

**REPUBLIC OF KENYA**  
**IN THE SUPREME COURT OF KENYA**  
**AT NAIROBI**

*(Maraga, CJ & P, Ibrahim, Ojwang, Wanjala & Njoki, SCJJ)*

**PETITION NO. 10 OF 2015**

**—BETWEEN—**

**ISACK M’INANGA KIEBIA.....APPELLANT**

**—AND—**

**1. ISAAYA THEURI M’LINTARI.....** }  
**2. ISACK NTONGAI M’LINTARI.....** } **RESPONDENTS**

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*(Being an appeal to the Supreme Court against the Judgment and Orders of the Court of Appeal (Visram, Koome and Otieno, J.J.A), dated 1<sup>st</sup> October, 2014 at Nyeri Court of Appeal in Civil Appeal No. 24 of 2010; **Isack M’Inanga Kiebia and Another v. Isaaya Theuri M’Lintari and Another**)*

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**JUDGMENT**

*Wanjala, SCJ, with whom Maraga, CJ & P, Ibrahim, Ojwang, & Njoki, SCJJ agree:*

**A. INTRODUCTION**

**[1]**This petition dated and filed on 29<sup>th</sup> July, 2015 is an appeal under Article 163(4), (b) of the Constitution pursuant to certification and leave to appeal granted by this Court in a Ruling delivered on the 16<sup>th</sup> July, 2015, in Application

No. 46 of 2014, involving the same parties. In certifying the petition as involving a matter of general public importance, this Court formulated the following question at para 35:

*“Is there a state of uncertainty in the law, arising from contradictory precedents, and warranting this Court’s resolution of the doubt? While the question of customary, or generational trust has been determined from time to time, the resulting body of precedent is not clear on the singular question, whether a claimant of a trust in customary law needs to prove actual physical possession, or occupation. Despite an overhaul of the previous land laws, and the enactment of a new Land Registration Act (2012), to consolidate and rationalize the registration of titles, the manner of resolution of the said question will affect pending matters, as well as matters to be heard in the future (pursuant to Section 28(b) of the Land Registration Act). The issue, therefore, will continually engage the workings of the judicial organs.”*

[2] The Court then concluded that the intended appeal had satisfied the threshold for admission, set under Article 163 (4) (b) of the Constitution as expounded in the *Hermanus decision*. The Court was categorical that the applicant had demonstrated that the matter in question bears specific elements of real public interest and concern, the determination of which, would create certainty and predictability in the law.

## **B. BACKGROUND**

**(i) Proceedings in the High Court**

**[3]** The respondents filed suit on 23<sup>rd</sup> August, 1995 in the Chief Magistrate's Court at Meru. The suit was however transferred to the High Court on grounds that the Magistrate's Court lacked jurisdiction to entertain the claim (it being a land dispute). The respondents' claim was that they were members of the Athimba clan, which owned a large parcel of ancestral land in Njia Location, Nyambene District. They averred that during the process of land adjudication in 1963, it had been agreed that the land would be sub-divided and each portion registered in the name of an appointed member who would then hold the land in trust on behalf of a specific household.

**[4]** It was the respondents' averment that pursuant to this agreement, two land parcels No. Njia/Kiegoi Scheme 86 and Njia/Kiengoi Scheme/70 were allocated to their grandfather's household (M'Kiebia Baithambu) and registered in the names of two of his three sons (respondents' uncles) to hold in trust on behalf of the entire household (M'Kiebia Baithambu). As such, it was the respondent's case that the appellants held one third of the land in trust on behalf of their deceased father, Musa Lintari (who was one of their grandfather's three sons). They urged that they had lived on the said property, were in possession of it, and had made substantial developments on the same. The appellants however denied these allegations.

**[5]** The High Court (*Kasango J.*) held that the plaintiffs (respondents herein) had established the existence of a trust in their favour on the basis of their being in actual occupation and also as bona-fide members of the household.

**[6]** The High Court then entered Judgment for the plaintiffs by declaring that the 1<sup>st</sup> respondent held 3 acres of L.R. No. Njia/Kiegoi Scheme/86 in trust for the

plaintiffs and the 2<sup>nd</sup> respondent held 3 acres of L.R. No. Njia/Kiegoi Scheme 70 in trust for the plaintiffs.

