

LEGAL ASPECTS OF THE
EQUITABLE CUSTOMARY
TRUST

by

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NAIROBI

MAY 30, 1982.

To My Brother, Ezira

(iv)

him.

Byamukama, J.K.

Kwameh NkurumahHall,
University of Nairobi,
MAY 30, 1982.

FOREWORD

The aim of this paper is to discuss a concept that has risen a lot of questions in the Land Law of Kenya. This is the concept of the equitable customary trust. The concept is a judicial intervention to mitigate certain harsh aspects of the introduction of individual title and land registration in the African areas of the country where land was governed by customary law rules. The main thrust of the inquiry is as to whether in the welter of case-law for and against the concept, its legal existence can be ascertained and, if so, what is its nature. In the process aspects touching Land Law reform in Kenya, the aims of registration, nature of customary tenure and the English doctrine of trusts are briefly discussed.

The subject has been a challenging one partly due to lack of legal writing in the field of study and also because of confusing judicial decisions that are scantily reasoned and unreported. The reader is recommended to read more in the application of equity in Kenya and its Land Law in order to get a more detailed picture.

May I express my indebtedness to Mr. David Salter who has been my supervisor in this paper. His zeal and thoroughness were a major asset to me. However, the ideas here in are mine and should not be attributed to

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(ii) - Present -day

The Constitution, Act 5 of 1969
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The Land Control Act 1968, Cap 302 Laws of Kenya

The Land Adjudication Act, Cap 284

The Land Consolidation Act, Cap 283

The Limitation of Actions Act, 1968, Cap. 22 Laws of
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The Land Acquisition Act, Cap 295

The Land (Group Representatives) Act, Cap 287

The Magistrates Jurisdiction (Amendment) Act, 1981.

ABBREVIATIONS

A.C.	Appeal Cases
All E.R.	All England Law Reports
C.L.R.	Commonwealth Law Reports
C.C.No.	Civil Case Number
Civ. App.No	Civil Appeal Number
E.A.	East Africa Law Reports
E.A.P.L.R.	East Africa Protectorate Law Reports
J.A.L.	Journal of African Law
K.L.R.	Kenya Law Reports.

INTRODUCTION

Kenya is an agricultural country. This means that land is the chief source of income for the government and individual alike. It is therefore no wonder that issues pertaining to land have since colonial times, drawn special attention from Kenyan society. Especially controversial is the aspect of Kenyan Land Law dealt with in the present paper - the equitable customary trust. This is because the concept is a reaction to the draconian legislations that were the hall-mark of the 1950-60s Land reform programme. It is the injustices that were borne of the new system of land tenure introduced at this time and finally espoused by the Registered Land Act, 1963 that the equitable customary trust was conceived to fight.

Before the introduction of individual tenure under the land reform programme, all African lands in the country were governed by customary land tenure. This has been characterized by various authors as communal in nature. This meant that, as opposed to individual ownership of land which exists under English law, land was owned by a group of people - it may be a tribe, a clan or a family. Each member of such clan or family automatically had a right to land. Land was not a commercial commodity. No one could freely and without regard to the rights of the other clan or family members sell clan

family land. Of course by the 1950s as a study of authors like Sorrenson¹ and Mzee Jomo Kenyatta² will reveal, some African societies had eventually begun to realise the commercial value of land. They had therefore begun to clamour for individual titles of a kind they had seen the colonial administration give to European settlers. But by and large, African customary tenure still clung to communal ownership. This is revealed by the fact that at the time of registration of rights in land under the new system most African families would only put forward one member of the family to register for land in which they all had rights under customary law without ever suspecting that such person may take advantage of the new laws to later deny their rights. It is also shown by land disputes like that which gave rise to Esiroyo v. Esiroyo³ where the basic argument of the defendants was that their father had no absolute individual title to what was family land. The African today, remains dearly attached to the community in which he grew up and his family. Hence Professor Mbithi's famous words on African kinship:

" I am because we are;
and since we are, therefore
I am".⁴

clearly showing the communal nature of African life.

