



**Mugambi (Legal Representative of the Estate of Geoffrey Mugambi Nkanata - Deceased) v Jacks & 8 others (Environment and Land Appeal E045 of 2023) [2024] KEELC 3800 (KLR) (8 May 2024) (Judgment)**

Neutral citation: [2024] KEELC 3800 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT AND LAND APPEAL E045 OF 2023**

**CK NZILI, J  
MAY 8, 2024**

**BETWEEN**

**SILVIA MUGAMBI (LEGAL REPRESENTATIVE OF THE ESTATE OF GEOFFREY MUGAMBI NKANATA - DECEASED) ..... APPELLANT**

**AND**

**ROBERT KAARIA JACKS ..... 1<sup>ST</sup> RESPONDENT**  
**WYCLIFF RIUNGU M'ARITHI ..... 2<sup>ND</sup> RESPONDENT**  
**BONFACE M'NKANATA ..... 3<sup>RD</sup> RESPONDENT**  
**KENNETH M'NKANATA ..... 4<sup>TH</sup> RESPONDENT**  
**LYDIA KAIMURI M'ARITHI ..... 5<sup>TH</sup> RESPONDENT**  
**FRED M'MURITHI ..... 6<sup>TH</sup> RESPONDENT**  
**ANN KAGURE ..... 7<sup>TH</sup> RESPONDENT**  
**SUSAN KAWIRA ..... 8<sup>TH</sup> RESPONDENT**  
**ROSALID NGETA ..... 9<sup>TH</sup> RESPONDENT**

*(Being an appeal from the Judgment of Hon. E.M Ayuka – PM delivered on 19.10.2023 at Nkubu in PMC ELC No. 80 of 2018)*

**JUDGMENT**

1. The deceased, who was the defendant at the lower court, had been sued by the respondents as the plaintiffs, who are his brothers and sisters, from a breach of trust over L.R No. Abogeta/Lower



- Kiungone/1124, initially gathered and owned by their late father M'Arithi Nkanata as L.R No. Abogeta/Lower Kiungone/282 alongside L.R No. Abogeta/L. Kiungone/283.
2. It was averred that the deceased, as the eldest son, was nominated to be registered as the proprietor of the land at a tender age for and on behalf of their late father and his entire family. The respondent prayed for a declaration that the deceased held the land in trust for them which is liable to be shared equally and be registered in their joint names.
  3. The deceased had opposed the claim through an amended statement of defense and counterclaim dated 24.2.2020. He denied the alleged trust or its breach thereof. By way of a counterclaim, he averred that he solely gathered the land in the 1960s during the adjudication process, and no objection was raised against his parcel until it was subsequently registered under his name in 1966, as to which he obtained a title deed as an absolute proprietor.
  4. The deceased had averred that he had licensed his late father to use the land during his lifetime which terminated upon his death. It was averred that in the exercise of his ownership rights, subdivided the land into two portions and disposed of half an acre of his land to a third party, hence retaining the other balance of L.R No. Abogeta/Upper Kiungone/1124, to which the 1<sup>st</sup> and 2<sup>nd</sup> defendants to the counterclaim had trespassed and have adamantly refused to vacate. He prayed by way of a counterclaim for a declaration that the suit land is absolutely his with no attendant intended trust, eviction of the two intruders, and a permanent injunction restraining any interference by the defendants.
  5. The counterclaim had no titular heading. The court also has been unable to trace any filing fee receipt for the four reliefs in the counterclaim. Be that as it may, the respondents filed a reply to the defense and defense to the counterclaim dated 16.6.2020, reiterating the contents of their plaint and terming the defense as not disclosing any triable issues.
  6. The respondents denied any alleged gathering of the initial land by the appellant as alleged or at all in the counterclaim since he was still a minor at the time of the adjudication in the 1960s. Further, the respondents averred that the appellant did not have absolute rights of ownership over the land, for the sale agreement dated 3.9.2007, listed him as a mere witness thereof. The respondents termed the reliefs sought in the counterclaim as untenable and lacking merits.
  7. Following the death of the initial defendant, Geoffrey Mugambi Nkanata, Sylvia Mugambi, pursuant to a limited grant ad litem dated 24.9.2020 was granted leave to replace him following a notice of motion dated 19.10.2020.
  8. Following interlocutory applications and compliance with Order 11 Civil of the Procedure Rules, the hearing of the suit commenced on 25.2.2021 with Robert Kaaria Jackson testifying as PW 1. He adopted his two witness statements dated 1.10.2019 and 25.2.2020 as his evidence in chief.
  9. Briefly, he told the court that his late father, M'Arithi Nkanata, had two houses, the first house of Eunice Kajau with eight children, while the second house of Elizabeth Mbuthia had nine children. He said that his late father's parcels of the land were L.R No. Abogeta/Lower Kiringa/165 and 507 and Plot No. 23 Kanyakine. PW 1 said that the rest of the parcels of land were recorded in the name of their deceased father except the suit land. He said L.R No. 1124 was carved out of L.R No. 282 after the appellant was authorized to satisfy an agreement dated 3.9.2007 by their late father.
  10. PW 1 said that his late father allocated portions of L.R No. 282 to his children between 1976 and 1990, namely; himself, Wycliff Riungu, Boniface Mbaabu, and the appellant; who have been cultivating the land. He said that in September 2018, the appellant subdivided the land into two portions, namely Parcel L.R No's. 1580 and 1581, which they objected to, following which the land registrar had to cancel the resultant subdivisions.