***(ii) Proceedings in the Court of Appeal***

[7] Aggrieved by the decision of the High Court, the petitioners appealed to the Court of Appeal in Nyeri Civil Appeal No. 24 of 2010. The Appellate Court (*Visram, Koome & Otieno-Odek, JJA*) held that the evidence on record was sufficient proof that the respondents had been born and raised on L.R. No. Njia/Kiegoi Scheme/86 and had been in possession and occupation of the said parcel of land. With regard to parcel No. Njia/Kiegoi Scheme/70, the appellate Court held that the evidence on record was contradictory and thus could not provide conclusive proof that the respondents had been in possession and occupation of the said parcel. As such, the respondents could not found their claim upon Section 30(g) of the Registered Land Act (now repealed). However, the Court opined that if the respondents were basing their claim on the existence of a customary trust, they could be protected, as long as the said trust was proved. The clincher by the learned judges of appeal came when they declared that *“to prove a trust in land (read customary trust), one need not be in actual physical possession and occupation of the land.”*

[8] The Court found that the trial Judge did not err in finding that a trust existed in relation to L.R No. Njia/Kiegoi Scheme/86 (Plot No. 86) and L.R No. Njia/Kiegoi Scheme/70 (Plot No. 70). It proceeded to dismiss the appeal in its entirety.

## ***Proceedings in the Supreme Court***

### **(a) *Petitioner's case***

[9] The petitioner's case is as set out in the petition, the supporting affidavit sworn by the petitioner dated 29<sup>th</sup> July, 2015, and written submissions, dated 23<sup>rd</sup> September, 2015. Although the petition is based on many grounds, the real question that fell for determination by the Court was whether a customary trust could be implied as subsisting in favour of the respondents with regard to L. R. No. Njia/Kiegoi Scheme 70 (Plot No. 70) notwithstanding the fact that the respondents were neither in possession nor in actual occupation of the same.

[10] The petitioner submitted that, a customary trust cannot be implied if the claimant does not have any rights arising from actual occupation or possession of the land in question. A customary trust, argued the petitioner, was always usufructuary in origin. In addition, the petitioner submitted that the concept of intergenerational equity applied by the High Court and Court of Appeal in this case does not have customary or legal roots but is traceable to scholarly discourses on sustainable development (including conservation of the environment). It was the petitioner's argument that such a doctrine could not be the basis for the attribution of a customary trust.

[11] It was the petitioner's case that, having found that the respondents were not in possession, the High Court and Court of Appeal could not again fall back on customary law to confer a right not based on possession. In contending so, the petitioner relied on the famous cases of *Esiroyo v. Esiroyo* 1973 EA 388; and *Obiero v. Opiyo* 1972 EA 277;

[12] Counsel for the petitioner submitted that although the Constitution obligates all to respect and act to protect reasonable and relevant customary laws and

practices; courts are duty bound to investigate the intention, conditions, and effect of any customary law before confirming its continuation; confirming its continuation in amended form; or rejecting its use.

***(b) The Respondents' submissions***

**[13]** The respondents' case is as stated in the written submissions and list of authorities dated 2<sup>nd</sup> October, 2015 and filed by Counsel on record for the respondents.

**[14]** The respondents reiterate the fact that as per the clan agreement, each household was to be given 10 acres of the clan land which was to be registered in the name of one family member to hold in trust for the other family members; in this case, for the other sons.

**[15]** The respondents submitted that the concept of community land is not new, and has been fortified by Article 63 of the new Constitution. That community land may be held as communal, family, clan land or as a reserve land. As such they stated that, the Athimba clan owned their land as clan land before they decided that the clan land be sub-divided and each family given 10.5 acres.

**[16]** It was the respondents' case that the courts have always protected customary interests in land even where the land in question was registered in favour of an individual. It was their contention, that to allow this petition would open a flood gate of suits to this Court from the earlier decided cases wherein customary trusts, had been the basis of protecting unregistered claimants.

### C. ANALYSIS

[22] On its way to dismissing the appeal and affirming the High Court's Judgment, the Court of Appeal made what we consider a pronouncement of jurisprudential import. The Court stated thus:

***“Unless a trust is proved, the respondents have neither possessory nor occupational rights that can be protected as overriding interests... We hasten to add that to prove a trust in land; one need not be in actual physical possession and occupation of the land.”***

In so asserting, the Appellate Court was echoing (and therefore affirming) an earlier holding by the High Court in ***James N. Kiarie v. Geoffrey Kinuthia & Another*** (2012) eKLR wherein the Court stated:

***“...While occupation may be relevant and has been found to be relevant in some cases in raising the inference of a trust, it is not ... a necessary ingredient for a trust to be established.”***

[23] The foregoing declaration forms the basis of the appeal before us, for in strenuously disagreeing with the appellate court, Mr. Nowrojee, counsel for the appellant, argues that a customary trust in relation to registered land can only be founded upon the actual physical possession or occupation of the land by the claimant. In other words, absent the possession or occupation of the land, or part of it by an unregistered claimant, there can be no customary trust to which the

registered proprietor would be subject. Herein lies the conundrum that has characterized disputes between registered and unregistered claimants to land.

