



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT NYAHURURU

ELC CASE NO 384 OF 2017

JANET MUTHONI MURIITHI.....1st PLAINTIFF

MARGARET WANJUGU NDUNGU.....2nd PLAINTIFF

MARY WAIRIMU GAKANGA3rd PLAINTIFF

VERSUS

LYDIAH WANJIRU KAMAU.....1st DEFENDANT

PETER GICHUKI KAMAU.....2nd DEFENDANT

JUDGEMENT

1. This case was filed at the Nakuru Environment and Land Court wherein it was registered as No. 419 of 2013 wherein on the 19th January 2015, the court ordered the parties to try and resolve their dispute through mediation since they were family members.
2. On the 8th July 2015, the court was informed that the Mediator had filed a report and that the plaintiffs were agreeable to the same. The Defence then sought for more time to enable Counsel to consult with the 1st Defendant who was indisposed at the time.
3. On the 23rd September 2015 the court was informed that the Defendants were not agreeable to the mediation report wherein the court urged parties try and settle the matter amicably out of court.
4. On the 22nd September 2016, the court was informed that the Defendants were not interested in mediation process. Instead they preferred that the matter to be determined by the court. The court was also informed that the 1st defendant was deceased, having passed away on the 7th May 2016.
5. There were orders that the matter be left in abeyance for at least one year to be calculated from the 7th May 2016 to await substitution of the 1st Defendant or the abatement against her all together.
6. Subsequently upon the establishment of this Court, the matter was transferred herein and registered with the present number.
7. On the 27th September 2017 when the matter was placed before me, Counsel for the Plaintiff informed the court that no substitution had been made for the 1st Defendant. The court thus marked the suit as abated against the 1st Defendant, pursuant to order 24 Rule 4(3) of the Civil procedure Rules and proceeded to certify the matter ready for hearing as against the 2nd Defendant on the 4th December 2017.
8. On the 4th December 2017, evidence was lead against the 2nd Defendant by the 1st Plaintiff-PW1 Janet Muthoni Muriithi who testified that the other two plaintiffs were her sisters and that she was given by her co- plaintiffs' the authority to testify on their behalf which she filed on the 12th June 2013.
9. She further testified that they were children to the late Kamau Kamunya and Lydia Wanjiru Kamau (deceased 1st Defendant) and that by the time they filed the present case, their mother Lydia was alive and was the 1st Defendant. That the 2nd defendant, Peter Gichuki Kamau was also a sibling, their brother.
10. She further testified that they had other siblings totaling to six girls and 1 boy whom she named as Janet Muthoni, Margaret Wanjugu, Miriam Njoki, Tabitha Wamaitha, Peter Gichuki and Mary Wairimu who were Children of the same mother.

11. It was the Plaintiff's evidence that their deceased father had two wives, the first wife being Herenah Wairimu Kamau and the second wife, who was their mother was known as Lydia Wanjiru Kamau.

12. She further testified that their father had a piece of land at Upper Gilgil settlement scheme which was known as plot No. 17. That after their father passed away, his family members had informed them that one of his two wives was to be put in trust of the said Plot wherein their step mother Herenah Wairimu Kamau was put in the said trust and was made an administrator through the court that used to be in Thomson's falls.

13. By consent, the Plaintiff produced a letter dated the 19th October 2012 as exhibit 1 from the land adjudication and settlement which confirmed that plot No. 17 Upper Gilgil Nyandarua was allocated to Kamau Kamunya in 1963. The said letter also confirmed that Helen was appointed as the heir and the plot was discharged to her.

14. That after Herenah Wairimu Kamau took the plot, the same was divided amongst their father's wives wherein each wife took possession of and lived on her individual land.

15. That their mother Lydia got about 32 acres of land which was registered in her name as Nyandarua/Upper Gilgil/398 as was evidenced by the certificate of search dated the 29th April 2013 and produced as exhibit 2. That this piece of land was utilized by the whole family wherein they lived therein and used to farm on it as well.

16. PW1 went on to testify that she, Margaret and Miriam plus their brother had built on the land but were later informed by their brother Peter Gichuki, the 2nd Defendant herein, not to continue farming and cultivating thereon as the land had now been divided between him and their mother Lydia.

17. That upon being so informed, the Plaintiff went to the land's office to conduct a search on the 29th April 2013 wherein they found that parcel No. Nyandarua/ Upper Gilgil/398 had been subdivided into 2 wherein their mother got 3 acres of land while their brother Gichuki had given himself had 28 acres. The subdivision had resulted into two (2) with different numbers being Nyandarua/Upper Gilgil/935 measuring 28 acres registered in the name of Peter Gichuki. She produced the certificate of official search as Exhibit 3, and Nyandarua/Upper Gilgil/936 in the name of Lydia measuring 1.214 hectares. She produced the certificate of official search as Exhibit 4. We shall refer to both these parcels of land as the suit land for ease of reference.

18. Following this discovery, Tabitha, Margaret, Janet, Miriam and Mary placed a caution on the said parcels of land because they were not involved and further, that the Defendants wanted to evict them from the suit land because they were girls. That they had not agreed that the suit land be sub divided, and the sub division had been done was by their late mother Lydia and their brother Peter without the involvement of their father's family.

19. The witness testified that the subdivision was done on 2nd January 2011 by which year, their mother was about 80 something years old. After the said subdivision, the 2nd Defendant then got onto the 1st Plaintiff's ½ acres of land where she had grown her potatoes and uprooted them.

20. That she had reported the matter to the Agricultural Officer as well as to the police station in Ndundori. The agricultural officer had gone to the scene, made a report dated the 8th February 2011, herein produced as Exhibit 4(b), which she took to the police who then wrote a letter dated 2nd September 2011, produced as Exhibit 4(a).

21. That the 2nd Defendant had also gone to another land measuring 3 acres wherein he had pulled out the poles, the barbed wires as well as the whole fence. He then went and destroyed the 1st Plaintiff's kitchen. That at the moment they were not utilizing the suit land because they had been threatened by the 2nd Defendant. That nobody was in possession of the suit land. That the 2nd defendant had been destroying anything planted on the piece of land and that both pieces of land were now being used by the 2nd Defendant wherein he has also leased part of the suit land to strangers because he believes that the whole land is his.

22. The witness' further testimony was that after the subdivision of the land, their advocate had written a demand letter dated the 15th February 2013 to their (deceased) mother and brother (2nd defendant) She produced the said letter as exhibit 6

23. The witness closed her examination in chief by seeking that the court directs that their family goes back to living on their deceased father's land the way they used to live. That every one of them was praying for their rights on their father's land. She also prayed for judgment against the 2nd Defendant as per their plaint dated the 12th June, 2013 and for the 2nd Defendant to pay for the cost of the suit.

24. In Cross examination, the plaintiff testified that they had been living on their share of the piece of land that belonged to their deceased father. That there was a succession cause where their father's property had been given to Herenah Wairimu Kamau to hold in trust. At this stage, the witness was referred to exhibit 1, a letter dated 19th October 2012 wherein she stated that she did not understand what certificate of succession meant.

25. She stated that Herenah Wairimu Kamau was to hold the piece of land in trust for a short time because at the time, they were young children. That they had grown up at home and further that she did not know whether as children they had been mentioned when Herenah was put to hold their father's property in trust. That she had lived on the suit land for all her life. That at the moment, she was about 60 years old.

26. When she was referred to exhibit 2, she stated that the land is registered in the name of Lydia Wanjiru Kamau who was their mother's. That in 2011, their mother was over 80 years old. That at the time, their mother had a weak memory although she had not gone to hospital.

That they all knew that their mother had a memory problem. She confirmed that she had no documents to show that their mother held the suit land in trust for the children although she knew that she held the same in trust for them. That since the land was their father's and they were his children, automatically the suit land was held in trust for them.

27. The witness reiterated that they were born on that suit land and grew there. When referred to Pf exhibit 1 and the attached supporting documents namely certificate of succession at paragraph 9, she stated that there was nobody listed there as the land had been divided between their father's two wives.

28. She testifies that when their father died, both his wives were alive. They were given his property so that they could use it together with their children. They could not use it the way they wanted. The children could not be given the parcels of land while the wives were alive.

29. She stated that the land was sub divided well between the wives whereby she did not deem it fit to go to the high court for the subdivision again.

30. In Re-examination, the witness reiterated that when they filed this case, the suit land was in the names of the Defendants. That before the said sub-division into the defendants name, they had no dispute. That in the year 2011, the land was not in their father's name.

31. She also confirmed that the succession cause in Thomson falls court was in 1974 and that at the time, she had just finished class 8. She also confirmed that at that time, their father's land (original) was being utilized by the whole family before Herenah Wairimu Kamau decided to subdivide the same between her and her co-wife. That they had lived thereon happily as a family whereby their mother had showed them their own pieces of land where they had continued living and cultivating on the same. She stated that that they had also respected the portion given to their step mother Herenah Wairimu Kamau.

32. She was firm that the land was their fathers land which he had left the same in the hands of his wives on behalf of his children. That as the children of their deceased father, they had a right to inherit their father's property. The Plaintiff thus closed its case.

Defence case

33. The 2nd Defendant, Peter Gichuki Kamau testified to the effect that he lived in Milangine in Wanjura village and that he was a farmer. That he knew the 1st Plaintiff Janet who was his sister. He further testified that it had reached a certain point, when his sister had started disturbing his mother, Lydia Wanjiru Kamau, that she had called him together with some other elderly men wherein she had willingly given him the suit land. He was categorical that his mother did not hold the suit land in trust for anybody.

34. He informed that court that the suit land belonged to his mother and that she was free to deal with it as she deemed fit. That even at her death, she had cautioned them to let the suit land remain the way she had subdivided it.

35. He stated that his sisters lived with their husbands and not on the suit land and that they often went to visit from time to time. He confirmed that even though the 1st Plaintiff had built a semi-permanent house on the suit land, yet all he wanted was to honor his mother's last wishes. He also asked the court to do the same.

36. In Cross examination, the Defendant confirmed that he was the son to the deceased Lydia was the registered owner of Plot No. 389. That apart from the Plaintiffs, he had other sisters some of whom had died. He also confirmed that Miriam Njoki and Tabitha were also his sisters and that his father was now deceased.

37. The witness went on to state that his mother was given the suit land which measured 32 acres by the clan members because she had participated in the re-payment of the loan. That before she got the suit land, which initially belonged to his father Kamau Kamunya, it had been registered in the name of their step mother Herenah Wairimu Kamau. He also confirmed that they were all brought up on the suit land.

38. The Defendant reiterated that he was the only son to his mother and that in the year 2011, the suit land No 389 was sub divided into two wherein he was registered as the proprietor of land parcel No. 935 comprising of 28 acres while the rest of the land was left for his mother.

39. The Defendant testified that before the subdivision took place, their mother had called for a family meeting in the year 2011 wherein the Plaintiff was also present but did not agree to the subdivision.

40. He however confirmed that he did not have any the documents showing the minutes of that meeting. That his sister Miriam Njoki had joined the meeting after his mother had spoken and that the other sisters were not there. He also stated that there was no day that they had sat with his sisters and their mother to agree that he be given the 28 acres of land and that presently, he did not have any witness who were at the meeting when his mother gave him the suit land.

41. He stated that the 1st Plaintiff had only constructed a semi-permanent house, and did not farm on the suit land. That his other sisters had not built on that suit land and neither were they cultivating on the same. He finally testified that he had never been summoned by the police on allegation that he had destroyed the Plaintiff's property or cut down her vegetation. The defence thus closed its case.

42. At the close of the case, both parties filed their respective submissions.

Plaintiffs Submission.

43. The Plaintiff in their submission reiterated the evidence adduced in court as well as in their pleadings. Their main bone of contention

being that Kamau Kamuya was the original allottee of plot No. 17, upper Gilgil Settlement scheme having been given the same by the Government of Kenya on or about the 9th august 1969.

44. That the said Kamau Kamuya was survived by two wives namely Herenah Wairimu Kamau and Lydiah Wanjiru Kamau. That following the demise of the said Kamau Kamuya the District Magistrate's Court, Thompson Falls (Nyahururu) vide succession Cause No. 51 of 1971 appointed Herenah Wairimu Kamau as the heir Administrator of the deceased's Estate. Upon clearing of the loan on the said land, the same was registered in the name of Herenah Wairimu Kamau who subsequently divided it between the two houses of Kamau Kamuya wherein Lydiah Wanjiru Kamau was registered as the proprietor of Nyandarua/Upper Gilgil/389 measuring 12.95 Hectares (32 acres), the subject suit herein.