11. Therefore, PW 1 told the court that the appellant was registered as the eldest son to hold the land in trust for them. PW 1 said that the elder son belonged to the first house, and therefore, customarily, he could not possibly deny the other children their rightful share of the land. He said that his late father gathered some of his lands through inheritance in Kaguruta, Mathanjui, Gaturumbari, Mbuti, and Kiurone areas. In contrast, the parcels of land in Kethangu, Gaitune, Mutuatine Kwa Kinyiru, Kathithire, Maraa and Cionkondi areas were purchased by him.
12. Regarding how L.R No. 282 came under the appellant's name, PW 1 told the court that by 1959, their late father had established a homestead for his second wife on the ancestral land at Mbuti while he had a coffee plantation at Mutuatine. Therefore, due to advice by land adjudication officials that he would duly have his land on one side of the road, Kairiria Road, pursuant to land consolidation patterns and could not have separate parcels registered under his name, the deceased opted to register one of the parcels under the name of a family member to hold in trust for him and the rest after paying all the requisite registration fees.
13. PW 1 told the court that his late father had shown all his sons where to build their homesteads on L.R No. 239, including the appellant; otherwise, if the elder brother had gathered the suit land, he would have erected his homestead therein. Further, PW 1 told the court that in 1977, his late father apportioned 250 coffee tree stumps to Robert Kaaria in 1980, some to Wycliff Riungu, others in 1985 to Boniface Mbaabu and others to the appellant, all out of L.R No. 282 without any objection from the elder son.
14. Again, PW 1 said that in 2008, his late father sliced  $\frac{1}{2}$  an acre of L.R No. 282 and gave it to Kenneth Muriungi to sort out some financial problems and that he told the elder son to sign a sale agreement and the transfer in favor of Woodward Gitobu, the ultimate buyer. Further, PW 1 told the court that before the bonafide owner passed on in 2013, he convened about seven meetings attended by all his six sons to explain how he acquired his land, L.R No. 282 included, and how he wished the parcels to be shared out equally which minutes were captured in an A4 black cover book by the eldest son as the secretary.
15. PW 1 told the court that immediately before his father passed on, it was he who approved the (KPLC) way leave on the suit land. Therefore, PW 1 told the court that since his late father had divided L.R No. 282 into two portions where his two wives had been carrying out farming activities through their son, it was dishonest and mischievous for the eldest son to turn around and deny obvious facts after the demise of their late father in 2013, with a view of pushing them out of the land. PW 1 relied on a copy of records for L.R No. 282 and an agreement dated 3.9.2007 as P. Exh No. (1) & (2).
16. In cross-examination, PW 1 told the court that he was the third born in the first house in 1951. He was emphatic that his brother was nominated to hold the land in trust in 1966, which is separated by a road from Parcel L.R No. 239, where his late father's homestead was. PW 1 told the court they filed the suit on their behalf and that of the estate of the late father, following a demand letter to them dated 23.8.2018 to vacate the land. He said that all his brothers resided on L.R No. 239 registered under the late father's name.
17. PW1 insisted the 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> respondents were all given coffee farms on L.R No. 282 by their late father in 1977, 1980, and 1985, respectively, and all of them had coffee factory registration numbers. He said the whole of L.R No. 282 was a coffee plantation, and none of the parties had built on the land. PW 1 said the suit was filed six years after the death of their father since they used to amicably co-exist together as a family until the appellant ordered them out of the land.