[24] It all started with the earth shaking declarations (at least from the perspective of African tribes, clans, families, other ethnic cleavages and individuals) by the Courts in **Obiero v. Opiyo** (1972) E.A 227 and **Esiroyo v. Esiroyo** (1973) E.A 388 wherein the Judges proclaimed the extinction of customary rights to land upon the registration of such land under Sections 27 and 28 of the Registered Land Act, Cap 300 (now repealed).

Section 27 (a) of the Registered Land Act (now repealed) provides that:

*“The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto”*

While Section 28 of the said Act provides that:

*“The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject-*

- (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and*

(b) *unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by Section 30 not to require noting on the register;*

*Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee.”*

Section 30 in turn provides that:

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

*(g) the rights of a person in possession or actual occupation of land to which he is entitled in right only of such possession or occupation, save where inquiry is made of such person and the rights are not disclosed.”*

[25] And so it was that, in interpreting the above provisions, *Bennett J*, in ***Obiero v. Opiyo***, peremptorily decreed that rights to land under customary law become extinguished upon registration of the land in question. In the words of the learned Judge:

*“...Section 28 of the Registered Land Act confers upon a registered proprietor a title ‘free from all other interests and claims whatsoever,’ subject to the leases, charges and encumbrances shown in the register and such overriding*

*interests as are not required to be noted in the register....Rights arising under customary law are not among the interests listed in s. 30 of the Act as overriding interests. Had the legislature intended that the rights of a registered proprietor were to be subject to the rights of any person under customary law, nothing could have been easier than for it to say so”*[Emphasis added].

[26] This reasoning was unequivocally reaffirmed by Kneller J, in ***Esiroyo v. Esiroyo***, where the learned Judge declared that:

*“The matter (claim of interest in registered land) is taken out of the purview of customary law by the provisions of the Registered Land Act. ...The rights of the defendant under customary law have been extinguished. Section 28 of the Registered Land Act confers upon a registered proprietor ‘a title free from all other interests and claims whatsoever’, subject to the leases, charges and encumbrances shown in the register and such overriding interests not quoted in the register. ...Rights arising under customary law are not among the interests listed in Section 30 of the Act as overriding interests* [Emphasis added].

[27] These two decisions, would unleash a jurisprudential maelstrom, the real effects of which, wove and have continued to weave, around courts, like an albatross. Some courts, imbibed this school of thought wholeheartedly, without any question whatsoever. For example in ***Joseph Karisa Musonga v. Johnson Nyati*** (1984) eKLR the court stated as follows:

*“The defendant as the registered proprietor has a title free from all interests and claims whatsoever, but subject to any lease, charge and encumbrance shown in the register together with such overriding interests that exist and are not required to be noted in the register under Sections 28 and 30 of the Registered Land Act. Rights arising under customary law are not among the rights listed in Section 30 of the Act as overriding interests. Bennet J ... pointed this out and added ‘**had the legislature intended that the rights of a registered proprietor were to be subject to the rights of any person under customary law, nothing could have easier than for it to say so.**’ And 12 years later, it still has not done so.*

[28] Fast forward to 1997, and the Court of Appeal would reverently restate the Bennett doctrine in *Muriuki Marigi v. Richard Marigi & 2 Others* (Nyeri C.A No. 189/96: unreported); the declaration by the appellate court which we here-below reproduce is instructive:

*“We earlier set out the provisions of Sections 27 and 28 of the Registered Land Act, which in effect state that the rights of a registered proprietor of land registered under the Act are absolute and indefeasible and are only subject to rights and encumbrances noted on the register or overriding interests which are set out in Section 30 of the Act.....The only other aspect outstanding for consideration is whether the customary law rights, if they exist at all, are overriding rights or interests recognizable under that Section. **The issue was considered in the following two reported cases of Obiero v. Opiyo and Esiroyo v. Esiroyo and in both cases it was held that they are not. The Court in both***

***cases was bound to come to that conclusion because of the clear language of Section 30 above...***

[29] Three statements of legal principle are deducible from what we have christened the *Bennett J*, doctrine. These are:

- (i) *The registration of land under the Registered Land Act, (cap 300) extinguishes customary rights to that land for all purposes.*
- (ii) *Rights under customary law or such rights as existed prior to registration are not overriding interests under Section 30 of the Registered Land Act.*
- (iii) *The Trust envisaged under the proviso to Section 28 of the Registered Land Act is the trust known under English common law and doctrines of Equity. In other words, customary law is incapable of creating a trust to which a registered proprietor would be subject after registration.*

[30] This doctrine, had a pervasive influence on judicial reasoning, and indeed served as a yardstick for the determination of rights to land between registered and unregistered claimants. It is worthy of note, that even where, courts departed from the rigidities of the *ratio decidendi*, established by the two decisions, (in response to the dictates of justice), there was still a reticence, in their pronouncements as to whether, the language of Sections 27, 28 and 30 of the Registered Land Act could admit of any contrary interpretation. For example, in ***Alan Kiama v. Ndia Mathunya & Others***, C.A 42/1978, *Madan J.A.*, ever so erudite, when confronted with what was meant by the phrase, “rights of a person in possession or actual occupation of land” in language reminiscent of a Shakespearean soliloquy, rendered himself thus:

***“What meaning is to be given to Section 30 (g)? The rights under customary law may be argued to be extinguished by Section 28... It must refer to equitable rights, it cannot be otherwise, it has to be so to be sensibly interpretable. Overriding interests which arise in right only of possession or actual occupation without legal title are equitable rights which are binding on the land, therefore on the registered owner of it. Under Section 30(g) they possess legal sanctity without being noted on the register; Overriding interests which so exist or are so created are entitled to protection because they are equitable rights even if they have a customary law flavor... Equity always protects the just rights of the oppressed. Equity always prevents an injustice being perpetrated. Equity sanctifies the administration of justice...”***

[31] Clearly therefore, because he was still shackled by the pronouncement in ***Obiero v. Opiyoto*** to the effect that “rights under customary law are not overriding interests”, this icon of law, had to seek refuge in Equity; hence his conclusion that rights of a person in possession or actual occupation are ***“equitable rights even if they have a customary law flavor”***. On the other hand, *Potter J.A.*, in the same case, while still approving the Bennett doctrine, envisaged a trust, not under the proviso to Section 28 but under Section 30 (g) of the Registered Land Act.

[32] The clearest indication of the unsustainability of the Bennett doctrine is to be traced to the case of ***Kanyi v. Muthiora*** (1984) KLR 712, wherein *Nyarangi Ag. J.A.* stated:

*“I doubt like Madan J.A did in **Kiama v. Mathunya...**, if rights under customary law are excluded by Section 30 of the Act. Had the legislature intended that customary law rights were to be excluded, nothing would have been easier than for it to say so. I would say any valid rights are included in Section 30 of the Act just as a trustee referred to in Section 28 of the Act could not fairly be interpreted and applied to exclude a trustee under customary law. Be that as it may, the trust, in favour of Maritha is a resulting one by virtue of Section 163 of the Act. **Besides, having been in occupation of a portion of the suit land and no inquiry having been made, Maritha had created rights of an overriding nature under Section 30 (g) to which the appellant as proprietor was subject.**”*

[33] Even Kneller J.A, one of the architects of the Bennett doctrine, this time as judge of appeal, appeared to have softened his hardline stance albeit without acknowledging it, when he stated in **Kanyi v. Muthiora:**

*“Furthermore, the respondent under the trust which arose between her and the appellant in the circumstances of this case had rights against the appellant stemming from her possession and occupation of part of Muthiora’s land though it was registered in the name of the appellant. This is an overriding interest which is not required to be noted on the register and the appellant’s proprietorship is subject to it.”*

Chesoni J.A, in the same case was of the view that:

*“The registration of the suit land in the name of Kanyi under the Registered Land Act did not extinguish Nyokabi’s rights under the Kikuyu customary law, Kanyi was not relieved from her duty or obligation to which she was as a trustee to Muthora’s land: see proviso to Section 28 of the Act...”*

[34] What *Kneller J.A* did not state was whether these rights “stemming from ...possession and occupation” had their origin in customary law. *Nyarangi J.A*, on the other hand, appeared to be asserting so, terming them “valid rights” without categorically identifying the root of that “validity”, and still hamstrung by the Bennetian Mantra that “*had the legislature intended that.....nothing would have been easier than for it to say so*”. *Chesoni J.A*, clearly envisaged a customary trust under the proviso to Section 28, while *Khamoni J*, in ***Gathiba v. Gathiba***(2001) 2 EA 368, concluded that the notion of a trust, was inherent in African customary land law. But even so, the learned judge had also, already capitulated to the proclamation that, “rights under customary law, are not overriding interests under Section 30 of the Registered Land Act”.

[35] In ***Mbui Mukangu v. Gerald Mutwiri Mbui***(2004) eKLR(*O’kubasu, Githinji & Waki,JJA*) the Court in embracing the concept of a customary trust, stated:

*“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 possession and occupation of part of the registered land which **strictly it (sic) 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.”***

[36] The Bennett doctrine, which has had a pervasive influence on the ebb and flow of judicial opinion, was a jurisprudence borne out of colonial land tenure policy. It was a jurisprudence, whose unstated contrivance, was to consign customary land law and rights flowing therefrom, to the dustbins of eternity. This was a judicial validation of the Swynnerton Plan whose architect had argued that:

***“Sound agricultural development is dependent upon a system of land tenure which will make available to the African farmer, a unit of land and a system of farming whose production will support his family. He must be provided with such security of tenure through an indefeasible title as will encourage him to invest his labour and profits into the development of his farm and as will enable him to offer it as security for such financial credits as he may wish to secure.”***

[37] Both exponents of colonial land policy and jurisprudence, either completely disregarded, or did not fully appreciate, the nature, scope, and complexity of African land relations. Land in a traditional African setting, is always the subject of many interests and derivative rights. The content of such interests and rights is often a complex area of inquiry. Such rights could be vested in individuals or group units. The rights and interests frequently co-exist with each other. For example, the rights of members of a family do not necessarily derive from the corporate rights of the family as such, but by operation of the applicable law and customs. Besides, the enjoyment of the rights is dependent on the fulfilment of certain conditions unique to the group unit. Several rights of the members could

be inferior to, or co-terminus with, or indeed superior to the sum total of the rights of a group. Hence, customary law does not vest “ownership”, in land in the English sense, in the family, but ascribes to the family the aggregate of the rights that could be described as “ownership.” (Bennett 1995:3 and Cocker 1966: 30-33).

[38] It is therefore our view that, the decisions in ***Obiero v. Opiyo***, and ***Esiroyo v. Esiroyo***; were based on faulty conceptual and contextual premises. Faulty conceptually because, they did not take into account the complex nature of customary rights to land, and faulty contextually because, in interpreting Sections 27, 28 and 30 of the Registered Land Act, the courts paid little or no attention to the relevant provisions of the retired Constitution regarding trust land. It is the registration of land in the trust land areas that had triggered the enduring tension between registered proprietors and claimants under customary law. It is no wonder that customary rights to land would exhibit resilience in subsequent decisions.

Towards this end, Section 115 (1) of the retired Constitution provides that:

*“All Trust land shall vest in the county council within whose area of jurisdiction it is situated.”*

While sub-Section (2) provides that:

*“Each county council shall hold the Trust land vested in it for the benefit of the persons ordinarily resident on that land and shall give effect to such rights, interests, or other benefits in respect of the land as may, under the African customary law for the time being in force and applicable thereto, be vested in*

*any tribe, group, family or individual provided that no right, interest or other benefit under African customary law, shall have effect for the purposes of this sub-section so far as it is repugnant to any written law.”*

Section 116 (1) which is the basis for registration of individual titles to Trust land provides:

*“A county council may, in such manner and subject to such conditions as may be prescribed by or under an Act of Parliament, request that any law to which this sub-section applies shall apply to an area of Trust land vested in that county council, and when the title to any parcel of land within that area is registered under any such law otherwise than in the name of the county council it **shall cease to be Trust land.**”*

**[39]** It is instructive to note that neither Section 115 nor 116 of the retired Constitution stipulates that upon registration of Trust land, any rights, interests or other benefits in respect of that land that were previously vested in a tribe, group, family or individual under African customary law shall be extinguished. All that the Section provides is that “no right, interest or other benefit under African customary law shall have effect for the purposes of the relevant subSection (115 (2)) so far as it is repugnant to any written law”. On the contrary, the Constitution is categorical that each county council *shall give effect to such rights, interests or other benefits in respect of the land as may, under African customary law for the time being in force or applicable thereto, be vested in any tribe, group, family or individual.*