45. That subsequently the said Lydiah Wanjiru Kamau subdivided the suit land into two resulting into Nyandarua/Upper Gilgil/935 measuring 27.8 acres and parcel No. 936 measuring 3 acres. She thus transferred a substantial portion to the 2nd Defendant herein.

46. It was therefore the Plaintiffs' contention that the suit land was registered in the name of Lydiah Wanjiru Kamau to hold in trust for her own behalf and on behalf of the second house of Kamau Kamuya and that the subsequent registration of Nyandarua/Upper Gilgil/935 in the 2nd Defendants name was also in trust for all the children from the second house of Kamau Kamuya.

47. The Plaintiffs' further contention was that parcel No Nyandarua/Upper Gilgil/935 and 936 having been created on the subdivision of No. Nyandarua/Upper Gilgil/389 was not registered in the name of Kamau Kamuya (Deceased) at the time of filing the present suit on the 12th June 2013 and therefor the Plaintiff needed not have taken out letters of administration. That the Plaintiffs were not claiming a share directly from the estate of Kamau Kamuya (Deceased)

48. That the registration of the Lydia Wanjiru Kamau(deceased) as the proprietor of Nyandarua/Upper Gilgil/389 and the subsequent registration of The 2nd Defendant as proprietor of Nyandarua/Upper Gilgil/935 did not relieve them from the duty or obligation to which they were subject as trustees.

49. That the Customary Law trust that existed against Land parcel No. Nyandarua/Upper Gilgil/389 in favor of the Plaintiffs and the customary law trust that exists against land parcel No. Nyandarua/Upper Gilgil/935 in favor of the Plaintiffs was and is implied trust because the same was not and is not backed by the relevant instrument of a trust and the words 'as Trustees' were not and are not entered in the relevant registers for the said parcels of land.

50. The Plaintiffs relied on the following decided cases;

i. Mwangi & Another vs Mwangi [1986] KLR 328

ii. Wanjiru Mwangi Gichuhi & Another vs Tabitha Njoki Mwangi (Nakuru HCC No. 105 of 2003)

iii. Kanyi vs Muthiora [1984] KLR 712

iv. Joseph Githinji Gathiba vs Charles Kingori Gathiba [2001] eKLR

v. Limuli vs Marko Sabayi [1979] KLR 251

51. It was further the Plaintiffs' submission that previously they had been using the suit land for farming but following the subdivision and transfer of the same to the 2nd Defendant, the result was an eviction of the Plaintiffs from the suit land through threats of physical violence to the Plaintiffs and destruction of the Plaintiff's properties and crops thereon by the 2nd Defendant.

52. The Plaintiffs submitted that they had proved their case on a balance of probabilities against the 2nd defendants and urged the court to declare that the Lydia Wanjiru Kamau (deceased) held Land No. Nyandarua/Upper Gilgil/389 in trust for her own and behalf and on behalf of the Plaintiffs , the 2nd Defendant and other children from the second house of Kamau Kamuya(deceased) and also to hold that the 2nd Defendant also holds land parcel No. Nyandarua/Upper Gilgil/935 in trust on his own behalf and on behalf of the Plaintiffs and other children from the second house of Kamau Kamuya(deceased).

53. The Plaintiff thus urged the court to order that the trust in respect to land parcel No. Nyandarua/Upper Gilgil/935 be determined and the land be shared equally among all the Children from the second house of Kamau Kamuya(deceased) namely Janet Muthoni Muriithi, Margaret Wanjugu Ngungu, Mary Wairimu Gikanga, Miriam Njoki, Tabitha Wamaitha, and Peter Gichuki Kamau. That the division of Nyandarua/Upper Gilgil/936 was the preserve of a succession cause.

54. Last but not least, the Plaintiffs urged the court to issue orders of permanent injunction restraining the 2nd Defendant, his proxies, servants, employees and or agents from selling Charging, sub-dividing, disposing of or interfering with the Plaintiffs quiet occupation and possession of and peaceful use and enjoyment of land parcel No. Nyandarua/Upper Gilgil/935 and 936.