18. Evans Gitonga Muriuki testified as PW 2. He told the court that one Woodward Gitobu instructed him to witness a land sale agreement he intended to buy from the 4<sup>th</sup> respondent, measuring one acre out of L.R No. 282 and belonging to the appellant as a trustee. He told the court that he met all the family members, and after explaining how the issue could be handled, he reduced the agreement to writing. He produced the original handwritten agreement as D. Exh No. (3), which captured the beneficial interests of the seller.
19. PW 2 said that the meeting took place at the appellant's home in the presence of Elizabeth M'Arithi, the mother of the seller. PW 2 said the sale agreement was witnessed by Jackson M'Arithi, his wife, the appellant, his wife, Silvia Mugambi, and Julia Kaaria, wife to the 1<sup>st</sup> respondent, in the presence of other family members. PW 2 said the sale agreement was eventually consummated with the ½ an acre being hived off the initial L.R No. 282 to create L.R No. 1123 in favor of the purchaser one Gitobu.
20. In cross-examination, PW 2 told the court that the entire land was about 3-5 acres, that the appellant did not object to the sale, and that he was the one to facilitate the land control board consent and the transfer.
21. PW 2 said that from the meeting and its deliberations, it came out clearly that the title holder was holding the land in trust for the family since the patriarch and the matriarch were all there as the land initially belonged to the Jackson M'Arithi. In re-examination, PW 2 said the beneficial interests were meant to flow from the trust land held by the registered owner of the land, and therefore, it was unnecessary to capture the information that the elder son held the land in trust. He said it was a happy family meeting who voluntarily and willingly executed the sale agreement, and eventually, the title holder adhered to clause number 4 by facilitating a land control board consent since it was agricultural land.
22. Silvia Mugambi, the wife of the deceased initial defendant, testified as DW 1 and adopted her witness statement dated 12.7.2022 as her evidence in chief. She said that she was married to the family on 12.8.1978 and that all the sons of her father-in-law had built homes on L.R No. 239, which Jackson M'Arithi owns, and that none have built on L.R No. 282 where his late father-in-law had a coffee plantation.
23. Moreso DW 1 said that the land was registered in the name of her late husband, who bought it while working in Mombasa as an adult. She denied that it was registered under his name as a minor or that it was family land, she denied signing P. Exh No. (3), even though the signature of her husband was visible. DW 1 also denied that her husband authorized the 4<sup>th</sup> respondent to sell his land to bail him out of some loan obligations other than a boundary dispute. D.W. 1 said her late husband had no other case with her deceased father-in-law and that it was only after he passed on that the respondents demanded a share of the land.
24. Again, DW 1 said that if the land belonged to her late father-in-law he could have subdivided it before he passed on among the respondents. Her evidence was that the deceased husband acquired the land from his uncle Festus. She relied on Registry Index Map Sheets No. 8912 and 13 for Abogeta Lower Kiungone area, bond bail for Nyahururu Cr. No. 1184/2010, demand letter dated 23.8.2018, letter dated 23.10.2018, green card for L.R No. 282 and 1124 and a ruling in Meru H.C Civil Application No. 93 of 2000 as D. Exh No. 1-7, respectively.
25. In cross-examination, DW 1 told the court her late husband was born in 1949 and passed on at the age of 71. She said he was registered as the owner of the land at the age of 17 years since he was already working in Mombasa with the Ministry of Commerce.



26. DW 1 said that her late husband was capable of buying the land. She denied that her father-in-law was the one who had gathered and registered the land in the name of her late husband between 1959 and 1967. Further, DW 1 said her deceased husband was shown where to erect his house by their late father-in-law in 1980 on L.R No. 239 and that he did not need to build a house on L.R No. 282.
27. DW 1 said that she was desirous to have the respondents evicted from L.R No. 282. Asked when they entered the land, DW 1 could not remember but admitted that her late husband had never before this suit, other than the demand letter for eviction. She, however, admitted that her late father-in-law used to utilize the land before he passed on, even though he never raised any ownership claim over it. D.W. 1 said she was not aware if it was the late father-in-law or someone else who showed the respondents the specific portions of L.R No. 282 to cultivate between 1976 and 1990. She denied knowledge of the alleged trust.
28. Asked about the signature appearing on P. Exh No. (3) and its similarity with the one in the application to substitute her deceased husband in this suit, DW 1 confirmed that her late husband sold ½ an acre of his land to the 4<sup>th</sup> respondent, as captured in paragraph 16 of the counterclaim. She, however, could not recall whether she witnessed any sale agreement over the land. DW 1, however, claimed that her deceased husband attended the land control board for consent to transfer the land to the 4<sup>th</sup> respondent. She said her late husband eventually signed both the transfer and the mutation forms. Similarly, DW 1 admitted that the respondents have all been cultivating coffee farms belonging to her late father-in-law on L.R No. 282, which her late husband had demanded that they vacate. However, DW1 denied being a signatory to P. Exh No. (3) or her late husband authorizing the 4<sup>th</sup> respondent to sell his land. She, however, admitted accompanying her late husband in the land control board meeting. With this evidence, the trial court delivered its judgment on 19.10.2023, now appealed against before this court.
29. The appellants have raised eleven grounds of appeal. The trial court is faulted for finding existence of a trust, for finding that some respondents had been allocated portions of the suit land yet no such evidence was available, for finding the suit land as acquired by the deceased from an uncle; for relying on unproven rule/regulation of land adjudication that one could not own two pieces of land in one unit; for holding the suit land as ancestral or family without any evidence from the respondents for dismissing the counterclaim yet it was supported by cogent evidence; for failing to find ancestral or family land was not pleaded or supported by evidence yet parties are bound by their pleadings for sidestepping the clear evidence that the parties father owned six other pieces of land in the same area and find an answer why then he did not register this one under his name for relying on hearsay evidence of PW 1, who was a minor during the gathering adjudication and registration stages who did not have first-hand information; for failing to find that the 4<sup>th</sup> respondent had no proprietary interest to sell the suit land and that nemo dat quid no habet maxims applied and lastly for not finding that the 2<sup>nd</sup> – 9<sup>th</sup> respondents had not sworn verifying affidavit to the plaint or give a consent or authority to sue and testify to PW 1.
30. With leave of court parties were directed to canvass this appeal by way of written submissions. The appellants relied on written submissions dated 19.4.2024 while the respondents relied on ones dated 20.4.2024.
31. Relying on Mbui vs Maranya (1993) KLR 726 and Meru ELC No. E04 of 2021 M'Arimi Marete vs Gikunda M'Arithi and the appellant submitted that the evidence of the respondents did not meet the threshold to find a claim on customary trust. Francis Murithi Rutere (suing as the administrator of the estate of M'Rutere M'Munyange alias Munyungi (deceased) vs Julius Mutwiri Njuki & another (2017) eKLR citing with approval Njenga Kimani & 2 others vs Kimani Ng'ang'a (2017) eKLR, Mbui vs Maranya (supra) and Alice Wairimu Macharia vs Kirigo P. Macharia (2019) eKLR. The respondents on



- the other hand set out two issues for determination. On whether the appeal has merits, it was submitted that the rights of a registered property owner are set out under Section 27 of the Registered [Land Act](#) as well as sections 24 & 25 of the [Land Registration Act](#), 2012. Reliance was placed on Isaack Kiebia M’Inanga vs Isaaya Theuri M’Lintari & another (2018) eKLR citing with approval Kiarie vs Kinuthia (2012) eKLR.
32. The role of an appellate court of the first instance is to carefully scrutinize the lower court record independently and arrive at findings on facts and the law while giving credit to the court below, which had the benefit of seeing and hearing the witnesses firsthand. See Abok James Odera t/a A.J Odera & Associates vs John Patrick Machira t/a Machira & co. advocates (2000) eKLR, Selle & another vs Associated Motor Boat Company Ltd (1965) E.A 123 and Gitobu Imanyara & others vs A.G. & others (2013) eKLR.
  33. The issues calling for determination after reviewing the grounds of appeal, lower court record, pleadings, evidence tendered written submissions, and the law are:
    - i. If there were competent pleadings by the parties before the trial court.
    - ii. If the respondents pleaded and proved the existence of a trust, breach thereof, and entitlement to equal share of the suit land with the elder brother.
    - iii. If the deceased had pleaded and proved that he was the exclusive gatherer, acquired for value, and was the exclusive owner, occupier, and user of the L.R No. 282.
    - iv. If the deceased rebutted a presumption of the existence of a trust in the manner he acquired, registered, utilized, licensed, or allowed his late father-in-law and brothers to use, deal with, and or utilize the land.
    - v. When and under what terms did the deceased allow his late father and brothers to enter into use, develop, access farm produce, and deal with the suit land?
    - vi. What was the effect of not amending the plaint and the amended defense and counterclaim after the initial defendant passed on?
    - vii. If the appeal has merits.
  34. The primary pleadings before the trial court were the plaint dated 1.10.2019, the amended defense and counterclaim dated 24.2.2020, and the reply to the defense and defense to the counterclaim dated 10.6.2020.
  35. Through an order dated 29.10.2020 the appellant was allowed to substitute the deceased as defendant at the lower court. It appears the pleadings were not amended to capture the new defendants till the decree was issued on 26.1.2024. The name of the appellant appeared for the first time in the memorandum of appeal dated 17.11.2023. Other than filing a witness statement dated 12.7.2022 and a further supplementary list of witnesses dated 16.8.2022, there is no evidence that the appellant signed any affidavits to verify the amended defense and counterclaim dated 24.2.2020.
  36. A counterclaim is a stand-alone suit that must have a titular heading capturing the plaintiffs and the defendants of the counterclaim. The purpose of substitution is to step into the shoes of the late litigant, where the action survives. There was a need, in my view, for the appellant to formally join the defense and counterclaim within 14 days after the order was made. A dead person could not continue to appear in the pleadings as the defendant. Section 2 of the Civil Procedure Rules, as read together with Order



- 24 of the [Civil Procedure Act](#) and Sections 54 & 82 of the [Law of Succession Act](#), had to be adhered to since the estate of the deceased defendant devolved to the appellant as legal representative.
37. The appellants never signed the verifying affidavit to the counterclaim as the legal representative. The limited grant ad litem was also not produced as part of the appellant's evidence at the lower court and before this court. The capacity to sue is critical. It has to be pleaded by the parties. There was the need for the appellant to comply with Order 4 Rule (1), (2) and Order 7 Rule (5) (a) of the Civil Procedure Rules, which are in mandatory terms. The witness statement dated 12.7.2022 could not replace or amount to a substitution.
38. Regarding the plaint, Order 4 Rule (1) (3) of the Civil Procedure Rules provides that where there are several plaintiffs, one of them with written authority may sign the verifying affidavit on behalf of the others. The plaint dated 1.10.2019 was accompanied by a verifying affidavit signed by the 1<sup>st</sup> respondent. It was silent on the rest of the respondents. It was not accompanied by an authority to sue, plead, and or act for the rest of the respondents yet, the suit sought for substantive relief on their behalf. Whereas there is no requirement in law for all the witnesses or parties to testify, a party who is seeking relief beyond himself must have the legal authority to plead, act, and represent his co-plaintiffs.
39. The supplementary witness statements dated 16.8.2022 only included the 4<sup>th</sup> respondent as one of the witnesses 2<sup>nd</sup>, 3<sup>rd</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup> & 9<sup>th</sup> respondents did not sign and the witness statements alluding to authorizing the 1<sup>st</sup> respondents to sue, plead, or act on their behalf. The authority to plead was also not included in the 1<sup>st</sup> respondent's affidavit dated 16.8.2022 where he had sought leave to file additional witness statements.
40. The above notwithstanding, the appellant & filed a replying affidavit sworn on 24.8.2022. In that affidavit, he did not dispute the capacity of the 1<sup>st</sup> respondent or whether he was authorized by the rest of the respondents to conduct the suit on their behalf of them being conversant with the issue of the matter.
41. The law is that pleadings may be amended at any stage of the proceedings on such terms as are just to identify the real matters in controversy and to ensure that substantive justice is achieved as required under Article 159 of [the Constitution](#). The court does so in order to ensure that there will be no injustice to the other side, to cure a defect in the pleadings and to bring all the matters in controversy before the court to effectually determine the matter so as to avoid a multiplicity of suits.
42. Both the appellant and the respondents were allowed to amend their respective pleadings after the initial defendant passed on. The order for substitution was made by consent. The appellant proceeded to testify even without verifying the initial defense and counterclaim or producing the limited letters of administration ad litem. Similarly, the 1<sup>st</sup> respondent continued to represent the rest of the respondents. Even though the respective pleadings were defective, the defects were not fatal. Parties were able to present their respective evidence before the trial court. Therefore, I find no prejudice or error apparent on the face of the record, which went to the very core of the proceedings so as to render the process and the outcome fatal. Ground number 11 of the memorandum of appeal is as a result of this dismissal.
43. Trust is a fiduciary relationship in which a settler gives another party, known as the trustee, the right to hold title to property or assets for the benefit of a third-party beneficiary. Trusts in Kenya are governed by [the Constitution](#), the [Land Registration Act](#), the [Land Act](#), the Trustees Act, the [Trusts of Land Act](#), the [Income Tax Act](#), the [Tax Procedures Act](#), and the Civil Procedure Rules.
44. In *Twalib Hatayan & another vs. said Saggar Ahmed Al-Heidy & 5 others* (2015) eKLR, the respondents as trustees approached the appellants for funding towards the purchase of some land on



the understanding that the land would be utilized by putting up a mosque, a social hall and madrassa for use by the local muslim community. Some money was released towards the endeavor, and the land was purchased and registered in the name of the trust. All was well until the respondents sought to sell the suit premises to a third party for mining operations. Things turned upside down when the appellants realized they had been misled all along and sought to recover the land and for a declaration that the registration of the land in the name of the Muslim women's center was illegal, void, and null, or in the alternative the land belongs to them, for an injunction to prevent any adverse dealing with the law. The respondents denied the claim saying that they had not made such representation to the appellant or ever obtaining support thereof agreeing on the nature of the trust and its use. The trial court dismissed the suit. On appeal, at issue was whether a trust of whichever description arose between the parties and whether or not once gift is donated is capable of being recalled.

45. Explaining what a trust is, the court cited Black's Law Dictionary 9<sup>th</sup> Edition that a trust was a right enforceable, solely in equity, to the beneficial enjoyment of the property to which another holds legal title, a property interest held by one person (trustee) at the request of another (settlor) for the benefit of a third party (beneficiary). The court said that under the *trustee act*, the expression "trustee" and "trustee" extend to implied and constructive trust and cases where the trustee has a beneficial interest in the trust property.
46. Further, the court said that trusts are created either expressly by parties or by operation of law, the latter falling into two categories: constructive and resulting trusts. The court went on to define constructive trust as one imposed by a court against one who acquires property by wrongdoing or a trustee who takes advantage of his position for his benefit notwithstanding to guard against unjust enrichment.
47. As to resulting trusts, the court said it was a remedy imposed by equity where the property is transferred in circumstances that the transferor did not intend to confer a beneficial interest upon the transferee. In this sense, the court said it would look into the circumstances of the case and presume or infer the transferor's intention.
48. Trust is a matter of fact to be proved through evidence. In *Mumo vs Makau* (2002) E.A 170, the court said trust is proved through evidence. In *Elijah Njeru Mugo & another vs. Njiru Samuel M'Rwingo* (2014) eKLR. Both parties were the children of the late Samuel Ibrahim and the owner of ancestral land that he had wanted to subdivide among them upon his death equally. The defendant fraudulently transferred the whole land through succession to himself in breach of the trust. The court cited Section 25 of the *Land Registration Act* 2012 that registration per se does not relieve a proprietor from any duties or obligations to which he is subject as a trustee.
49. In this appeal, the respondents pleaded and testified on the circumstances before leading to and after the registration of the suit land in the name of their elder brother as pointing to trust in favour of their deceased father and themselves. In his evidence, PW 1 laid bare the family history and how their late father gathered several parcels of land, settled on one, and registered the suit land under the name of his eldest son while still a minor due to the existing policy or rule on land consolidation, and because the land was adjacent to his residential home. Further, PW 1 led evidence to show that his late father was the one who singlehandedly planted coffee trees therein and how, over the period between 1976 and 1990, he gave and showed each of his six sons a portion of the suit land to cultivate, till, and care for the coffee trees therein for their benefit.
50. Additionally, evidence by PW 1 showed how the 4<sup>th</sup> respondent sold part of the suit land as L.R No. 1213 and eventually, how the remainder of the land became L.R No. 1124 without any objection from the appellant's late husband. PW 2 corroborated the said evidence and produced P. Exh No. (3).



51. Among the Ameru people, it is common for a patriarch to share land based on "houses." It is also not unusual for Ameru people to register land under the name of the firstborn son. See Muthuri M'Rinyuri vs Marangu M'Rinyuri & another Meru ELCA No. 19 of 2017.
52. In *Mukangu vs Mukangu Meru ELC no 88 of 2015*, this court cited Omollo vs Oduor 2022 KECA 371 KLR 18<sup>th</sup> February 2022, that evidence must be led to prove the existence of a trust. The court also cited Charles Kahende Kinuthia and Anor vs Naomi Nyabae Kamunyu (2019) eKLR that the basis of registration of the land was solely for being the firstborn son, which was recognized under Kikuyu customary law. The court held that the act of allowing the late mother and all the siblings to live and occupy the land since its registration pointed to an intention to create a trust.
53. The appellant in this suit admitted that every son of the deceased patriarch has been enjoying possessory and occupation rights over the suit land since 1976 or thereabouts with the full knowledge, consent, and approval of the late elder brother. In the process of rebutting the evidence tendered by the respondents, DW1 adopted as her evidence in chief the witness statement filed by her late husband dated 16.10.2019 and 24.2.2020, respectively.
54. DW 1 also produced the documents in the list of documents dated 24.2.2022. Her evidence was that she got married in 1978 and was therefore not privy to the manner in which L.R No. 282 was acquired, registered, and settled. She also confirmed that the respondents have been utilizing the suit land for along. According to DW 1, the respondents only started demanding the suit land after her father-in-law passed on. Asked why her late husband did not evict the respondents from the land earlier than after the death of the late father-in-law, DW 1 said she did not know how, when, and who had authorized the respondents to occupy the land in the first instance. She said, however, that it was only after the respondents started demanding a share of the land that her late husband issued a notice that they vacate his land.
55. Even though D.W. 1 insisted that her late husband was 17 years old when the suit land was registered under his name, she did not call any evidence to substantiate the claims by her deceased husband in his witness statements that he solely acquired the land from his uncle one Festus Kithinji, that was distinct from what his late father had gathered as L.R No. 239.
56. Regarding P. Exh No. (3), the appellants denied its contents the same way her late husband had termed it strange. Unfortunately, the document was not subjected to any forensic examination during the lifetime of the late Geoffrey Mugambi Nkanata or soon thereafter that. Given the evidence of PW 2, my finding is that the appellant and her late husband were signatories to the sale agreement. Consequently, I find no merits in ground number 10 of the memorandum of appeal.
57. In *Arvind Shah and others vs. Mombasa Brick & tiles Ltd & others S.C.K Petition No. 18 (E020) of 2022*, the court said under the (Cap 167), trust and trustee extend to implied and constructive trust and that a constructive trust is an equitable instruction that serves to prevent unjust enrichment. The court cited *Sovlos vs Korkontzilas (1997) 2 SCR 217* in Canada that constructive trusts remedy unjust enrichment and corresponding deprivation by a wrongdoer who, in good conscience, should not be permitted to retain it. Additionally, the court cited U.S Supreme Court in *Harris JR & Sav Bank vs Solomon Smith Barney Inc 530 U.S 238, 250 – 51 (2000)*, which cited *Moore vs Crawford 130 U.S 122, 128 (1889)* that whenever a legal title to property is obtained through means or under unconscientious for the holder of legal title to retain and enjoy the beneficial interests equity impresses a constructive trust on the property thus acquired in favor of the one who is genuinely and equitably entitled to the same. The court held vide section 3(1) of the *Judicature Act* that the doctrines of equity were applicable, including implied, resulting, and constructive trusts as held in *Kiebia vs M'Lintari &*



another (2018) eKLR, Twalib Haatayan & another, Macharia Mwangi Maina & 81 others vs Davidson Mwangi Kagiri (2014) eKLR and Willy Kimutai Kitilit vs Michael Kibet (2018) eKLR.

58. Applying the preceding case law, I think the circumstances under which L.R No. 282 came to the name of the appellant's late husband were subject to trust. At the time, he was a minor; the manner in which he allowed not only his late father but also his siblings to plant, tender, and harvest coffee trees therein for over four decades showed that he was willing to share the land as a family land. Lastly, how his late father and mother, plus siblings, participated in the sale agreement and the eventual transfer of a portion of the land to the 4<sup>th</sup> respondent, leave no doubt in my mind that the deceased's title was subject to overriding interests in the nature of both resultant and constructive trust, in favor of his siblings.

59. The upshot is that I find the appeal lacking merits. The same is dismissed with costs.

**DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU**

**ON THIS 8<sup>TH</sup> DAY OF MAY, 2024**

**In presence of**

C.A Kananu

Mwanzia for the appellant

Miss Kerubo for the respondents

**HON. C K NZILI**

**JUDGE**

