibit No. 1, the Minutes of 16th October 1994, show that both the 1st and 2nd defendants were in attendance of the clan meeting. They are number 1 and 8 of the list of members present in that meeting. Those Minutes, in my view, are worth reproducing in this judgment".***
>
> ***"After a lengthy discussion, Mr. Isaac M'Ananga (2nd defendant) said he kept his promise of surrendering 3 acres to this family (Mr. M'Lintari's family) according to the sub-clans agreement. Mr. George Mbiti (1st defendant) told the clan that he had changed his mind of giving 3 acres but he was to surrender only one acre to them. After a terrible debate between the clan members, George was warned by the clan. He was advised to call his family aside and reconsider his remarks. The clan refused the acre totally. After a private talk between George's family members, they came with a solution that he agreed to add to another acre to make them two. Mr. Gideon Mugwika became the mediator".***

23. The trial Judge observed that *"as it can be seen from the above quotation, the defendants did not object to transferring some of the land to the plaintiffs, the dispute rather was on the acreage that was to be transferred*".
24. In relation to ***Land Reference No. Njia/Kiegoi Scheme/70***, the evidence on record as to the occupation and possession by the respondents is contradictory. The respondents state that they cultivated this parcel of land. In the same vein the respondents state that the land is in the occupation and possession of their uncles who are the appellants. The respondents' evidence before the trial court was that they were cultivating ***Parcel No. 70*** until after the death of their father when the 2nd appellant, Isaack M'Inanga Kiebia, denied them access. This evidence was challenged by the appellant. It is our considered view that the respondents have not proved on a balance of probability that they have been in possession of this parcel of land. It is our considered view that unless trust is proved, the respondents have neither possessory nor occupational rights over ***Land Reference No. Njia/Kiegoi Scheme/70*** that can be protected as an overriding interest under ***Section 30 (g)*** of the ***Registered Land Act***. We hasten to add that to prove a trust in land;

one need not be in actual physical possession and occupation of the land.

25. We now turn to consider whether trust has been established and proved by the respondents in relation to ***Land Reference No. Njia/Kiegoi Scheme/86*** and ***Land Reference No. Njia/Kiegoi Scheme/70***. On this issue, the trial court pronounced itself as follows:

> ***"The trust which the plaintiffs have sought to enforce by this action arose not only from their possession and occupation of the suit properties but rather from the fact that this was ancestral land which was passed from generation to generation. This is what the Court of Appeal as quoted above termed intergenerational equity. The defendants have not denied that the plaintiffs are members of their family. Further it is not denied that the plaintiffs have been in possession and had utilized the land, all with knowledge of the defendants. That being so, the plaintiffs have on a balance of probability proved their claim that the defendants hold the land in trust for them. They are therefore entitled to a share of that land. The plaintiff's father was a brother to both defendants. By virtue of that relationship, the plaintiffs are entitled to the share that their father would have obtained. The defendants did not dispute the plaintiffs' evidence in respect of the acreage of the suit properties. The plaintiffs claim for 3 acres from both parcels of land would ensure that the defendants and the plaintiff's deceased father would get more or less equal share of land"***.

26. We have considered the pronouncement by the trial court as stated above and submission by counsel and we pose two questions: what is the law on trust and what is the relationship between customary law rights and overriding interests? In ***Obiero-v- Obiero, (1972) EA 227***, it was stated that rights under customary law are not overriding interests. This was re-confirmed in the case of ***Esiroyo-v-Esiroyo***, ***(1973) EA 388*** and ***Mutsonga – v- Nyati***, ***(1984) KLR 425***; ***Kanyi – v- Muthiora, (1984) KLR 712***. However, in ***Mutsonga – v- Nyati, (1984) KLR 425*** and also in ***Kanyi – v- Muthiora, (1984) KLR 712***, it was held that the equitable doctrines of implied, constructive and resulting trusts are applicable to registered land by virtue of ***Section 163*** of the ***Registered Land Act*** which provides for the *application of the common law of England as modified by equity. In the* ***Mutsonga case***, the court held that a constructive trust arose in favour of the plaintiff's father as the owner of the land under customary law when the land was first registered in the name of the defendant. In ***Kanyi – v- Muthiora, (1984) KLR 712***, it was held that the registration of the land in the name of the appellant under the ***Registered Land Act*** did not extinguish the respondent's rights under Kikuyu customary law and neither did it relieve the appellant of her duties or obligations under ***Section 28*** as trustee. In ***Mwangi & Another –v – Mwangi, (1986) KLR 328***, it was held that the rights of a person in possession or occupation of land are equitable rights which are binding on the land and the land is subject to those rights and the absence of any reference to the existence of a trust in the title documents does not affect the enforceability of the trust since the provisions of ***Section 126 (1)*** of the ***Registered Land Act*** as to the reference to a trustee are merely permissive and not mandatory.