**[40]** There can be no doubt that the obligation imposed upon a county council to give effect to rights under African customary law applicable to Trust land did not cease upon the application of the Land Consolidation Act and the Land Adjudication Act to that land. In fact, the duty to give effect to these rights, became more pronounced, during the land registration process. Given the fluidity and complexity of these rights, it is obvious that, such rights could not find expression in the Register in their totality. Such customary rights as could not be noted on the register would have to be recognized somehow, for they had already been recognized by the Constitution.

**[41]** Thus, the obligations of a registered proprietor upon a first registration, as embodied in Section 28(b) (and the proviso thereto) and Section 30 (g) of the Registered Land Act, could only logically, be traceable to the “rights, interests, or other benefits under African customary law”. How then, given this historical context, and the constitutional and statutory provisions, could it have been so easy to declare that rights under customary law become extinguished for all purposes upon the registration of a person and that none could survive whatsoever?

**[42]** The only situation where the retired Constitution envisages the extinction of African customary rights to Trust land, is where such land has been “set apart” for a public purpose under Section 117. Sub-section 2 of the said Section provides:

*“Where a county council has set apart an area of land in pursuance of this section, any rights, interests or other benefits in respect of that land that were previously vested in a tribe, group, family or individual under African customary law shall be extinguished.”*

**[43]** Besides, the setting apart of Trust land under Section 117 of the retired Constitution, hence the extinction of rights under African customary law, could only take effect upon the prompt payment of full compensation. Towards this end, sub-section (4) provides:

*“No setting apart in pursuance of this section shall have effect unless provision is made by the law under which the setting apart takes place for the prompt payment of full compensation to any resident of the land set apart who-*

*(a) under the African Customary law for the time being in force and applicable to the land, has a right to occupy any part of the land;”*

**[44]** Again, the only situation where African customary law would be excluded is where such law was determined to be repugnant to any written law. But even so, “*repugnancy*”, was such a polemical and subjective notion that it could hardly have provided a stable yardstick for the extinction of customary land rights.

**[45]** In our considered view, the language of Section 117 (2) of the retired Constitution, was wrongly imported into Sections 27, 28 and 30 of the Registered Land Act(now repealed) by the Judges in the cited decisions. Had the judges’ view been informed by a proper appreciation of the nature, scope and content of the rights, interests and benefits to land under African customary law, subsisting before individualization of tenure, both the proviso to Section 28 and Section 30(g) of the Registered Land Act, would have been contextually interpreted. In this regard, there would have been no difficulty in construing a “customary trust” under the proviso to Section 28 of the Act. Surely, before a first registration, what

other trust, if not “a customary one”, could have subsisted over land held under African customary law as to bind a registered proprietor?

[46] From the authorities we have considered, it is clear that the courts, *vide* Section 163 of the Registered Land Act, have been more willing to import the doctrines of implied, resulting and constructive trust as known in English law, into Section 28 of the Act. But the notion of a customary trust, which should have been the first port of call, has only been gradually and hesitatingly embraced. Due to this judicial hesitancy, the vital elements and content of a customary trust have yet to be fully and clearly developed.

[47] The declaration to the effect that “rights arising under African customary law are not among the interests listed in Section 30 of the Registered Land Act” in ***Obiero v. Opiyo***, as wrong as it was, has quite inexplicably, been affirmed in subsequent decisions, even by those courts that now recognize the doctrine of a customary trust. What is one to make of Section 30 (g) of the Registered Land Act? This subSection recognizes as overriding interests:

*“The rights of a person in possession, or actual occupation of land to which he is entitled in right only of such possession or occupation, save where inquiry is made of such person and the rights are not disclosed.”*

[48] If the rights of a person in possession or actual occupation of Trust land before registration, are not rights arising under African customary law, what are they? Or to put it differently, if the rights of a person arising under African customary law as evidenced by his/her being in possession or actual occupation of the land are not overriding interests under Section 30 (g) as decreed in ***Obiero v. Opiyo***, what are they? *Madan J.A.*, inappropriately termed them

“equitable rights” even if they have “a customary flavour”, while *Nyarangi J.A* termed them “valid rights”.

[49] Be that as it may, it is undeniable that such rights of a person that subsisted at the time of first registration, as evidenced by his being in possession or actual occupation, are rooted in customary law. They arise under African customary law. They derive their validity from African customary law. They are “rights to which one is entitled *in right only of such possession or occupation*”. They have no equivalent either at common law or in equity. They do not arise through adverse possession, neither do they arise through prescription. For if they did arise through these processes, they would be overriding interests, not under Section 30(g), but under Section 30(f) of the Registered Land Act, which recognizes:

*“rights acquired or in the process of being acquired, by virtue of any written law relating to the limitation of actions or by prescription.”*

[50] It is customary law and practice that clothes the rights of a person in possession or actual occupation, with legal validity. If customary law and practice, does not recognize such possession or actual occupation, then it cannot be a right to which a person is entitled. *Madan J.A* did in fact recognize this statement of principle without as much as saying so in *Alan Kiama*, when he stated:

*“...they (meaning, the rights in possession or actual occupation) are not subject to interference or disturbance such as by eviction save where inquiry is made and they are not disclosed. In this case, the respondents were in possession and actual occupation of the land and they also cultivated it to the knowledge of the*

*appellant. He made no inquiry, any inquiry would have been superfluous; he had himself lived on the land together with the respondents for a time and knew that they cultivated it.”*

[51] In other words, the learned judge was acknowledging the fact that, the only reason the respondents could not have been evicted, was because any inquiry into their possession or actual occupation of the land, would have revealed that such possession was permitted by customary law and practice.

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

Each case has to be determined on its own merits and quality of evidence. It is not every claim of a right to land that will qualify as a customary trust. In this regard, we agree with the High Court in *Kiarie v. Kinuthia*, that what is essential is the nature of the holding of the land and intention of the parties. If the said holding is for the benefit of other members of the family, then a customary trust would be presumed to have been created in favour of such other

members, whether or not they are in possession or actual occupation of the land. Some of the elements that would qualify a claimant as a trustee are:

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.

**[53]** 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.

**[54]** 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.

Although the Respondents herein were not in possession or actual occupation of Parcel No. Njia/Kiegoi Scheme 70, both the High Court and Court of Appeal were

entitled to enquire into the circumstances of registration, to establish whether a trust was envisaged. Since the two superior courts were satisfied that indeed elements of a customary trust in favour of the Respondents pertaining to the parcel existed, we see no reason to interfere with their conclusions.

[55] In pronouncing the extinction of customary land rights, Bennett J, made a declaration to the effect that, ***“had the legislature intended that the rights of a registered proprietor were to be subject to the rights of any person under customary law, nothing could have been easier than for it to say so”***. This statement, has in a cruel twist of irony, become a judicial mantra, and repeated with abandon, even by courts in the post 2010 era! *Nyarangi J.A*, would, years later, in ***Kanyi v. Muthiora***, turn the Bennett proclamation on its head by stating that ***“had the legislature intended that customary law rights were to be excluded, nothing would have been easier than for it to say so.”***

[56] Suffice it to say, that legislative intent cannot, always be attributable to what it (the legislature) says through statute. To assume that what parliament doesn't say, in the final legislative edict, was never meant to be, is to tread the dangerous path of judicial cynicism. Parliament cannot legislate for every exigency of human existence. Indeed, there is nothing easy when the legislature sits to make laws; just as there is never a straight-forward or clear-cut route when a court of law embarks on the interpretation of a written law.

### ***The Land Registration Act, 2012***

[57] With the repeal of the Registered Land Act (Cap 300), Parliament enacted the Land Registration Act No. 3 of 2012. The provisions of Section 28 of the former, including the proviso thereto, were re-enacted as Section 25 of the

latter; while the provisions of Section 30 of Cap 300 were re-enacted as Section 28 of the Land Registration Act. However, Parliament introduced two new categories of overriding interests, the first category is what are now called “*spousal rights overmatrimonial property*”; while the second category is what are, rather curiously called “*trusts including customary trusts*”. Even more curious, is the fact that “*the rights of a person in possession or actual occupation of land to which he is entitled in right only of such possession or occupation,*” as earlier provided for under Section 30 (g) of the Registered Land Act, are no longer on the list of overriding interests under Section 28 of the Land Registration Act.

[58] 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

In conformity with this Court’s decision in ***Samuel Macharia***, it is to be noted that this Judgment is forward looking and has no effect on cases already decided.



**SUPREME COURT OF KENYA**