55. They also prayed for costs of the suit.

Defendant's submission.

56. The Defendant submitted that the suit land was transferred to him by his mother freely and without any coercion, his mother having been

the registered proprietor of the said suit land.

57. The defendant took issue with the jurisdiction of this court to hear this matter. In their submission, they stated that the original land having been registered to the deceased Kamau Kamuya who was the father to the parties herein, the Plaintiffs herein being his children, now lay claim to beneficial interest in the property of their late father.

58. That the net intestate of the deceased's estate was inherited by the deceased's 1st wife Herenah Wairimu Kamau and any challenge in the distribution of the land can only be done in a succession cause and not through an independent action. That this matter therefore falls under the probate and administration division and not the Environment and Land Court as was held in the case of **PLR vs JNR & Another [2013] eKLR**.

59. The defendant further submitted that the administration of the estate of Kamau Kamuya was concluded in Succession Cause No. 51 of 1971 where his estate was bequeathed to Herenah Wairimu Kamau and therefore this court cannot purport to sit on appeal on the orders of the Succession Cause No. 51 of 1971. Reliance was placed on the case of **Isaiah Gichimu Waweru vs Elijah Nganga Waweru [2015] eKLR**.

60. The defendant further submitted that the suit land was not transferred to the party's mother through a succession cause, but that the original land being Plot 17 Upper Gilgil Nyandarua had been wholly bequeathed to Herenah Wairimu Kamau through the Succession Cause No. 51 of 1971. That there were no other heirs, guardians or trustees appointed thereon under paragraph 'G' of the said certificate of Succession. The parties herein therefore had no legal right to the estate of the deceased Kamau Kamuya.

61. The Defendant's position was that a portion of parcel No. 17 Upper Gilgil Nyandarua was transferred to the party's mother by Herenah Wairimu Kamau. That subsequently that portion measuring 12.95 hectares was registered as Nyandarua/Upper Gilgil/389 in the name of Lydia Wanjiru Kamau (deceased) and a title deed was issued to that effect bestowing upon the said Lydia Wanjiru (deceased) absolute proprietorship as is envisaged under Section 26 of the Land Registration Act. That they only way this title could be impeached was upon proof of fraud which had not been pleaded by the plaintiffs in the circumstance.

62. That in the instant case the Plaintiffs had failed to prove that they were beneficiaries in the estate of their late father. The mere fact that they were his children was not sufficient. That they had proved that the suit land herein did not devolve to the deceased mother (previously the 1st Defendant) from the estate of the deceased husband because the same had devolved entirely to Herena Wairimu Kamau wherein she acquired a registrable interest and not a life interest. There were also no reservations attached thereon.

63. That if the property of the late Kamau Kamuya was held in trust in any of the beneficiaries, then the same was held in trust by Herena Wairimu who was appointed as the administrator and that had Herena intended that the property she had transferred to Lydia be held in trust by the said Lydia on behalf of her children, she would have noted the adverse interest as against the Lydia's title. Reliance was placed on the case of **Ayup vs Standard Bank of SA [1963] EA 619**. It was the defendant's submission that no trust, legal or constructive has been established in respect of the parcel of land No. Nyandarua/Upper Gilgil/389 which was later sub-divide to form Nyandarua/Upper Gilgil/935 and 936.

64. This being the case, it was the defendant's submission that Lydia Wanjiru (deceased) had absolute proprietorship to the suit land No. Nyandarua/Upper Gilgil/389 and could deal with it as she pleased including sub-division of the same and transferring it to the Defendant herein. No evidence had been adduced that the Defendant herein prevailed upon their mother to transfer the suit land to him. That this suit was filed when the 1st Defendant was still alive wherein Nyandarua/Upper Gilgil/936 was not available for distribution amongst the Plaintiffs except on the deceased 1st Defendant's free will.

65. In closing, it was the Defendant's submission that the Defendant is the rightful proprietor of land No. Nyandarua/Upper Gilgil/935 and the only parcel of land now available for distribution is land No. Nyandarua/Upper Gilgil/936 upon filing of a Succession Cause.

Analysis and determination.