27. In ***George Roine Titus & Another - v- John P. Ngurai, Civil Appeal No. 107 of 1999, Kwach, J.A.,*** stated that in adjudication matters, in order to succeed on a claim to land based on trust, it must be shown that at the conclusion of the adjudication process but before the suit land was registered in the name of a proprietor, the adjudication committee had ascertained the interest of the claimant and confirmed that the suit land belonged to them. And further, that the reason why the claimant was not registered was because of some legal impediment which precluded the claimant from taking title immediately thereby making it necessary for the suit land to be registered in the proprietor in trust. Applying this dictum to the present case, the evidence on record as adduced by the respondents and which was not challenged by the appellants is that the Athimba Clan had agreed that land was to be apportioned to each household and one person was to hold for the benefit of members of the family. The appellant admitted that their late brother Musa M'Lintari resided on ***Parcel No. 86*** and was buried thereon. Why would the deceased Musa M'Lintari be living on this parcel and be buried thereon if he had no right to this parcel of land? Why should the respondents who were born on this parcel of land and who continue to live thereon have no right to the parcel? On record, the 1st appellant's response was that the respondents' occupation of ***Land Parcel No. 86*** was wrongful and unlawful and the father to the

respondents should explain why no parcel of land was registered in his name yet he had no debilitating incapacitation.

28. The legal burden to prove the existence of the trust rests with the respondents. To discharge this burden, the respondents testified that the suit properties were ancestral clan land; that during adjudication and consolidation, one member of the family was designated to hold on behalf of the family; that the appellants were the designated family members who were registered to hold the two parcels of land on behalf of the family. Under ***Section 112*** of the ***Evidence Act***, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him. How the appellant got registered as proprietor ***Land Parcel No. 70*** is a fact within the personal knowledge of the appellant and it was incumbent upon the appellant to dislodge the notion that ***Land Parcel No. 70*** was ancestral clan land and refute that he was not registered as proprietor as a representative of the family of the late ***M'Kiebia Baithumbu***. The appellant did not dislodge the explanation given by the respondents as to how he came to be registered as proprietor of ***Land Parcel No. 70***. (See ***Anne Wambui Ndiritu – v- Joseph Kiprono Ropkoi & Another, Nyeri Civil Appeal No. 345 of 2000).*** Likewise, ***Section 116*** of the ***Evidence Act*** stipulates that where the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner. The respondents are in possession of ***Land parcel No. 86. Section 116*** of the ***Evidence Act*** requires the respondents to prove that the appellant holds ***Land Parcel No. 70*** subject to a trust**.** (See ***John Kariri Mucheke – v – M'Itabari M'Arunga, Nyeri Civil Appeal No. 15 of 2003; Jennifer Nyambura Kamau – v- Humphrey Mbaka Nandi, Nyeri Civil Appeal No. 342 of 2010).*** It is our considered view that the appellants did not rebut and dislodge the testimony of the respondents who are not only in occupation and possession of ***Parcel No. 86*** but also claim entitlement to ***Parcel No. 70*** pursuant to their being members of the family that owned the ancestral clan land. We state that when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and rebut the notion that the property is not free from any encumbrances including any and all interests which need not be noted on the register. It is our considered view that the appellant did not go this extra mile that is required of him in relation to ***Land Parcel No. 70*** and no evidence was led to rebut the respondents' testimony. We find that a trust exists in relation to the ***Land Parcel No. 86*** and ***Land Parcel No. 70***.

29. The case of ***Muchungu-v-Muchungu, (1984) KLR 202*** is distinguishable from the instant case. In the ***Muchungu case***, the respondent sued the appellant who was his elder brother, asking the High Court to order the appellant to transfer to him a half-share of a certain piece of land on the basis that it had been owned by their father and the appellant had been registered as proprietor of it to hold for himself and for the respondent as trustee. The appellant stated in his defence that the land belonged to him and had never been owned by their father and produced a certificate of ownership in respect of a different piece of land which he said was the one owned by their father and which was therefore the one to be shared. There was no evidence that the parties' father owned the land which the respondent claimed or on what constituted the appellant a trustee for the respondent in respect of it. The Court of Appeal held that there was no evidence to support a finding of trust held by the appellant in favour of the respondent. The facts of the present case are distinguishable to the extent that there is evidence on record that the suit properties were clan land and during adjudication, one member of the family was to hold the land for the benefit of the other members. There is also evidence on record that the Athimba Clan agreed that one member of the family was to hold land on behalf of the other members. There is evidence on record that the household of ***M'Kiebia Baithumbu*** was allocated clan land and the land was not registered in the name of ***M'Kiebia Baithumbu***. The question we ask ourselves is where the land is allocated to the household of ***M'Kiebia Baithumbu.*** We are satisfied that the land allocated to the household of ***M'Kiebia Baithumbu*** is the suit properties being ***Land Reference No. Njia/Kiegoi Scheme/86*** and ***Land Reference Njia/Kiegoi Scheme/70***.

30. On the issue of letters of administration, it is the appellant's contention that the learned Judge erred in entertaining the respondents' suit when they had no letters of administration to the estate of their deceased father Musa M'Lintari. In ***Hintz – v- Mwakima, (1984) KLR 294***, it was clearly stated that without a grant of letters of administration to the estate of the deceased, no person can

bring action and represent that estate. Until grant is obtained by someone, the estate and the legal chose in action are vested in the court. The estate and the legal chose in action automatically pass to the administrator when the grant is obtained. On the issue that there were no letters of administration, the Honourable Judge expressed herself:

> ***"I understand the plaintiff's claim is that the defendants hold the suit properties in trust for them as family members. It is not necessarily their claim that what they seek from court is the interest of their deceased father. Their claim as I understand it is by virtue of being members of the family who originally owned the suit properties. That being so, their claim does not fail for lack of grant of letters of administration of their father's estate. The plaintiff's claim arises from customary law"***.

31. The question before us is whether the respondents instituted the instant suit on behalf of the estate of the deceased or in their own name and behalf. Our reading of the Plaint particularly paragraphs 7, 8 and 9 reveals that the respondents are asserting their individual claim to be entitled to 3 acres of the suit properties. Their claim is not made for and on behalf of the estate of their deceased father Musa M'Lintari. In paragraph 7 of the Plaint, the respondents state that they live on the suit properties and have lived thereon since childhood. In paragraph 8, the respondents aver that they are jointly entitled to 3 acres of the suit property and in paragraph 9 they aver that the suit property is clan land. It is our considered view that the respondents claim against the appellant is an individual claim for breach of trust for land that was to be held for the benefit of the family and household of ***M'Kiebia Baithumbu***. We are satisfied that the learned Judge did not err in holding that letters of administration was not necessarily required in the instant case.
32. The appellant further contend that learned Judge erred in failing to find that if the three (3) sons of the late ***M'Kiebia Baithumbu*** were entitled to share ***Land Reference No. Njia/Kiegoi Scheme/86*** and ***Land Reference No. Njia/Kiegoi Scheme/70,*** then the three brothers were also entitled to share ***Land Parcel No. Kiegoi/Kinyanga/117***. We have considered this ground of appeal and state that the issue of sharing ***Land Parcel No. Kiegoi/Kinyanga/117*** was not pleaded in the Plaint and neither was it raised in the Statement of Defence and Counterclaim. The official search tendered in relation to this property had cancellations and alterations thereon. The Honourable Judge did not err in failing to address the sharing of this parcel of land as it was not raised in the pleadings as an issue for the court to consider and make a determination thereon. In addition, the registered proprietor of ***Land Parcel No. Kiegoi/Kinyanga/117*** was not a party to the proceedings before the High Court and in this Court and we cannot make any orders against an individual who is not a party to the proceedings.
33. The totality of our re-evaluation of the evidence on record is that the learned Judge did not err in finding that the respondents had proved the existence of a trust over ***Land Reference No. Njia/Kiegoi Scheme/86*** and ***Land Reference No. Njia/Kiegoi Scheme/70***. Having found that a trust existed over the suit properties, we are satisfied that the learned Judge did not err in failing to expressly address the counterclaim in the judgment as the final orders, declarations and decree of the trial court have the effect of negating and dismissing the counterclaim. For avoidance of doubt, we hereby order the counterclaim by the appellants be and is hereby dismissed with costs. The upshot is that we dismiss this appeal in entirety with costs to the respondent.

Dated and delivered at Nyeri this 1st day of October, 2014.

ALNASHIR VISRAM

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

J. OTIENO- ODEK

….....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR