



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KITUI**

**ELC APPEAL NO. 35 OF 2021**

**(FORMALLY MACHAKOS ELC APPEAL NO. 54 OF 2019)**

**SOLOMON MWENDWA JOSHIAH.....APPELLANT**

**-VERSUS-**

**KAVITI KALANI.....RESPONDENT**

*(Being an appeal from the judgment of the Senior Resident*

*Magistrate in Mutomo Land Case No. 5 of 2018 delivered on 12<sup>th</sup> November 2019)*

**BETWEEN**

**SOLOMON MWENDWA JOSHIAH.....APPELLANT**

**-VERSUS-**

**KAVITI KALANI.....RESPONDENT**

**JUDGEMENT**

1. The Appellant Appeals from the judgment of the Senior Resident Magistrate in Mutomo Land Case No.5 of 2018 delivered on 12<sup>th</sup> November 2019 and sets forth the following Grounds of Appeal:

**1. THAT the Learned trial Magistrate erred and misdirected herself both in law and facts by failing to find as a fact that all the way in the adjudication process there was evidence that the Respondent was adjudicated the parcel in dispute as a scion of *Peter Luku Moki*, the patriarch.**

**2. THAT the Learned Trial Magistrate erred and misdirected himself both in law and facts by failing to find as a fact that there was evidence from previous attempts to resolve the dispute that the parties had been recommended to sit and share out the disputed property amongst the three wives of the patriarch, *Peter Lutu Moki*.**

**3. THAT the Learned trial Magistrate erred and misdirected himself both in law and in facts by failing to find that the Respondent in law and in facts was married scion of *Peter Lutu Moki* and as such she could not inherit all the lands devolving from the patriarch *Peter Lutu Moki* alone to the exclusion of all others.**

**4. THAT the Learned trial Magistrate erred and misdirected himself both in law and facts by determining the question as to whether the late *Peter Lutu Moki* had shared his lands amongst his wives on a subjective approach and without any evidence to back up such a finding.**

**5. THAT the Learned Trial Magistrate erred and misdirected himself both in law and in facts by failing to find as a fact that the registration of the Respondent as the proprietor of the disputed parcel of land as a scion of *Peter Lutu Moki* was not absolute.**

**6. THAT the Learned Trial Magistrate erred and misdirected himself both in law and in facts by failing to find as a fact that there was a clear case of customary trust established in relation to the registration of the Respondent as the proprietor of the disputed parcel of land.**

**7. THAT the Learned Trial Magistrate erred and misdirected himself both in law and in facts by failing to find as a fact that there was enough evidence of the Appellant and other scion of the Late Peter Lutu Moki challenging the registration of the Respondent as the absolute proprietor of the disputed land all the way in the process of adjudication.**

**8. THAT the Learned Trial Magistrate erred and misdirected himself both in law and in facts by failing to appreciate that first registration is no bar in law for declaration of a trust and further, he erred and misdirected himself by failing to look or examine the surrounding circumstances of the registration of the Respondent in this case.**

**9. THAT the Learned Trial Magistrate further erred and misdirected himself both in law and in facts by finding without any supporting evidence that grandchildren are not entitled to inherit property belonging to their grandparents.**

**10. THAT the Learned Trial Magistrate erred and misdirected himself both in law and in facts by failing to appreciate that the parties had agreed to share the proceeds from Kenya National Highway Authorities according to the graves of their relatives in the disputed land.**

2. The Appellant prays:

**a) That the judgment of the lower court be quashed and set aside.**

**b) That judgment of the lower court be substituted with an order allowing the Appellant's case in the lower court as prayed for in the **Plaint** with costs.**

**c) That the Respondent to pay costs of this appeal.**

3. The Appeal stems from Magistrate's Court at Mutomo Land case No.5 of 2018 where the Plaintiff who is the Appellant in this case had filed a **Plaint** seeking the following orders:

a) A permanent injunction restraining the defendant whether by herself, her agents, proxies or servants from selling, encroaching, trespassing, alienating, sub-dividing, developing, possessing, occupying, using, cutting down vegetation or in any other way whatsoever dealing with the parcel of land known as Mutomo/Mwala/1124.

b) A declaration that the parcel of land known as **Mutomo/Mwala/1124** is ancestral land.

c) An order directed to Kenya National Highway Authority and the National Land Commission not to roll out the compensation payable to the Defendant pending the hearing and determination of this suit.

d) Costs of the suit and any other relief as the court deems fit.

## **Background**

4. The background to the original suit is that the Plaintiff **Solomon Mwendwa Joshiah** claimed that at all material times he was a beneficiary to the suit land known as **Mutomo/Mwala/1124**. That his grandfather, the Peter Lutu Moki (Deceased) was the original proprietor of the suit property and the Plaintiff is a descendant of the deceased from his first wife. He claimed that his grandfather had three wives Koki Lutu (Solomon Mwendwa's grandmother), Syokau Lutu (The Defendant/Respondent Kaviti Kalani's mother) and Ndalikwa Lutu all deceased.

5. The Plaintiff claimed that many years after his grandfather passed on the area where the suit land is located was declared an adjudication area. The land was surveyed in the presence of some family members and was registered as **Mutomo/Mwala/1113** in the name of the Defendant Kaviti Kalani. Solomon Mwendwa claims that Kaviti Kalani was to hold the land in trust and on behalf of the entire family as she was a daughter of his grandfather. He claimed that unbeknown to him and the rest of the family members Kaviti Kalani registered two different parcels of land registering herself as the proprietor of **Mutomo/Mwala/1124** fraudulently and with the intention of obtaining the same and a smaller portion of the land was registered as **Mutomo/Mwala/1113**.

6. The Plaintiff stated that they only came to know of this fact when officers from the National Land Commission and the Contracting Company (SINOHYDRO) undertaking the construction of the **Kitui-Mutomo-Kibwezi Road** visited the suit land to register the names of the persons to be compensated. It was the Plaintiff's contention that the suit property is ancestral land and that there is proof that it is host to eight graves belonging to diverse family members.

7. The Defendant filed a defence and gave evidence before the trial Court. She claimed that the Plaintiff was merely a grandson of the deceased Peter Lutu Moki who was the proprietor of the suit land before his demise. The Defendant claimed that the deceased Peter Lutu Moki died in 1973 and had earmarked and shown his three wives their respective parcels of land and that the mother of the Plaintiff Koki Lutu had died and was buried in her land at Ikutha. The Defendant denied allegations that she held the suit land in trust for the family of the deceased Peter Moki. She also denied allegations of fraud and further claimed that she was the proprietor of the suit land and enjoyed rights as contained in the Registered Land Act.

8. In his judgment the Honorable Trial Magistrate Z. J Nyakundi summarized the evidence of the witnesses at the hearing and concluded that four issues arose for determination. On the first issue on whether the deceased Peter Lutu Moki sub-divided his land among the three wives, the Trial Court found that he indeed apportioned his land to his three wives with the 1<sup>st</sup> wife being apportioned land in Ikutha where she was buried the 2<sup>nd</sup> wife was apportioned the suit land in Mutomo while the 3<sup>rd</sup> wife was given her land in Mutomo which she sold and went to live with her daughter.

9. On the second issue, of whether the Defendant is the registered proprietor of **Parcel Mutomo/Mwala/1124** the trial court found that the Defendant had produced a copy of title deed of the suit land, a copy of the official search and a letter from the Ministry of Lands all indicating that she is the registered proprietor of the suit property. Further, the trial court found that there was no evidence that the Defendant was acting as a trustee.

10. The court cited Section 26 of the Land Registration Act No.3 of 2012 that a certificate of title is prima facie evidence that the person named as the proprietor of the land is the absolute and indefeasible owner unless there was fraud or misrepresentation while acquiring the title or it was acquired illegally, unprocedurally or through a corrupt scheme. The court found that the Plaintiff did not tender evidence of such wrongdoing and thus the trial court held that the Defendant indeed was the registered proprietor of **Mutomo/Mwala/1124**.

11. The third issue of whether grandchildren are entitled to inherit their grandparent's property such as the plaintiff in the trial court, the court found that grandchildren can only inherit if they demonstrate that they were being supported or they were dependants of the said grandparents immediately before their demise which was not the case here.

12. On the fourth issue for determination by the trial court is the compensation that is to be paid on account of the graves of Peter Moki Lutu family members where the court found that there was no such alleged agreement produced that the family members entered into stating how they would distribute the compensation. The court however found it reasonable that they share compensation that may be paid by the National Land Commission on account of the said graves and any compensation on account of **Parcel No. Mutomo/Mwala/1124** shall be payable to the Defendant.

13. The trial court also noted that the subject of the suit was **Mutomo/Mwala/1124** and not **Mutomo/Mwala/1113** and that a dispute over the said land parcel 1113 was the subject of proceedings before another forum. The court found that the Plaintiff had failed to

prove his case on a balance of probabilities and the same was dismissed with costs to the Defendant.

### **The Appellant's Submissions**

14. The Appellants Counsel referred the Court to the submissions filed in the trial Court contained in the record of appeal seeking to rely on them as well as the submissions filed before this court. He submitted and compressed the grounds of appeal contained in the Memorandum of Appeal into six main issues for determination and addressed them as hereunder:

A) Whether during the adjudication process the Respondent was registered as a proprietor of Land Parcel Mutomo/Mwala/1124 in trust of Peter Lutu Moki family"

B) Whether the trial magistrate failed to appreciate the fact that the parties had agreed to share the proceeds from the Kenya National Highways Authorities according to the graves of their relatives"

C) Whether there was enough evidence of the Appellant and other scion of Peter Lutu Moki challenging the registration of the Respondent as the absolute proprietor of the disputed land"

D) Whether the registration of the Respondent as the proprietor of Mutomo/Mwala/1124 can be disputed and challenged"

E) Whether there was evidence that the late Peter Lutu Moki had shared out his lands amongst his wives"

F) Whether grandchildren are entitled to inherit property belonging to their grandparents"

15. On the first issue raised, the Appellant submits that he testified at the time of adjudication that the Respondent was the only child of Peter Lutu Moki living on the suit land and this why she was adjudicated and registered as the absolute proprietor of the suit land. He added that the Respondent admitted during the hearing that there are several graves of family members located on the suit land making it ancestral land that cannot be turned into a one-person absolute title. It was their submission that the Respondent was to hold the land in trust for the other family members and relied on the following cases: **Mwangi & Another v. Mwangi(1986)KLR 328, Jardu v. Kirpal (1975) EA Page 226, Kanyi v. Muthiora(1984)KLR,712, Njuguna v. Njuguna(1984) KLR, 527.**The Appellant further cited that in **John Gitibu Buruna & Another-vs-Jackson Rioba Buruna Civil Appeal No.89 of 2003** the Court of Appeal held that a constructive trust arises where the property is held by a person where it would be inequitable to allow him to assert full beneficial ownership of the property.

16. Secondly, the Appellant submitted that the trial magistrate erred and misdirected himself by failing to appreciate that the parties agreed to share the proceeds from KenHa according to the graves of their relatives where the family members agreed to meet, identify all the property left by the deceased and sub-divide it among his three wives. It was the Appellant's submission that the graves were further evidence that other family members acquired overriding prescriptive rights over the suit property and so they were entitled to compensation and the registration of the Respondent as the sole owner did not extinguish the rights and interests of the scion of the patriarch Lutu.

17. Thirdly, the Appellant submitted that there was enough evidence challenging the registration of the Respondent as the absolute proprietor of the disputed land. That Parcel No.1124 originated from Lutu and hence he contends that the Respondent was adjudicated and registered as proprietor in trust for other family members.

18. On the fourth issue raised, the Appellant submitted that the registration of the Respondent as the absolute proprietor can be challenged under the provisions of Section 26(1) of the Land Registration Act on the exceptions on which a Certificate of title can be challenged. The Appellant stated that at the time of registration, the Respondent failed to disclose that the suit land was ancestral land that she was holding in trust for other family members. He relied on the cases of **Edward Samuel Limuli vs Micheal(Marko) Sabayi HCCC No.222 of 1978, Gituanja v Gituanja(1983)KLR P.575** and **Kanyi vs Muthiora(1984) KLR P.723.**

19. Regarding the fifth issue the Appellant stated that no evidence was tabled to prove that the patriarch had subdivided and apportioned his land to his three wives and that the Trial Magistrate erred in finding so.

20. On the final issue of whether grandchildren are entitled to inherit from their grandparents, the Appellant submitted that when the grandchildren's own parents are dead, the grandchildren step into the shoes of their parents and take directly what ought to have gone to the said parents and he relied on the case of **Re Estate of Wahome Njoki Wakagoto(2013)eKLR**. The Appellant submitted that the deceased wives had passed away and their children were entitled to inherit from their grandfather.

### **The Respondents submissions.**

21. The Respondent submitted in support of the decision of the trial court and urged this court to uphold it. She supported the finding that the deceased Peter Lutu Moki divided his land among his three wives in his lifetime. That it was only after the Government announced construction of Kibwezi-Kitui-Kabati-Migwani road project in 2018 and the suit parcel of land which had already been mapped out as an area where the road would pass that the Appellant started claiming that the suit land was family land. The Respondent claimed that the suit land was adjudicated under the Land Adjudication Act and the same had no recorded disputes. All ownership disputes had been resolved at the land adjudication stage. The Respondent thus claimed that she is the absolute proprietor of the suit land and did not hold the same in trust for the family of the deceased Peter Moki.

22. On the issue of graves the Respondent submitted that being compensated for a grave of one's kinsman did not confer ownership of the land where the land is situated. The Respondent further submitted that the court found that the Appellant failed to prove his case on a balance of probability and urged the court find the same.

### **Analysis and Determination**

23. As the first appellate court, this court's mandate is to re-evaluate the evidence adduced in trial and the judgment in order to come to its own conclusion as was succinctly stated by the Court of Appeal in **Okeno –Vs– Republic (1972) EA 32** as follows: - *“An appellant is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellant's court own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and conclusions. Only then can it decide whether the magistrate's findings can be supported. In doing so, it should make an allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses”*

24. In his submissions the Appellant compressed the ten Grounds of Appeal contained in his Memorandum of Appeal into six issues for determination. I propose to deal with the said issues as proposed by the Appellant with ground A) and E) being dealt with together and grounds C) and D) being dealt with together and ground B) and F) being dealt with individually:

A) Whether during the adjudication process the Respondent was registered as proprietor of land parcel Mutomo/Mwala/1124 in trust for Peter Lutu Moki family.

B) Whether the trial Magistrate failed to appreciate the fact that the parties had agreed to share the proceeds from the Kenya National Highway Authorities according to the graves of their relatives.

C) Whether there was enough evidence of the Appellant and the other scion of Peter Lutu challenging the registration of the Respondent as the absolute proprietor of the disputed land

D) Whether the registration of the Respondent as proprietor of Mutomo/Mwala/1124 can be disputed and challenged.

E) Whether there was evidence that the late Peter Lutu Moki had shared out his lands amongst his wives

F) Whether grandchildren are entitled to inherit the property belonging to their grandparents,

**A) Whether during the adjudication process the Respondent was registered as proprietor of land parcel Mutomo/Mwala/1124 in trust for Peter Lutu Moki family and E) Whether there was evidence that the late Peter Lutu Moki had shared out his lands amongst his wives**

25. As proof of ownership, the Respondent produced in evidence a copy of the title deed and a land parcel **Mutomo/Mwala/1124** and the same show under the proprietorship section Mary Kaviti Kalani was registered on 8<sup>th</sup> March 2017 and a title deed was issued on 27<sup>th</sup> June 2018. The said documents do not show evidence of existence of a trust. Section 25 of the Land Registration Act No. 3 of 2012 provides for rights of a proprietor as hereunder: -

1) *The rights of a proprietor, whether acquired on first registration or 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) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and,*

*b) to such liabilities, rights and interests as affect the same and are declared by [section 28](#) not to require noting on the register, unless the contrary is expressed in the register*

2) *Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.*

26. Section 28 of the Land Registration Act provides for Overriding interests.

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

*(a) deleted by Act No. 28 of 2016, s. 11a.*

*(b) trusts including customary trusts;*

28. The case of **Twalib Hatayan & another v Said Saggah Ahmed Al-Heidy & 5 others [2015] Eklr** aptly summarizes the different types of trust that can arise as follows:<sup>27</sup>. From the foregoing it is clear that registered land is subject to trust under Section 28 (2) and overriding interests under Section 28 which include under subsection (b) “*trusts including customary rights.*”

“... according to the **Black’s Law Dictionary, 9<sup>th</sup> Edition**; a trust is defined as

**“1. The right, enforceable solely in equity, to the beneficial enjoyment of 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).”**

*Under the Trustee Act, “...the expressions “trust” and “trustee” extend to implied and constructive trust, and cases where the trustee has a beneficial interest in the trust property...Trusts are created either expressly (by the parties) or by operation of law. An express trust arises where the trust property, its purpose and beneficiaries have been clearly identified (see. **Halsbury’s Laws of England vol 16 Butterworths 1976 at para 1452**). In this case, we have a definite property and beneficiary. The purpose/intent for which the property was bought remains in dispute. This negates the existence of an express trust herein. In the absence of an express trust, we have trusts created by operation of the law. These fall within two categories; constructive and resulting trusts. Given that the two are closely interlinked, it is perhaps pertinent to look at each of them in relation to the matter at hand. A constructive trust is an equitable remedy imposed by the court against one who has acquired property by wrong doing. (see **Black’s Law Dictionary**) (Supra). It arises where the intention of the parties cannot be ascertained. If the circumstances of the case are such as would demand that equity treats the legal owner as a trustee, the law will impose a trust. A constructive trust will thus automatically arise where a person who is already a trustee takes advantage of his position for his own benefit (see. **Halsbury’s Laws of England supra at para1453**). As earlier stated, with constructive trusts, proof of parties’ intention is immaterial; for the trust will nonetheless be imposed by the law for the benefit of the settlor. Imposition of a constructive trust is thus meant to guard against unjust enrichment.”*

29. The Appellant claims that the intention of the parties was clear that since the Respondent was the one living on the suit land she was to be registered as a trustee on behalf of the rest of the family but she took advantage of that fact and registered herself as absolute owner. On the other hand, the Respondent claims that she did not hold the suit property in trust since the rest of the family had been allocated land by the family patriarch Peter Lutu Moki through their respective mothers and they had no claim to the suit land. It is thus clear and the court finds from the two positions taken by the parties hereto and from the evidence adduced at the trial that there was no express trust over the suit property, whose purpose and beneficiaries could be clearly identified.

30. The Appellant urges the court to find that from the circumstances of this case a constructive trust can be implied. He relies on the case of **John Gitiba Buruna & another v Jackson Rioba Buruna [2007] eKLR** where it was held: -

*“A constructive trust which arises by operation of law. Generally speaking, a constructive trust arises where the property the subject of a constructive trust is held by a person in circumstances where it would be inequitable to allow him assert full beneficial ownership of the property”.*

31. The Appellant further relied on the case of **Mwangi & Another v Mwangi[1986] eKLR** where the court while quoting Muli J in (HCCC No 1400 of 1973);

*“I have given consideration to all issues raised by the parties and I am satisfied that these considerations are subject to the trust implied by law as well as created by the intention of the parties that there would be such a trust which under Kikuyu customary law is common. Registrations of titles are creation of the law and one must look into the considerations surrounding the registration of the titles to determine as to whether a trust was envisaged.”*

32. In the present case the court agrees with the submissions of the Appellants Counsel and findings in the above case of **Mwangi & Anor** that in order to imply that a constructive trust exists one must look at the considerations surrounding registration of the title Mutomo/Mwala/1124. In the **Mwangi & Anor** case the court established the fact of a clear original intention to create a trust and occupation of the suit land by the beneficiaries of the trust as some of the considerations that led to the court implying a trust. The court held: -

*“In the result I am satisfied that the original intention of Mwangi s/o Irungu was that all three sons of his (from different wives) were to hold the land in equal shares. There never was a change in this intention. It must have been so”*

The court further found: -

*“In my judgment therefore the avoiding interests of the plaintiff arising from actual occupation without legal title are equitable rights which are binding on the land and therefore on Njuru the defendant. I therefore find that when the suit land was registered in Njuru’s name it was subject to the plaintiffs, existing rights as already found by me”*

33. In the case of: **Peter Ndungu Njenga V Sophia Watiri Ndungu [2000] Eklr** the court emphasized the necessity of establishing the intention to create a trust before it is implied it was stated that:

*“The concept of trust is not new. In case of absolute necessity, but only in case of absolute necessity, the court may presume a trust. But such presumption is not to be arrived at easily. The courts will not imply a trust save in order to give effect to the intention of the parties. The intention of the parties to create a trust must be clearly determined before a trust is implied. See **Ayoub vs. Standard Bank of S.A [1963] E.A. 619 at pp 622, 623.**”* If there was an intention to creating a trust then it would have been obvious from the facts of the case. However, the Appellant has not said which overriding interests he has over the suit land.