66. The above suit was filed on the at the Nakuru Environment and Land court on the 19th January 2015. The same parties siblings against each other. It is worth noting that their mother Lydia Wanjiru (deceased) had been enjoined in the said suit as the 1st defendant but she passed away on the 7th May 2016 during the pendency of the trial and the matter against her abated pursuant to the provisions of Order 24 rule (4) (3) of the Civil Procedure Rules.

67. The Plaintiff called one (1) witness, the 1st Plaintiff herein whereas the defence called the 2nd Defendant herein as their witness. In their plaint, the Plaintiffs sought for the following orders;

a) A declaration be issued that the 1st defendant was registered as proprietor of the original land parcel number **Nyandarua/Upper Gilgil/389** to hold in trust of her own behalf and behalf of the plaintiffs, the 2nd Defendant and the other children of Kamau Kamuya (deceased) from the deceased's second house.

b) A declaration be issued that the sub division of the said land parcel number **Nyandarua/Upper Gilgil/935** to the 2nd defendant by 1st Defendant was done in breach of the said trust and the same was and is unlawful, illegal, null and void and of no legal consequence.

c) A declaration be issued that the defendants hold land parcel No's **Nyandarua/Upper Gilgil/935 and 936** both created on subdivision of the said land parcel No. **Nyandarua/Upper Gilgil/389** in trust for the plaintiffs and the defendants and the other

children from the deceased's second house.

d) An order that the said trust be determined and the said Land Parcel Nos. **Nyandarua/Upper Gilgil/935 and 936** be sub divided and shared equally amongst the plaintiffs and the defendants and the other children from the deceased's second house.

e) Costs of this suit.

f) Any other better relief that the court may deem fit, expedient and just to grant in the circumstances of this suit.

68. I have considered the pleadings, the oral evidence tendered in court, the law as well as the authorities herein filed. I find that the matters that are not disputed in this suit as being:

- i. That the Plaintiffs and the Defendant herein are siblings and the children of Kamau Kamuya and Lydia Wanjiru, both deceased.
- ii. That their father Kamau Kamuya (deceased) was the proprietor of parcel of land No. 17 Upper Gilgil Nyandarua having been allocated the same in 1963.
- iii. That the said Kamau Kamuya had two wives namely Herenah Wairimu Kamau and Lydia Wanjiru Kamau, the second wife and mother to the parties herein.
- iv. That the said Kamau Kamuya died on 9th August 1969 intestate wherein vide District Magistrate's Court, at Thompson Falls (Nyahururu) Succession Cause No. 51 of 1971 Herenah Wairimu Kamau was appointed as the heir Administrator of the Kamau Kamuya's Estate.
- v. That land No. 17 Upper Gilgil Nyandarua was subsequently registered as Nyandarua/Upper Gilgil/17 in the name of Herenah Wairimu Kamau.
- vi. That in 1966, Herenah Wairimu Kamau subsequently divided this parcel of land between the two houses of Kamau Kamuya wherein Lydiah Wanjiru Kamau was registered as the proprietor of Nyandarua/Upper Gilgil/389 measuring 12.95 Hectares (32 acres).
- vii. That in the year 2011 Lydiah Wanjiru Kamau sub-divided Parcel No. Nyandarua/Upper Gilgil/389 into two resulting into land parcel No. Nyandarua/Upper Gilgil/935 measuring 28 acres which she registered in the name of the 2nd Defendant, Peter Gichuki wherein she registered the second land, No Nyandarua/Upper Gilgil /936 measuring about 3 acres in her name.

69. I find the matters for determination however as being;

- i. Whether this court has jurisdiction to hear this matter.
- ii. Whether the 1st Defendant (deceased) was registered as an absolute proprietor of land, No Nyandarua/Upper Gilgil /389 or whether she held land, No Nyandarua/Upper Gilgil /389 in trust on her own behalf and on behalf of the children of the second house of Kamau Kamuya.
- iii. Whether the 2nd Defendant holds land, No Nyandarua/Upper Gilgil /935 in trust for himself and on behalf of the Plaintiffs and whether the Plaintiffs are entitled to a share in land parcel No Nyandarua/Upper Gilgil /935.

70. On the first issue for determination, it is important to state at the outset that the present matter does not relate to the administration of the estate of Kamau Kamuya Plot No. 17 Upper Gilgil Nyandarua the same having been determined via District Magistrate's Court, at Thompson Falls (Nyahururu) Succession Cause No. 51 of 1971 wherein Herenah Wairimu Kamau was appointed as the sole heir and Administrator and was subsequently registered as proprietor(absolute proprietor) of Nyandarua/Upper Gilgil/17. There was no reservations regarding the portion of land designated for the benefit of the deceased widow. There is no mention of a life interest in the grant. Herenah Wairimu thus acquired a registrable interest, not the life interest thereon.

71. Once Herenah Wairimu Kamau become the absolute proprietor of Nyandarua/Upper Gilgil/17, the same ceased to be the Estate of Kamau Kamuya thus extinguishing all rights that had vested in Kamu Kamuya thus closing the chapter on succession on the Estate of Kamau Kamuya. It would therefore be wrong to purport either directly or indirectly that this court is either sitting on appeal on the orders of the District Magistrate's Court, at Thompson Falls (Nyahururu) Succession Cause No. 51 of 1971 or on pertaining to a succession cause. The court, I find has jurisdiction to hear this matter.

72. Herenah Wairimu Kamau, having become the absolute proprietor of Nyandarua/Upper Gilgil/17 dealt with it as she deemed fit by subdividing it between the two houses of Kamau Kamuya thereby making each house become independent. Once Lydiah Wanjiru Kamau was registered as the proprietor of Nyandarua/Upper Gilgil/389, she too become the absolute proprietor of the suit land and could also deal with it as she pleased.

73. I note that these properties were registered under the repealed Registered Land Act which is now governed by The Land Act, 2012 and The Land Registration Act, 2012. Indeed the law is very clear on the position of a holder of a title deed in respect of land. Section 26(1) of the Land Registration Act provides as follows:

“the Certificate of Title issued by the Registrar upon registration, 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 the 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*

b. *Where the Certificate of Title has been acquired illegally un-procedurally or through a corrupt scheme*

74. As may be observed, the law is extremely protective of title and provides only two instances for the challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired illegally, un-procedurally or through a corrupt scheme.

75. In the instance case, none of the two scenarios have been pleaded. Further I find that the root of title pertaining to land parcel No. Nyandarua/Upper Gilgil/389 has been sufficiently established and that the 1st Defendant (deceased) Lydiah Wanjiru Kamau, was registered as an absolute proprietor of land, No Nyandarua/Upper Gilgil /389.

76. Having found that the father of the parties, Kamau Kamuya (deceased) was the proprietor of parcel of land No. 17 Upper Gilgil Nyandarua having been allocated the same in 1963 by the settlement Fund trustees, that upon his demise, the land was registered in the name of his first wife Herenah Wairimu Kamau as Nyandarua/Upper Gilgil/17 who subsequently subdivided the same into two and registered land parcel No. Nyandarua/Upper Gilgil /389 in the name of the 1st Defendant (deceased) Lydiah Wanjiru Kamau, who then subdivided the same further and registered land parcel No. Nyandarua/Upper Gilgil /935 in the name of the 2nd Defendant. The issue here is whether Lydiah Wanjiru Kamau (deceased) held the said land No. Nyandarua/Upper Gilgil /389 in trust on her own behalf and on behalf of the children of the second house of Kamau Kamuya.

77. From the evidence adduced in court, the same is clear that the suit land was given to the 1st Respondent by her co-wife, land which had formed part of their husband’s land. In so sub-dividing part of the land and giving it to the 1st defendant (deceased) part of the said land, Herenah Wairimu Kamau had recognized that the land was family land to be held in trust for the family of their husband the late Kamau Kamuya. At the time the 1st Defendant (deceased) obtained registration to the said parcel of land No Nyandarua/Upper Gilgil /389, this piece of land was being utilized by the whole family wherein they lived therein and used it to farm. It was further the testimony of PW1 that she, her sisters Margaret and Miriam plus their brother, 2nd Defendant had built on the land but after the land was sub-divided, their brother Peter Gichuki, asked them, not to continue farming and cultivating thereon and even went ahead to uproot the vegetation planted therein, a matter she reported to the police. It was therefore the Plaintiffs’ expectation that such possession and occupation of part of the registered land taken together with the fact that they were children to the deceased gave rise to a trust which is capable of protection under the law.

78. Khamoni J. in the case of **Joseph Githinji Gathiba v Charles Kingori Gathiba [2001] eKLR** stated:

“The position as I see it is therefore as follows: Correctly and properly, the registration of land under the Registered Land Act extinguishes customary land rights and rights under customary law are not overriding interest under section 30 of the Registered Land Act. But since the same registration recognizes trusts in general terms as is done in the proviso to section 28 and section 126 (1) of the Registered Land Act without specifically excluding trusts originating from customary law and since African Customary Laws in Kenya, generally, have the concept or notion of a trust inherent in them where a person holding a piece of land in a fiduciary capacity under any of the customary laws has the piece of land registered in his name under the Registered Land Act with the relevant instrument of an acquisition, either describing him or not describing him by the fiduciary capacity, that registration signifies recognition, by the Registered Land Act of the consequent trust with the legal effect of transforming the trust from customary law to the provisions of the Registered Land Act because, according to the proviso to section 28 of the Registered Land Act such registration does not “relieve a proprietor from any duty or obligation to which he is subject as a trustee”.

79. This statement by Khamoni,J. was approved by the court of Appeal in the case of Mukangu –vs- Mbui, KLR (E&L)1,622 where the court stated as follows:-

“We have also examined other authorities and we think it cannot be argued too strongly that the proper view of the qualification or proviso to Section 28 is that trusts arising from customary law claims are not excluded in the proviso. Such claims may stem from the possession and occupation of part of the Registered land which although strictly it may not be an overriding interest under Section 30(g), it nevertheless gives rise to a trust which is capable of protection under the Act”.

79. In this case the court held that a trust arose in favour of a son from the son’s possession and occupation of his father’s land which trust was protected under Sections 28 and 30(g) of the Registered Land Act, Cap. 300 (now repealed).

80. From the above case it is clear that Customary trust was recognized as part of the trusts stated under the repealed Land Registration Act section 27, 28 and 30(g) under which the suit land was registered. The fact that the word trust was not denoted on the title does not relieve the registered owner from any obligation as a trustee under Kikuyu custom to which the parties subscribe to.

81. In the case of **Salesio M’Itonga Vs M’Ithara & 3 Others (2015) eKLR**, the Court of Appeal stated that trust is a question of fact and has to be proved by evidence. In this case the Plaintiffs led evidence which was admitted by the Defendant that the suit land which was inherited by their mother the 1st defendant (deceased) had formed part of land which their deceased father had been allocated and therefore it would follow that the suit land was both ancestral and trust land.

82. In its judgment dated the 5th Day of October, 2018, The Supreme Court, in **Isack M'inanga Kiebia v Isaaya Theuri M'lintari & another [2018] eKLR** held as follows:

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:*

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

*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.

What are we to make of these changes? Several interpretations are plausible. 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

83. I find that the **Plaintiffs herein have established a valid claim to the suit property based on customary trust** and are entitled to the remedies sought. Judgment is entered for the Plaintiffs in the following terms.

- i. I find that** the suit land being Nyandarua/Upper Gilgil/389 was registered in the name of Lydiah Wanjiru Kamau(deceased) to hold in trust for her own behalf and on behalf of the second house of Kamau Kamuya.
- ii.** I also find that the subsequent subdivision of Nyandarua/Upper Gilgil/389 and subsequent registration of parcels No. Nyandarua/Upper Gilgil/935 in the 2nd Defendant's name, as well and parcel No. Nyandarua/Upper Gilgil/936 in the name of Lydiah Wanjiru Kamau (deceased) are also held in trust for all the children from the second house of Kamau Kamuya.
- iii.** This being the case, the caution registered on the title No. Nyandarua/Upper Gilgil/935 be and is hereby removed and Nyandarua/Upper Gilgil/935 be subdivided and shared equally amongst the Plaintiffs, the 2nd Defendant, and other children from the deceased's (Kamau Kamuya) second house.
- iv.** That Nyandarua/Upper Gilgil/936 shall be dealt with in a Succession Cause.
- v.** Parties being related I make no orders as to costs.

It is so ordered.

Dated and delivered at Nyahururu this 29th day of October 2018.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE