

**THE IMPACT OF THE USE OF IMPLIED TRUSTS ARISING OUT OF  
CUSTOMARY LAW RIGHTS IN LAND DISPUTES AND ITS EFFECT ON THE  
ADMINISTRATION OF JUSTICE.**

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## Declaration

I, MUMANYA, BASEKE ROSINE, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed:  .....

Date: 29/May/2018 .....

This dissertation has been submitted for examination with my approval as University Supervisor.

Signed:  .....

Mukami Wangai

## **Abstract**

This project demonstrates the impact that the use of implied trusts has on the rights of land owners under the Kenyan land laws. It attempts to show a trend in the use of implied trusts in land related issues using various case law. Case law obtained from the official case database in Kenya is used as the main method of collecting data. However, the study also shows how acknowledging trusts arising out of customary law claims can be seen as a way to preserve culture and tradition but also a way in which the enjoyment of certain rights are limited to protect the rights of others. There was a shift in the application of implied trusts arising out of customary rights. Courts started to allow customary claims to be the basis for imposing implied trusts on land, whereas after the enactment of the repealed Registered Land Act of 1963, the courts were reluctant in imposing implied trusts on the basis of customary rights. The application of customary law and common law principles needs to be in line with set guidelines and rules, to ensure consistency in providing justice.

## **List of Abbreviations**

LRA – Land Registration Act

NLP – National Land Policy

RLA – Registered Land Act

TDRMs – Traditional Dispute Resolution Mechanisms

## **List of Cases**

Hussey v Palmer [1972] 1 WLR 1286 Court of Appeal

Godfrey Kagia Githere v George Ndichu Kagia and others [2008] eKLR

Muriuki Marigi v Richard Marigi Muriuki & others [1996] eKLR

Joseph Githinji Gathiba v Charles Kingori Gathiba [2001] eKLR

Mukangu v Mbui [2000] LLR 4317

## **List of Legal Instruments**

Constitution of Kenya, 2010

Land Registration Act, 2012

Judicature Act, 1967

Law of Succession Act, 1972

National Land Policy, Sessional Paper no 3 of 2009

Registered Land Act (*repealed*), 1963

## CHAPTER 1: INTRODUCTION

### 1.1 Background of the problem

The issue of land has been a recurring one in Kenya as proved by the overflowing cases relating to land in the courts and the recognition of land issues in the National Land Policy (NLP) in 2009.<sup>1</sup> Considering that land seems to be an issue that dictates how people relate to each other, it is important to deal with these matters in a way that ensures justice and social welfare.

Towards the end of the 20th century, turmoil in the social life of the United Kingdom created a need for greater use of implied trusts to limit unconscionable behaviour in dealings with property and to allocate rights in the family home.<sup>2</sup> This was one of the original purposes of the creation and use of implied trusts.

Moreover, implied trusts, according to Lord Denning, exist in order to provide an equitable remedy to the aggrieved party so that they can be compensated. He is of the view that implied trusts are used only when and if justice and good conscience so require.<sup>3</sup>

Kenya is a common law system and its courts use doctrines of equity and the law of equity in order to deal with some issues, including implied trusts. In the 2008 case of **Godfrey Kagia Githere v George Ndichu Kagia and others**<sup>4</sup>, the court used the concept of implied trusts in dealing with land matters between family members. The judgment allowed a presumption of a constructive trust of the land making sure the defendants were given justice but leaving the plaintiff unable to claim his ownership rights under the Registered Land Act of 1989 (RLA).

### 1.2 Statement of problem

The problem in this situation is that the use of implied trusts in cases relating to land brings about an injustice in that, land owners are not able to enjoy the privileges that come with being a land owner because implied trusts are being imposed by courts. These rights include the ability to restrict people from entering one's land or to prevent other people from using that land without permission. On the other hand, acknowledging trusts arising out of customary law

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<sup>1</sup> National Land Policy, Sessional Paper no. 3 of 2009, Ministry of Lands, Republic of Kenya, 13.

<sup>2</sup> Hudson A, *Understanding Equity & Trusts*, 3ed, Routledge-Cavendish, 2008, 5.

<sup>3</sup> *Hussey v. Palmer* [1972] 1 WLR 1286 Court of Appeal

<sup>4</sup> *Godfrey Kagia Githere v George Ndichu Kagia and others* [2008] e KLR

claims can be seen as a way to preserve culture and tradition in addition to being a way in which the enjoyment of certain rights are limited.

### 1.3 Purpose of study

The reason why this study should be conducted is because in Kenya, land is a big deal. It was one of the motivations to obtain independence in the years leading up to December 12, 1963. The freedom fighters were motivated to fight to regain possession of their land that had been taken over by the British colonial rulers.<sup>5</sup> Land is an important aspect of the lives of Kenyan citizens since the rebellion against British rule to regain their land at the time of independence.

This means that it is important to study the rights people have in land and how they are being limited by foreign ideas like common law principles of equity. I say foreign idea because to the common Kenyan man who owns land rightfully from his great grandparents, he does not want to be told that his land can be taken away from him and given to someone else for example, because of the principle of implied trusts.

Family is the building block of society, it is the glue that holds society together and it is important to ensure there is peace and order in the family unit. Looking at the extent to which courts should use the law of equity in land issues is important because the people of Kenya were not part of the process of making these doctrines of equity but they were part of the legislation of the land laws through their representatives in parliament so it would only be just and right for them to benefit from the rights given to them in these laws.

As mentioned above, the reason for creating implied trusts in the beginning was to restrict and control unacceptable actions in dealings with property and to allocate rights in the family home. This study seeks to drive this noble purpose further in the court systems and judges when dealing with land cases.

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<sup>5</sup> Jeanne, "The Mau Mau – Kenya's Freedom Fighters", *All Things Kenya*, 27 December 2015, <http://allthingskenyan.com/history/the-mau-mau-kenyas-freedom-fightersv> on 6 June 2017.