34. The court finds that a trust must be proved by credible evidence adduced by the person claiming that a trust exists in the case of **Salesio M’ itonga v. M’ithara & 3 Others (2015) eKLR** where the Court of Appeal stated: -

*“It is trite law that trust is a question of fact and has to be proved by evidence. In **Gichuki -vs- Gichuki – Civil Appeal No. 21 of 1981**, this Court held that a party relying on the existence of a trust must prove through evidence the existence of a trust... We concur with the following findings by the High Court: -*

35. The trial court found that though the Appellant claimed that the Respondent was registered to hold the land in trust, no evidence was tendered to support the claim. The court found that;

*“In view of the fact that the 1<sup>st</sup> wife died and was buried at Ikutha, it means that the 1<sup>st</sup> wife had her parcel of land at Ikutha, which parcel was apportioned to her by her husband. The question would be could PETER LUTU MOKI apportion a parcel of land to the 1<sup>st</sup> wife to the exclusion of the two other wives, the court holds in the negative, PETER LUTU MOKI must have apportioned parcels of land to his three wives in the case of Mutomo where the two wives were staying, he must have subdivided his land to his two wives. that then gives credence to the defendants defence that PETER LUTU MOKI subdivided his land to the 2<sup>nd</sup> wife, which she Occupies and to the 3<sup>rd</sup> wife who sold her portion and went to stay with her daughter at a place called Muti, PW2 ROSE MWANGANGI is the daughter to ESTHER LUTU and that she was buried next to her husband’s grave when she died”*

36. In considering the above findings of the trial court and while reviewing the evidence before the trial court in order to determine whether the conclusion reached by the court should stand, I am guided by the findings in the case of **John Gitiba Buruna & another v Jackson Rioba Buruna [2007] eKLR** which stated that: -

*“While this Court has jurisdiction to review the evidence in order to determine whether the conclusion reached by the superior court should stand, nevertheless, the court cannot properly substitute its own factual finding for that of a trial court unless there is no evidence to support the finding or unless the findings are shown to be plainly wrong. Indeed, it is a strong thing for an appellate court to differ from the finding on a question of fact of the judge who tried the case and who has had the advantage of seeing and hearing the witnesses (see Peters vs. Sunday Post Ltd. [1958] EA 424, Kirunga vs. Kirunga & Another [1988] KLR 438).”*

37. Following the definition of a constructive trust as stated in the previously quoted cases of **Twalib Hatayan & another v Said Saggar Ahmed Al-Heidy & 5 others supra** and **John Gitiba Buruna & another v Jackson Rioba Buruna [2007] eKLR** the question is whether the Respondent acquired the suit property by wrongdoing or whether the Respondent having already been a trustee on behalf of the deceased’s family took advantage of her position for her own benefit. Are the circumstances surrounding the registration of the Respondent as proprietor of the suit land such that would lead the court to treat the legal owner as a trustee and impose a trust" In the words of the court in the case of Mwangi & Another vs Mwangi would it be inequitable to allow the Respondent beneficial ownership of the suit land"

38. In answering this question, I have examined the evidence adduced before the trial court and it is obvious that registration of the Respondent as proprietor of the suit land was through the land adjudication process under the Land Adjudication Act CAP 284. The said law is An Act of Parliament to provide for the ascertainment and recording of rights and interests in community land (trust land). This is an elaborate and detailed process that entails an intricate dispute resolution process. Section 11 to 15 of the Act provides for recording of claims and pointing out of boundaries to land by a person who claims to have an interest in the land. The law provides for a warning to be given of any demarcation and recording of claims that is expected to be carried out in any area. Under Section 15 the Demarcation officer causes to be demarcate the boundaries of each separate piece of land whether claimed by an individual or a group and in case of any dispute the same is referred to the committee for resolution Under section 16 the survey office r is to carry out work of survey and prepare a demarcation map of the adjudication section showing every parcel of land identified by a distinguished number.

39. The Appellant placed before the trial court documents of the dispute resolution proceedings, findings and orders made in the process of determination of rights and interests in land parcel No. Mutomo/Mwala/1113. However, no documents showing the process of ascertainment of rights and interests in land parcel No. **Mutomo/Mwala/1124** were produced. Presence of documents showing the process that led to the determination of ownership of the said land in favour of the Respondent would, in the courts view, have been a large part of ascertaining considerations surrounding the registration of the titles to determine as to whether there was any wrongdoing.

40. The courts assessment of the evidence adduced is that the Appellant and the family of Peter Lutu Moki (deceased) was aware of the land adjudication process. They participated in the process of registration of parcel number **Mutomo/Mwala/1113** and it was stated that the said land was surveyed in the presence of some family members and the land was registered in the name of the Respondent Kaviti Kalani. The Appellant claims that Kaviti Kalani was to hold the land in trust and on behalf of the entire family as she was a daughter of his grandfather Peter Lutu Moki. Further it is noted from the record that at the Objection stage land parcel **Mutomo/Mwala/1113** was awarded to Mukemba Ivala and according to the Appellant herein the Appeal to the Minister is pending hearing. The court is of the view that no evidence was placed before the trial court to show that the family members who witnessed

the survey of parcel number 1113 objected to the survey, the size or location of the land. There is further no evidence tendered before the trial court to show that the surveyed land parcel 1113 included the suit land **Mutomo/Mwala/1124**. There is also no evidence placed before the trial court that the boundaries witnessed by the family members had been changed.

41. The court further notes that the witnesses who testified on behalf of the Appellant gave names of family members who were buried on the suit land. None of the parties who testified claim that any family members apart from the Respondent live on the suit parcel of land at the present time or during the adjudication process or that any of them were evicted from the said land when the Respondent was registered as proprietor of the land.

42. On my part from the totality of the evidence adduced before the trial court, I do not find any reason to contradict or disturb the findings of fact by the trial court and especially that “*PETER LUTU MOKI must have apportioned parcels of land to his three wives*” and thus the finding that the Respondent was not registered as proprietor of land parcel Mutomo/Mwala/1124 in trust for the family of Peter Lutu Moki. Further I find that considerations surrounding registration of land parcel **Mutomo/Mwala/1124** are not such that would lead the court to conclude that it is inequitable to allow the Respondent ownership of the suit land and thus to impose a constructive trust.

**B) Whether the trial Magistrate failed to appreciate the fact that the parties had agreed to share the proceeds from the Kenya National Highway Authorities according to the graves of their relatives.**

43. The trial court determined that there was no evidence adduced to confirm that an agreement existed as to compensation to be paid on account of the graves that were on the suit land. The court however went ahead to determine that payment for compensation for graves be made as proposed by the Appellant but compensation for the suit land be made to the Respondent herein. I however find that the Defendant in her evidence in chief and in cross-examination confirmed that they agreed to share compensation for the graves where she was to take five graves while the other family members took three. On this issue the court is of the view that the fact that there were graves on the suit property does not automatically entitle a party to a share in the land where the graves are especially when rights and interests in the land have already been determined. Courts have held time and again that there is no property in a dead body. (See the Court of Appeal’s decision in **SAN v GW [2020] Civil Appeal No.1 of 2020 eKLR**).

**C) Whether there was enough evidence of the Appellant and the other scion of Peter Lutu challenging the registration of the Respondent as the absolute proprietor of the disputed land and Whether the registration of the Respondent as proprietor of Mutomo/Mwala/1124 can be disputed and challenged.**

44. The Court finds that there is evidence that the Respondent is the registered proprietor of land parcel **Mutomo/Mwala/1124** through the title deed produced and the search. **The** Appellant claimed that the Respondent did not hold the title as an absolute proprietor but that she obtained the same by not disclosing that she holds the suit land in trust for the rest of the family members and that she registered part of Plot No.1113 as Plot No.1124 in order to obtain a bigger share. He further claimed that it was unbeknown to him and the rest of the family members that while they believed only parcel **Mutomo/Mwala/1113** existed and was family land the Respondent had registered two different parcels of land and that she is registered as the proprietor of **Mutomo/Mwala/1124** fraudulently and with the intention of obtaining the same and a smaller portion of the land was registered as **Mutomo/Mwala/1113**. The Appellant stated that they only came to know of this fact when officers from the National Land Commission and the Contracting Company (SINOHYDRO) undertaking the construction of the **Kitui-Mutomo-Kibwezi Road** visited the suit land to register the names of the persons to be compensated.

45. Section 26(1) of the Land Registration Act provides that: -

*The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—*

*(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or*

*(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme*

**46. The Appellant alleges that there was mischief in the manner in which the Respondent acquired the title over the suit land, the onus was upon him to prove this allegation.** Section 107 of the Evidence Act provides that “*Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.*” **Order 2 Rule 10(a) of the Civil Procedure Rules (2010) provides that particulars of misrepresentation, fraud, breach of trust, willful default or undue influence must be listed. It was held by the Court of Appeal in the case of Vijay Morjaria v Nansingh Madhusingh Darbar & another [2000] eKLR that:**

*“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts. See Davy v Garrett (1878) 7 Ch. D 473 at 489.”*

47. Further, courts have held that allegations of fraud are subject to a higher standard of proof. In *Moses Parantai & Peris Wanjiku Mukuru suing as the legal representatives of the estate of Sospeter Mukuru Mbeere (deceased) v Stephen Njoroge Macharia* [2020] Eklr the court held that:

*“Fraud is a quasi-criminal charge which must, as already stated, not only be specifically pleaded but also proved on a standard though below beyond reasonable double doubt, but above balance of probabilities. No evidence was tendered to this end by the appellants. They did not call any witness from the land office to verify their allegations.”*

48. The trial court found that the Appellant had not tendered any evidence of misrepresentation, fraud, illegal acquisition of the title or any evidence of corruption against the Respondent. As earlier found the title to the land subject matter of this suit was obtained through land adjudication. Rights and interests in land under adjudication are ascertained as provided under the Act and the process of ascertainment and recording of rights is detailed and elaborate. The Respondent herein would not have managed to have herself fraudulently registered as proprietor of the land without participation the land adjudication office and the Ministry of lands. None of those offices was mentioned as having participated in the fraud, they have not been joined as parties to this suit and neither were they called as witnesses. I find that merely stating that the land was supposed to be registered in trust for the family of Peter Lutu Moki but was registered in the name of the Respondent cannot amount to proof or evidence of fraud or of any wrongdoing as envisaged by the law.

49. I am therefore unable to see any evidence presented to the Trial Court that the Respondents acquisition of the suit land falls within any of the grounds on which the title to land can be subject to challenge as contained in section 26 (1) (a) and (b) of the Land registration Act. In my view the title deed held by the Respondent remains proof that the Respondent being the person named as proprietor of the land is the absolute and indefeasible owner of the land and the decision of the Trial Court was not wrong in that regard.

#### **F) Whether grandchildren are entitled to inherit the property belonging to their grandparents,**

50. It is the Appellant’s contention that he is entitled to inherit the property of his grandfather, Peter Lutu Moki and therefore he has an interest in the suit land. I must start by pointing out that this is not a Succession matter and the matters of distribution of the estate of deceased are best dealt with in the proper forum where all the beneficiaries have been identified. However, the position taken by the trial court in what appears to be a general proposition of the law that grandchildren can only inherit property from their grandparents if they demonstrate that they were being supported or they were dependants of the said grandparents immediately before their demise is supported by Section 29 of the Law of Succession Act CAP 160 Laws of Kenya. The inheritance of grandchildren from their grandparents has further been addressed by the Courts where it was stated in **In the Matter of the estate of Veronica Njoki Wakagoto (Deceased) [2013] eKLR**

*“Under Part V, grandchildren have no right to inherit their grandparents who die intestate after 1<sup>st</sup> July 1981. The argument is that such grandchildren should inherit from their own parents. This means that the grandchildren can only inherit their grandparents’ indirectly through their own parents, the children of the deceased. The children inherit first and thereafter grandchildren inherit from the children. The only time grandchildren inherit directly from their grandparents is when the grandchildren’s own parents are dead. The grandchildren step into the shoes of their parents and take directly the share that ought to have gone to the said parents.”*

51. In conclusion, I do hold that the Appellant has failed to show that the trial court erred in finding that he had failed to prove his case on a balance of probabilities and in dismissing the suit **Mutomo Magistrate's Land Case No 5 of 2018** with costs to the Defendant in that suit. I therefore proceed to dismiss the appeal herein with costs to the Respondent.

**DELIVERED, DATED AND SIGNED AT KITUI THIS 22<sup>nd</sup> DAY OF MARCH, 2022**

**HON. L. G. KIMANI**

**ENVIRONMENT AND LAND COURT JUDGE**

Judgement read in open court in the presence of-

Stellamarris.....Court Assistant

M/s.Wambui Advocate.....for the Appellant

J.K.Mwalimu Advocates.....for the Respondent



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