## **1.4 Hypothesis**

That after the enactment of the Registered Land Act of 1963, claims of a relationship of trusts arising out of customary law rights were denied and extinguished due to the hunger for freedom from all sorts of colonization by giving people the freedom to own land individually without having to share.

That in most recent years, cases involving trusts arising out of customary law claims are now acknowledged, bringing back the native ideologies of the African Commons, thus preserving culture and customs. Perhaps due to change in perception of what justice really is in the judicial system or simply the mere preservation of culture and customs.

The presence of implied trusts in land matters brings a conflict of laws in terms of land laws and common law. This is a supposition based on the fact that the enacted land laws give rights to land owners that are being trumped or negated by the application of the law of equity in the form of implied trusts by courts.

## **1.5 Statement of Objectives**

1. To observe a trend in the use of implied trusts in land related issues using various case law.
2. To be able to demonstrate the impact that the use of implied trusts has on the rights of land owners/proprietors, as it relates to the administration of justice and the preservation of customary law rights.

## **1.6 Research Questions**

1. What is the impact of imposing trusts in land disputes?
2. In what circumstances should trusts be imposed by courts?
3. Is there a limitation of justice and full enjoyment of certain rights when trusts arising out of customary law are acknowledged by the courts?

## 1.7 Scope and limitation of the study

### 1.7.1 Assumptions

There is actually an injustice in the way the court used implied trusts in the case of **Godfrey Kagia Githere v George Ndichu Kagia and others** to judge the matter.

There is a social aspect to the use of implied trusts in individual matters/family matters

The society is affected by the discretion of the judges to use implied trusts in determining certain issues

### 1.7.2 Limitations

There will be no way to get any opinion from the parties involved in the various cases that will be analysed in order to get a different perspective on the issues at hand.

This study will not have any interviews or questionnaires in order to have a more hands on approach to the matter, therefore the study will only be based of case study and research.

## 1.8 Definition of terms

A **trust** is a relationship where a person holds title to property for instance, to use or possess for the benefit of another person. It is important to understand trusts by looking at the essential elements that create them. First there should be assets, anything that is capable of being owned. Equity creates a dual ownership; the legal ownership by the trustee who manages and controls the assets, and the equitable ownership which result in beneficial enjoyment by the beneficiary (the person whom the asset is being held of their benefit) or charitable purposes are fulfilled.<sup>6</sup>

**Implied trusts** are those trusts that exist when the court imposes a relationship of trust on persons.<sup>7</sup> They arise when there is no intention nor express declaration of creating a trust but the court finds it just and equitable to impose a trust relationship for the benefit of a party.<sup>8</sup>

**Land ownership/proprietorship** in simple terms means that a registered person as a proprietor is vested with absolute ownership of that land together with all rights and privileges

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<sup>6</sup> *Equity and trusts*, Lawcards Series, Routledge, 2010, 2.

<sup>7</sup> Hudson A, *Understanding Equity & Trusts*, 3<sup>rd</sup> Ed, Routledge Cavendish, London, 2008, 20.

<sup>8</sup> Worthington S, *Equity*, Oxford Press, 2003, 65.

that come with that land.<sup>9</sup> However, these rights and privileges are subject to certain overriding interests as set out in the LRA.<sup>10</sup>

**Customary land tenure** is basically land ownership and tenure in common. The LRA provides for a register to be kept for community land and its members<sup>11</sup>. This part of the Act allows for a group of people linked by ethnicity, culture or similar community interests to have rights and obligations over land and land based resources.<sup>12</sup>

## 1.9 Chapter Summary

**Chapter 1: Introduction;** which gives an introduction of the study and provides the route to be taken in the research process. The important terms relevant are defined and put into context so as to facilitate the flow of information and ideas throughout the research. Assumptions and limitations are set out so that the basis on which the study is standing on can be clear to avoid confusion.

**Chapter 2: Theoretical framework and Methodology;** this section will look at the concepts of implied trusts, rights of a proprietor and overriding interests. These concepts will be explained and linked using case law and the Land Laws of 2012 Kenya, in order to unify and merge the different ideas into a comprehensive framework. An explanation of the methodology to be used to obtain information will be provided as well.

**Chapter 3: Comparative study of cases on customary claim;** this part will contain a deep analysis of Kenyan cases that will support the research. Other African cases will be discussed to provide a disparity or a similarity with the Kenyan cases.

**Chapter 4: The paradigm shift of the court's use of implied trusts arising out of customary law rights;** this will have the conclusive findings obtained from the cases analyzed in the case study section. It will contain established opinions and decisions from different courts about the issue at hand. A deep and conclusive analysis of the findings will be done. This section will contain the meaning and implication of the results in the findings.

**Chapter 5: Conclusion and Recommendations;** which will conclude on the issues found in the analysis of the findings and will attempt to come up with answers to the research

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<sup>9</sup> Section 24, *Land Registration Act* (Act no 3 of 2012)

<sup>10</sup> Section 25, *Land Registration Act* (Act no 3 of 2012)

<sup>11</sup> Section 8, *Land Registration Act* (Act no 3 of 2012)

<sup>12</sup> Section 2, *Land Registration Act* (Act no 3 of 2012)

questions. In this chapter, the objectives of the research will be looked at to see whether they were achieved. Also in this part, the hypothesis will be compared with the actual results of the findings of the research. There will be recommendations that will help in dealing better and effectively with the problem in the research topic according to the findings obtained.

## CHAPTER 2 : THEORETICAL FRAMEWORK AND METHODOLOGY

This chapter looks at the use of trusts originally and their application in the Kenyan context. There is an explanation of why customary law rights are a factor in land matters in Kenya and how they are incorporated in the Kenyan laws relating to trusts. Different notions or perceptions of justice are explained in order to understand the delivery of justice by the Kenyan court case decisions on imposing relationships of trusts on land owners. The methodology used to collect information is explained as well as the justification for such methods.

### 2.1. Theoretical Framework

A trust is a relationship that arises when the legal ownership of property is transferred by one person (called the settlor) to another (called the trustee) to hold it on behalf or for the benefit of a third party (the beneficiary)<sup>13</sup>. This relationship can be created either expressly or the court can impose the relationship where there is no express declaration by the settlor. When the court imposes such a relationship on persons, it is called implied trusts and they are of two kinds, resulting and constructive.<sup>14</sup> They arise when there is no intention nor express declaration of creating a trust but the court finds it just and equitable to impose a trust relationship for the benefit of a party.<sup>15</sup>

Implied trusts, according to Lord Denning, exist in order to provide an equitable remedy to the aggrieved party so that they can be compensated. He is of the view that implied trusts are used only when and if justice and good conscience so require.<sup>16</sup>

The application of doctrines of equity and common law in Kenya is founded on the date of reception found in the Judicature Act.<sup>17</sup> This act provides that as of 12<sup>th</sup> August 1897, the High Court, Court of Appeal and all subordinate courts will have jurisdiction to be exercised in conformity with common law and doctrines of equity.<sup>18</sup> However, there is a proviso to this and it will only apply provided the circumstances of Kenya and its inhabitants permit it.<sup>19</sup> The circumstances are not specifically spelled out in the Judicature Act, so it is left to the judges to decide these circumstances in different cases. It is difficult to have uniformity in judgments

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<sup>13</sup> Nigel S and Richard E, *Trusts and Equity*, 7<sup>th</sup> Ed, Pearson Longman, London, 2005, 8.

<sup>14</sup> Hudson A, *Understanding Equity & Trusts*, 3<sup>rd</sup> Ed, Routledge Cavendish, London, 2008, 20.

<sup>15</sup> Worthington S, *Equity*, Oxford Press, 2003, 65.

<sup>16</sup> *Hussey v. Palmer* [1972] 1 WLR 1286 Court of Appeal

<sup>17</sup> Section 3(1)(c), *Judicature Act Cap*(Act no 16 of 1967)

<sup>18</sup> Section 3(1)(c), *Judicature Act Cap*(Act no 16 of 1967)

<sup>19</sup> Section 3(1)(c), *Judicature Act Cap*(Act no 16 of 1967)

about using implied trusts when the law is not specific on the circumstances and context in which they should be used. This is a problem that needs to be addressed, so that there is certainty in providing justice to the people of Kenya in land disputes.

All land belonging to Kenya, including private, public and community land, is protected under the Constitution. The protection extends to any land that is specifically reserved and held by communities identified on the basis of ethnicity, culture or similar community of interest.<sup>20</sup> Also extends to privately owned land, which can belong to an individual by way of registration.

The idea of private property rights originated from Adam Smith, who was an advocate of capitalism. According to Adam Smith, the fact that people can own property privately benefited the individual but also inadvertently helps the whole society.<sup>21</sup> He was of the mind that if one person owned his property, he is more encouraged to work hard on it to produce the best and to grow it. Owning property in common creates a scenario where some people would sit around and do nothing while they wait to reap the sowing of others, according to Adam Smith.

Since Kenya has had a history of owning land as a community just like many other African countries prior to colonization, it is important to consider the fact that some of these ideologies and traditions are still kept in mind when legislating laws relating to land. Okoth Ogendo was of the view that the concept of customary land tenure was suppressed by the strong colonial view that the native laws and customs were mere stages of the development of African societies and so it was not necessary to recognize these native customs and laws.<sup>22</sup> This idea was in relation to the African commons, which were land ownership and tenure in common. This has changed since then and there are now laws regulating land tenure and vesting individual rights to people making the idea of holding property in common like the pre-colonial times non-existent. However, there is still the concept of community owned land, as mentioned above. This was provided for in the making of the new land laws in Kenya in order to keep alive that idea of the commons. This is in section 8 of the LRA where it provides for a register to be kept for community land and its members<sup>23</sup>. This shows the spirit of preserving culture and tradition. It is important to note that customary law rights have found their way into the legislation and

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<sup>20</sup> Article 63, *Constitution of Kenya*, 2010.

<sup>21</sup> Smith A, *An Inquiry into the Nature and Causes of the Wealth of Nations*, Strahan W. and Cadell T., London, 1776.

<sup>22</sup> Ogendo O, *The Tragic African Commons: A Century of Expropriation, Suppression and Subversion*, School of Government, University of the Western Cape, South Africa, Occasional Paper Series no 24, 2002, 8.

<sup>23</sup> Section 8, *Land Registration Act* (Act no 3 of 2012)

laws of Kenya, making them a significant aspect to consider when dealing with land matters for instance.

Despite making laws allowing persons and individuals to own land privately, the doctrines of equity are introduced, under the pretext of promoting justice and good conscience, as Lord Denning said. This introduction is no doubt in the interest of justice, but should it go so far as to invalidate or limit the application of the laws made protecting individual property? I believe it is crucial to analyse the context and circumstances in which implied trusts should be used in land disputes, so as to not have a conflict of laws. Should the legislated laws on land ownership have more weight over the doctrines of common law such as implied trusts?

Justice is a complicated concept to define. In essence, it involves fairness. Justice allows a person to be given his or her due in all fairness. But it is so subjective that it is not possible to have a specific way of knowing what one person deserves and what another does not deserve. It is now left to the judge's moral thought to decide in a case if a son for example deserves to be given his father's land for free because the son is nice to the father. Judges and even law makers are given a difficult task to be as objective as possible in order to make fair laws and judgements.

For Aristotle, justice consists of what is lawful and fair. He says the fairness involves equitable distributions and that what is inequitable should be corrected.<sup>24</sup>

For Emmanuel Kant, justice is a virtue whereby we respect others' freedom, autonomy and dignity by not interfering with their voluntary actions, so long as those actions do not violate others' rights.<sup>25</sup> Many judges in Kenya tend to gravitate towards this form of justice as it will be later observed in the case study. In cases involving issues of justice being denied in land matters, the judge should try to look at whether imposing a trust relationship will violate or interfere with the rights of other parties involved in the matter.

This, in my opinion is what should be assessed when deciding whether implied trusts should be imposed by the courts for the administration of justice. This study is heavily leaning on Kant's concept of justice and its role in solving land matters in Kenya.

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<sup>24</sup> Pomerlau WP (Internet Encyclopedia of Philosophy)  
<<http://www.iep.utm.edu/justwest/>> on September 7, 2017.

<sup>25</sup> Pomerlau WP (Internet Encyclopedia of Philosophy)  
<<http://www.iep.utm.edu/justwest/>> on September 7, 2017.

Some people are of the view that it would be out of moral consideration and responsibility that a father should allow his sons to stay in his property or have a claim to it. As human beings, we are moral creatures. We tend to want to choose the good instead of evil. Aristotle said that because of our human nature, we tend to want to live a virtuous life which is the most fulfilling life that leads to our ultimate happiness, being the end or purpose of man.

## **2.2. Research Methodology**

The primary research method in this study will revolve around case law. To obtain information for this research, a variety of Kenyan cases will be analysed in contrast with some English cases in order to see the different ways in which judges from the common law system deal with implied trusts in family cases. Acts of the Kenyan Parliament and the Constitution will be used to get information about the different rights given to land owners and how private property is protected under Kenyan laws.

In Addition to this, text books by prominent authors and professors in the field of land law and the law of equity will be used.

For secondary research, internet searches will be made to obtain web articles and pages relevant to the study to see what can be found in the digital world about land and implied trusts.

### **2.2.1. Justification of Methodology**

Getting information and data for the research by way of case law and acts of parliament makes it possible to appreciate the way the Kenyan judicial system works. Kenya is under common law system therefore it would only be right for this study to get its main data the same was the judges and magistrates get rulings and judgments. The Acts of Parliament allow this study to have accurate information about the rights and obligation given to Kenyan citizens so as to relate these rights to the doctrines of equity and common law that the judiciary is guided by.

## CHAPTER 3 : COMPARATIVE STUDY OF CASES ON CUSTOMARY CLAIMS

This chapter looks at decisions from the Kenyan courts that show the different ways the courts apply implied trusts in land matters and its implications on the administration of justice. More cases are looked at to show the consequence of changing the court's opinion from the view that implied trusts should be in fact imposed on land owners in the presence of customary law claims. Others show the idea that they should not be imposed due to registration under the Registered Land Act of 1963 (*repealed*).

### 3.1. Denying trusts arising out of customary law

#### *Obiero v Opiyo and Others (1973)*<sup>26</sup>

In this case, the plaintiff was a wife of a man called Opiyo who had died and the defendants were the sons of a co-wife. She was the registered proprietor of a parcel of land. She claimed damages for trespass against the defendants and an injunction to restrain them from continuing or repeating acts of trespass. The defendants in their defence stated that they were in possession of the land in dispute and that they had cultivated it over a long period of time. They claimed that they were the owners of the land in dispute under customary law and denied the plaintiff's title to the land. This dispute had been heard and determined in the plaintiff's favour by a land adjudication committee and the defendant did not appeal against the decision. The judge in this case was not satisfied on the evidence that the defendants ever had any rights to the land under customary law. He held that rights under customary law are not overriding interests under s 30 of the RLA. The defendants were evicted from the land although they had been in possession and actually occupation, and cultivated the land.<sup>27</sup>

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<sup>26</sup> *Obiero v Opiyo and others* [1973] EA 227.

<sup>27</sup> <https://ogekazacharia.blogspot.co.ke/2015/06/the-absolute-estate-property-law.html> on 5 September 2017.

***Esiroyo v Esiroyo & Another (1973)***<sup>28</sup>

The plaintiff was the registered proprietor of the land under RLA. He wanted letters of eviction against the defendants of his land. He also claimed for damages for trespass on the land, and an injunction to restrain the defendants, their wives and children or servants from continuing or repeating any acts of trespass. The defendants were the sons of the plaintiff and claimed that they were entitled to certain portions of land and to occupy and cultivate those portions because it is land which came to their father from his father and grandfather and so forth. They claimed that their rights were founded under the Luhya customary law. The courts held that rights under customary law are not overriding interests under s 30 of the act. The court seems to have adopted the position that the plaintiff was no longer bound by customary law since the provisions of the act had taken away the matter in dispute out of the purview of customary law meaning that customary law rights are extinguished upon registration of land under the RLA.<sup>29</sup>

***Allan Kiama v Ndia Mathunya and 9 others (1978)***<sup>30</sup>

Karuma Kiragu had transferred land to the appellant Allan Kiama, who subsequently filed suit to eject respondents on grounds that they were trespassers. The respondents counterclaimed the case on the ground that the land belonged to their clan and therefore prayed for a declaration that the appellant held the land in trust for the respondents and alternatively the respondents prayed for a declaration that the appellant held the land subject to the rights of possession, occupation and cultivation of the respondent. The Court of Appeal declined to issue a declaration of land in trust which had been granted in the high court and this was despite the fact that there was evidence that during land adjudication and registration, the suit land was registered in the name of Karuma Kiragu so that he could later transfer the land to the rightful

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<sup>28</sup> Esiroyo v Esiroyo and another [1973] EA 388.

<sup>29</sup> Esiroyo v Esiroyo and another [1973] EA 388.

<sup>30</sup> Allan Kiama v Ndia Mathunya and 9 others [1978] eKLR.

owners after the rightful owners had been released from detention. Some of their relatives were on the land during land adjudication and registration. Karuma Kiragu who had been registered as absolute owner, on first registration without the words “as a trustee” having been entered on the land registrar had subsequently transferred the land to the appellant. In refusing a declaration of trust, the Court of Appeal held that it had not been proved by expert evidence that Kikuyu customary law contains the concept of a resulting trust within the jurisprudence as demanded by ss 48 and 51 of the Evidence Act. The Court of Appeal therefore ordered rectification of the land register in favor of the respondents on the basis of the overriding interest under s 30(g) of the RLA.

*Muriuki Marigi v. Richard Marigi Muriuki & others (1996)*<sup>31</sup>

The three sons of Marigi sued him in the High Court to compel him to equitably subdivide the parcel of land registered under his name under the RLA, fearing that the father intended to subdivide the land in a manner that would disadvantage them.

The Court of Appeal found that the claim of the son was based on customary law rights, which were excluded under ss 27, 28 and 29 of the RLA. According to the court, the effect of ss 28 and 29 is that the rights of a registered proprietor of land under the Act are absolute and indefeasible and can only be subject to rights and encumbrances noted in the register, or overriding interests which are set out in section 30. The court found that the evidence adduced did not indicate whether the Kikuyu customary rights of the parties were noted in the Land Register, in the absence of which the court could not infer or imply that the rights were in the register.<sup>32</sup>

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<sup>31</sup> Muriuki Marigi v Richard Marigi Muriuki and others [1996] eKLR.

<sup>32</sup> Busalie J, “The Practice in Land Law and Succession in Kenya: Constraints on the Full Enjoyment of Human Rights”, Unpublished LLM Thesis, Lund University, Autumn 2006, 54.

It is important to note that in the circumstance where there are ancestral claims over land, it is problematic and complex to determine the rights held on that particular land. The court shied away from imposing a trust relationship in this case because of the issue of customary rights, which were not envisaged by the land laws at the time. The defendants, Richard and Lydia Muriuki were relying on s 3(2) of the Judicature Act, which states that courts may be guided by African customary law so far as it is applicable and not repugnant to justice and morality or inconsistent with any written law. Mr. Muriuki Marigi was the registered owner of the land, which gives him the right to do with his land as he pleases. The RLA gave the father rights over his land and so customary law rights could not override the rights conferred in the Act at the time. They did not fall under overriding interests.

The court brought out the fact that in the Law of Succession Act, the estate of a person is only available for subdivision or claim only after he or she is dead, whether there was a will or not. The Act only comes in operation when a person dies and not before.<sup>33</sup> The court said that *“The defendant was still alive, and he was the registered owner of the suit property. He has the free will to decide whether he wants to subdivide his property and distribute it. He may not be urged, directed or ordered to do it against his own will.”*<sup>34</sup>

This is a position that goes hand in hand with Kant’s notion of justice, which involves respecting the freedom and autonomy of persons, and not interfering as long as it does not violate the rights of others.

### **3.2. Acknowledging trusts arising from customary law**

*Joseph Githinji Gathiba v Charles Kingori Gathiba (2001)*<sup>35</sup>

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<sup>33</sup> Section 3(1), *Law of Succession Act* (Act no 14 of 1972).

<sup>34</sup> *Muriuki Marigi v. Richard Marigi Muriuki & others* [1996] e KLR.

<sup>35</sup> *Joseph Githinji Gathiba v Charles Kingori Gathiba* [2001] eKLR.

The plaintiff brought a suit against a defendant who was his younger brother seeking him an order to restrain him from trespass or carrying any acts in relation to a piece of land of which the plaintiff was registered as an owner under the RLA. The plaintiff stated that he had solely paid for the purchase price of the land and it belonged to him absolutely and free from any claim by any family member. The defendants opposed the suit claiming that the land belonged to the family as it had been purchased by their late father. During the period of land adjudication and registration which came after their father's death their clan decided that the land should be registered in the name of the plaintiff to hold it on his own behalf and on behalf of the defendants. The defendant was not registered as a joint owner of the land directly because Kikuyu customary law did not permit unmarried men to own land.

It was held that despite the fact that customary law rights did not constitute an overriding interest, the same registration also recognizes trusts in general terms, and did not specifically exclude trusts originating from customary law, then such registration does not relieve a proprietor from any duty or obligations to which he is subject to as a trustee (created by the fact that under African customary laws, a person can hold a piece of land in a fiduciary capacity under a customary law). This was suggested in the proviso to s 28 of the RLA.

It was finally held that the land belonged to the plaintiff and the defendant as tenants in common in equal shares, and that the plaintiff as a proprietor holds the land in trust on his own behalf and on behalf of the defendant. The defendant was not a trespasser on the land and the plaintiff's claims were dismissed.<sup>36</sup>

*Mukangu v. Mbui (2004)*<sup>37</sup>

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<sup>36</sup> Joseph Githinji Gathiba v Charles Kingori Gathiba [2001] e KLR.

<sup>37</sup> Mukangu v Mbui [2004] LLR 4317.

The father was the registered proprietor under the RLA. His son allegedly threatened to harm him and had provoked him, so the father wanted him evicted from his land and so filed a suit. The son denied the allegations and pleaded that his father was holding the land in trust for all the family because the land was ancestral land devolved to the father upon the death of his grandfather. The father claimed he had purchased the land and registered in his name a portion of that ancestral land. The case went through appeal after being dismissed on the grounds that no evidence was given to show cause of action to warrant eviction of the son from the family land. On second appeal, the case was dismissed as well. This was after the court ruled that the concept of intergenerational equity should be brought up in this case, where the land is held by one generation for the benefit of the succeeding generations. The holding was that the son was in occupation and possession of the land since his birth with the consent and knowledge of the father, had a permanent house there and since the father was not going to compensate for that permanent house, it would not be right to evict the son. Therefore it was the final determination of the court that a trust arose from the possession and occupation of the land by the son and this trust has protection arising under ss 28 and 30 of the RLA.

The land in question was unregistered. The father had inherited that land from his ancestors so he could not claim absolute rights. Therefore, the court ruled that the son was entitled to live in that land and the father held it in trusts for the whole family.<sup>38</sup>

***Godfrey Kagia Githere v George Ndichu Kagia and others (2008)***<sup>39</sup>

The case involves a father and his five sons. The father initiated the suit wanting his sons to be evicted from his land and for him to be declared the registered owner of the suit premise. This was due to the fact that his sons had started to force him to sub divide his land among them against his wishes. The sons had become aggressive towards the applicant and they wanted to

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<sup>38</sup> Mukangu v. Mbui [2000] LLR 4317.

<sup>39</sup> Godfrey Kagia Githere v George Ndichu Kagia and others [2008] eKLR.

build their houses in his land without asking for his permission. One of the applicant's sons who is not a defendant in this case, testified that all the accused had refused to sell anything to contribute to the payment of the purchase price of the suit premise.

The sons sought to be recognized as beneficial owners and alleged that the plaintiff owned the suit land in trust, having sold the family ancestral land and used the proceeds to buy the suit premise.<sup>40</sup> They also ask the court to declare the presence of a constructive trust, seeing as they allegedly made financial contributions towards the settlement of the purchase of the suit premise. The sons also asked the court to prevent their father from interfering with their occupation of the land claiming they have beneficial rights to occupy the land in question due to the presence of an implied trust.<sup>41</sup>

The court ruled that it would be against public interest and good order to evict the sons from the land because it would be perpetuating poverty and homelessness. The judgment was in favor of the sons and the father was ordered not to evict them not to interfere with their occupation of the land. The sons were advised to respect and provide for their father.<sup>42</sup>

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<sup>40</sup> Godfrey Kagia Githere v George Ndichu Kagia & others [2008] e KLR.

<sup>41</sup> Godfrey Kagia Githere v George Ndichu Kagia & others [2008] e KLR.

<sup>42</sup> Godfrey Kagia Githere v George Ndichu Kagia & others [2008] e KLR.

## CHAPTER 4 : THE PARADIGM SHIFT OF THE COURT'S USE OF IMPLIED TRUSTS ARISING OUT OF CUSTOMARY LAW RIGHTS

This chapter looks at the trend that shows the shift in the court's position on implied trusts and discusses the events that led to the determination of these cases and the implications of such outcomes. There is an analysis of the judgments of the courts in the various cases and possible reasons why those conclusions were reached.

### 4.1. Possible justifications for the shift in the use of implied trusts

From the comparative study of cases in the previous chapter, it can be seen that in the periods between 1963 to around 2000, and after the enactment of the Registered Land Act of 1963, claims of a relationship of trusts arising out of customary law rights were denied and extinguished. This denial can be due to various factors, including the political situation at the time which was tense and just having recovered independence, the social norms dominating the country at the time or the thirst for complete freedom to own land individually, a thirst brought about by the past colonization that Kenya had just escaped by its independence in 1963.<sup>43</sup>

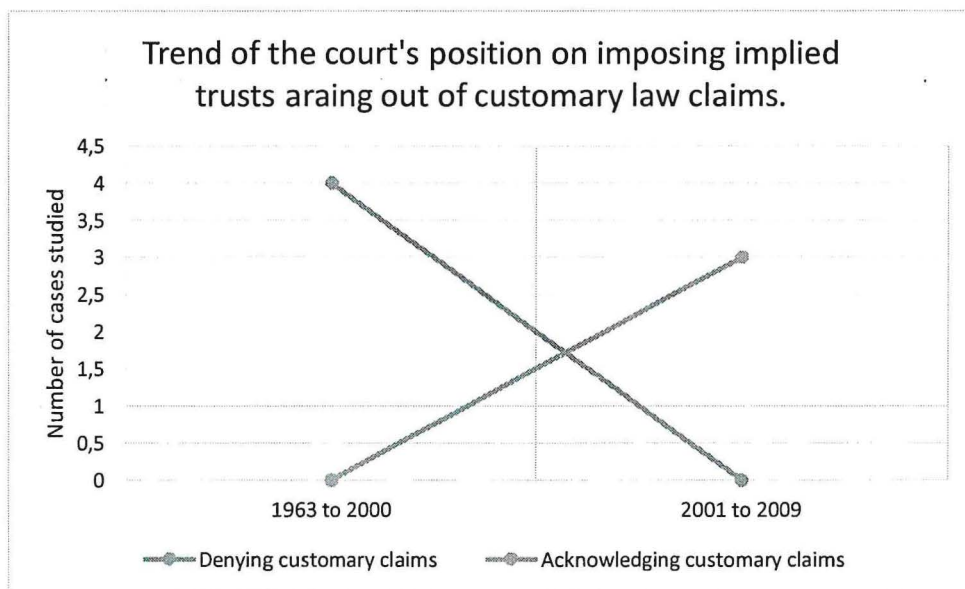


Figure 1 Chart showing trend in courts imposing trusts based on customary claims.

The case law shows that in the most recent years (between 2001 to 2009), cases involving trusts arising out of customary law claims are now acknowledged, bringing back the native ideologies

<sup>43</sup> <http://www.sahistory.org.za/dated-event/kenya-granted-independence> on 8 January 2018.

of the African Commons, thus preserving culture and customs. Why? Simply the mere preservation of culture and customs? Or perhaps due to change in perception of what justice really or what is perceived as “repugnant”. In the early 21<sup>st</sup> century, Kenya experienced a lot of changes in the political space. The then President Moi, announced that he would not be running again for presidency.<sup>44</sup> This must have caused a lot of liberation, since Moi had a regime that thrived in corruption, tribalism and discrimination. The IMF and the World Bank had cut off financial aid to Kenya to force Moi to carry out more economic reforms. The institutions maintained that his regime did little to improve its record of corruption, ethnic favouritism and human rights abuses.<sup>45</sup> From 1978 to 2001, he centralized and personalized power, becoming oppressive and authoritarian.<sup>46</sup> With Kibaki as the subsequent president, he led the country to the promulgation of a new Constitution<sup>47</sup> that sought to deal and correct all the things that were wrong with Moi’s regime. The Constitution allowed for the elimination of all forms of discrimination, with specificity to gender discrimination in land ownership.<sup>48</sup> There was provision made for equality and the equal treatment of men and women in the political, economic, cultural and social space.<sup>49</sup> An important provision that is relevant to this study is the one pertaining to the use of traditional dispute resolution mechanisms (TDRMs).<sup>50</sup> TDRMs are anchored and firmly embedded in the customs and traditions of communities and thus being part and parcel of their lives.<sup>51</sup>

The judicial system from the 1960s to the 1990s, it seems, saw it just and fair to allow an individual to own land, without any implications of customary law that would deny that individual the rights of ownership of the land, even if according to customs, other individuals should have rights over that land. It is clear that the courts at that time did not see justice as respect of others’ freedom, autonomy and dignity by not interfering with their voluntary actions, so long as those actions do not violate others’ rights.<sup>52</sup>

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<sup>44</sup> <https://www.britannica.com/place/Kenya/Kenya-in-the-21st-century> on 8 January 2018.

<sup>45</sup> <http://news.bbc.co.uk/2/hi/africa/2161868.stm> on 28 January 2018.

<sup>46</sup> Korwa G. and Munyae I., “Human Rights Abuse in Kenya Under Daniel Arap Moi, 1978 – 2001”, African Studies Quarterly, Volume 5, Issue 1, Winter 2001.

<sup>47</sup> Constitution of Kenya, 2010.

<sup>48</sup> Article 60, Constitution of Kenya, 2010.

<sup>49</sup> Article 27, Constitution of Kenya, 2010.

<sup>50</sup> Article 159, Constitution of Kenya, 2010.

<sup>51</sup> Kariuki F., “Applicability of Traditional Dispute Resolution Mechanisms in Criminal Cases in Kenya: Case Study of Republic v Mohamed Abdow Mohamed[2013] eKLR”, 2014.

<sup>52</sup> Pomerleau WP (Internet Encyclopedia of Philosophy)  
<<http://www.iep.utm.edu/justwest/>> accessed September 7, 2017.

However, we can see a paradigm shift in the court system, where courts find it fair to impose trusts arising from customary claims, allowing persons to enjoy rights over a particular property even if it is owned by another individual. This is because, in denying people who have rightful customary claims over a property the right to access and enjoy that property, would be violating their rights. This notion allows courts to objectively access and balance the rights of an individual versus the rights of other people, which helps in achieving the common good for all.

The presence of implied trusts in land issues brings a conflict of laws in terms of enacted land laws and customary law. This is observed in the cases analysed, like the *Obiero* case where there was an issue of whether customary rights are overriding interests on the right of owner given under the repealed RLA.<sup>53</sup> The enacted land laws give rights to land owners whose rights are being trumped or negated by the application of implied trusts on the basis of customary claims. This brings conflict of laws, and it is left to the courts and judges to decide which law is applicable or whether it is possible for one law to be applied without causing injustice.

In the *Godfrey* case, there was a conflict between the rights of a registered owner and land ownership as well as occupation by members of a family.<sup>54</sup> The rights of the father as the alleged land owner should have been properly given attention because if the interest of the majority was the only thing considered then it would just be another utilitarian way of judging matters. The common good, which the law is meant to advocate for, would not be achieved.

The father also had a right to do as he wished on his land. Was it correct for the court to impose the constructive trust on the land in question? It would seem so because the judgment provided that the reason why the constructive trust being imposed is so that there is no perpetuating poverty and homelessness and for public interest. The court did not explain or expound on what it meant when it said it is for public interest to allow the sons to remain in the father's land. This imposing of a constructive trust is limiting the right of the proprietor to do with his property as he wishes subject to overriding interests. Despite the fact that the title was not yet transferred to the father, he still had rights over that property.

Further, the court in the *Godfrey* case made an observation about taking into consideration the voice of the family matter. It was said that since the mother of the defendants and their uncle has urged the court to not evict the sons.<sup>55</sup> In a family setting, for the common good to be

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<sup>53</sup> *Obiero v Opiyo and Others* (1973) EA 227.

<sup>54</sup> *Godfrey Kagia Githere v George Ndichu Kagia and others* [2008] eKLR

<sup>55</sup> *Godfrey Kagia Githere v George Ndichu Kagia and others* [2008] eKLR.

achieved, all the members must be able to participate towards the achievement of happiness. Justice on the other hand means giving each one his or her due. The sons, in my opinion, having been disrespectful and aggressive towards their father, do not deserve to be allowed to stay in the land in dispute, so there should not be an implied trust imposed by the courts. It is not their due to receive benefit from being bad people. But then again, this argument is based on assessing the morality of human actions, which the courts usually tend to shy away from.

As a result of this judgment the family was left divided. The mother of the sons were one side and the father and his other son who was supporting him on the other side. The judgment in this case shows a negative impact on the family institution. It is clear the disharmony that has been created in this family by the judgement. Harmony comes with having justice, which allows fairness and so avoids conflict and disorder. If there is no justice, there will not be peace and harmony.

It seemed to be reasonable for the court to use implied trusts in land disputes only when justice so requires and in good conscience. It would have been unfair to allow the son in the *Muriuki* case to subdivide the property of the appellant who was still alive against his wishes. This would be limiting the rights of a land owner. The court, rightly so, did not impose an implied trusts in this case because it would have been unfair to the appellant, seeing as he is the registered owner and there was not contributions made by anyone else towards the acquisition of the estate. Customary rights could not be invoked in this case since the law does not list them as overriding interests as seen in *Esiroyo v Esiroyo and another*<sup>56</sup> and *Obiero v Opiyo and others*.<sup>57</sup>

The registered owner is able to prove that the land belongs to him by title deed and that customary rights should not be invoked when the land has been registered under the relevant act. Just because there are traditions and customs does not necessarily mean that the law enacted giving individual rights over land should be overlooked. The overriding interests that affect a person's land tenure do not include customs and traditions. These are issues that were abolished by the enactment of the Registered Land Act which is now repealed by the Land Registration Act of 2012. There must be a reason why customs were not included in that list.

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<sup>56</sup> *Esiroyo v Esiroyo and another* [1973] EA 388.

<sup>57</sup> *Obiero v Opiyo and Others* [1973] EA 227.

When the issue involves, like in the *Mukangu* case<sup>58</sup>, land that is deemed to be customary or belonging to a particular tribe or ethnic group, then issues of individual land ownership should not be imposed. The land is held in trust for all to use and benefit equally. In such instances, then it is absolutely justifiable for courts to impose the concept of implied trusts and this imposition would not be limiting the rights of land proprietors as given under the Land Registration Act of 2012 under section 25.

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<sup>58</sup> Mukangu v Mbui [2004] LLR 4317.

## CHAPTER 5 : CONCLUSION AND RECOMMENDATIONS

### 5.1. Conclusion

It is clear, from this study, that implied trusts can be imposed on land owners when it is apparent that justice will be observed on the aggrieved party. The same position is that of the English courts, where the application of implied trusts is discretionary to the judges and that circumstances of each case must be analysed carefully to decide how the implied trust can be imposed on the parties despite the lack of consent or intention of the registered owner of the property.

The trend observed shows a shift in the court's reluctance to accommodate claims arising out of customary rights. It started to impose implied trusts on customary rights from the early 21<sup>st</sup> century. There seemed to have been a change in perception of what justice really is in the judicial system and a change in what is now perceived to be repugnant about customary laws, because they are now being recognized easily by the courts as well as society in general, than before, where they were seen as primitive and immoral.

Before the application of the now repealed Registered Land Act Cap 300 of 1989(RLA)<sup>59</sup>, it was custom that land belonged to the entire community and its members. All members were entitled to occupy and work on the land, enjoying beneficial interests by virtue of birth, marriage or other ways of incorporation into that community.<sup>60</sup> This means that the issue of customary rights was not one that could cause injustice and division in families because they were recognized and supported by the law at the time. As the RLA was repealed, some of these customary claims were extinguished due to the fact that they were not specified as overriding interests over a person's land. This led to numerous claims of injustice where mostly family members would want to claim certain rights over a piece of land but they could not. However, as the 21<sup>st</sup> century drew near and all the changes that came with it, courts started to allow and entertain claims on property, arising out of customary rights. This was to preserve the inherent cultural history of the country as well as for the interest of justice. The events that may have caused or facilitated this paradigm shift could have been the end of Daniel Arap Moi as head of state, who many considered a dictator. It could also have been due to the changing perspective of how African customary law could be applied, without it being repugnant to

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<sup>59</sup> Registered Land Act (*Chapter 300 of 1989*) Repealed.

<sup>60</sup> Kanyinga K., *Re-distribution from Above: The Politics of Land Rights and Squatting in Coastal Kenya*, The Nordic Africa Institute, 2000, Research Report no. 115, 31-33.

justice and morality. Not all African customary law is repugnant to justice and morality as is often mistaken. The court may have realized this and so they found a way to introduce it back into the administration of justice through implied trusts created on land and property. These customary laws are not been labelled as primitive and immoral anymore. The society now embraces their diversity and their cultural history in a way that allows the court to see the positive in recognizing them and preserving them for the future generations.

Parties to a dispute involving family members still remain family even after the conclusion of the matter. This means that they will have to live together in the same society and it is important for them to be able to coexist peacefully. This cannot happen if the court process was too technical and formal, because the parties would not have expressed their true emotions and feelings because the court does not give them space to do so. It is important that all parties are able to live with each other peacefully to maintain harmony and order in society. Case law studied showed that families were broken during and after the proceedings. We cannot have a judicial system that causes families to be broken because the society is founded by these families.

## **5.2. Recommendations**

First of all, the court needs to have a look at the society and critically evaluate what the consequences of their decisions may have on it, because, when they suppress customary rights, it shows that they (customs) should not be embraced in the formal and public sphere and it gives them a negative connotation. The rights of others have to be balanced and weighed fairly so that justice is administered to all parties involved, without killing and rendering customs and traditions useless in society because they have a big role to play in ensuring the preservation of the state's history and culture as well as its diverse tribes. In recent years, it has been observed that tribes, ethnicities and cultures are being embraced openly and are portrayed so positively that it would be moving backwards if the courts suppress the manifestation of such cultures in the judicial system. Therefore courts in their judgments should make the importance of culture clear so that when other judges refer to the judgment, there is clarity as to where culture stands.

In order to maintain peace and harmony in the family and in society in general, there should not be unnecessary interference in family matters. The court needs to take a step back and give a chance to the families involved to solve the dispute outside the court in some instances.

Mediation and other forms of Traditional Dispute Resolution Mechanisms should be encouraged in order to avoid tensions and separation between families. This is already provided for in the Constitution but parliament needs to make laws effecting this and provide a framework for them to work properly. Better yet, there needs to be a judicial guideline that clarifies the proper way to apply s 3 of the Judicature Act. This will ensure that courts have a way of applying the section appropriately and consistently.

Restorative methods of providing justice should be incorporated in the legal process so that at the end of the dispute, all parties are able to continue living in harmony and peace.<sup>61</sup> For instance, plaintiff and defendant and all other family members involved in the land dispute should have victim offender mediation that will help them come up with a solution on their own. This helps in restoring broken relationships and thus keep a society together.<sup>62</sup>

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<sup>61</sup> Nugent W, Williams M and Umbreit M, *Participation in Victim-Offender Mediation and the Prevalence and Severity of Subsequent Delinquent Behaviour: A Meta-Analysis*, 2004, 408-415.

<sup>62</sup> Daly K, *Restorative Justice: The real story*, School of Criminology and Criminal Justice, Griffith University, Australia, 2001, 6, 13.

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