Therefore , when the land reform programme introduced individual title and sought to replace customary tenure with a new kind of tenure predicated upon English property notions, the great controversy, then as today, arose as to what was to happen to customary interests in land. More especially, what was the fate of such customary interests in land which after registration of individual titles remained unregistered? This question is central to the whole concept of the equitable customary trust.

Some Judges have answered the question by saying all such customary rights were extinguished by the act of registration. Bennett, J in Obiero v Opiyo⁵ and Kneller, J in Esiroyo v Esiroyo⁶ are the best examples of this view. Other judges however, have found the view adopted by their brothers harsh and unfair, and so have held a registered proprietor of family land under the new laws to be a trustee holding such land on behalf of himself and the other members of the family who did not have their rights adjudicated and registered- thereby begetting the concept of the equitable customary trust. Examples of such judges include Madan, J in Muguthu v. Muguthu⁷ and Mulli, J in Zephania Nthiga v Eunice Nthiga.⁸

Unfortunately, this noble and equitable concept, espoused by judges of conscience who could never countenance fraud and injustice when they saw it, is far from clearly

defined. What is its nature, is it of customary law origin or is it a creature of the English doctrines of equity, or is it a concept sui generis - of its own kind, what rights does it protect, inter alia, are only a few of the problems and issues that assail a student of the concept.

The purpose of this paper in light of the foregoing, is to map out all the issues and problematic aspects afflicting the study and application of the concept. In the event, chiefly by a process of deduction and balancing of arguments for and against, effort will be made to arrive at logical solutions to the issues and problems thus set out. All this in the hope that this paper will at last provide the stepping stone upon which later scholars, researchers as well as our courts will proceed to study and apply the concept.

The format of this paper is as follows: there are four chapters and a conclusion. Chapter One considers the historical background to the concept. The programme of Land reform of 1950s is here considered since it is the introduction of individual tenure by the latter that created an unjust situation necessitating equitable intervention. Case-law that has applied the concept will be examined in Chapter Two. The controversial case of Alan Kiama v Ndia Mathunya⁹ is examined separately in Chapter Three. In course of this examination issues like

the kind of rights protected by the concept and its nature as seen by the Court of Appeal are touched. Chapter Four deals with the theoretical basis of the concept of the equitable customary trust. It is here that an attempt is made to answer many of the riddles surrounding the concept - like its juridical basis, whether it is a customary law institution or a creature of English equity, if it is the latter then what type of English trust is it akin to and, above all, how does the concept fit within the scheme of provisions contained in the Registered Land Act, among others. Last to come will be the conclusion which by a method of extraction of key passages in the main body of the paper, will condense all the findings made about the concept.

FOOTNOTESINTRODUCTION

1. Sorrenson, Land Reform in Kikuyu Country, Oxford University Press 1966, pp.52-71.
2. Kenyatta, Facing Mount Kenya, London 1938.
3. (1973) E.A. 388.
4. John Mbithi, " African Religions and Philosophy," Heineman 1969, at p.108.
5. (1972) E.A. 227
6. Supra.
7. High Court of Kenya at Nairobi, H.C.C.C. No.377 of 1968, unreported.
8. High Court of Kenya at Nairobi, H.C.C.C. No. 1949 of 1976, unreported.
9. The Court of Appeal at Nairobi, Civ. App. No.42 of 1978, unreported.

CHAPTER ONEA HISTORICAL BACKGROUND

The genesis of the concept of the equitable customary trust is best grasped by first going back and recapitulating a part of the legal history of land law in Kenya. The problem starts with the land reform programme of the 1950s. At that material time all African lands were governed chiefly by the Native Lands Trust Ordinance 1938. This Ordinance vested all African lands in the Native Lands Trust Board as trustee and the Africans continued to occupy them and to practise their customary methods of land use and tenure. But increasing scarcity of land, the poverty of the little that was available leading to low yields, as well as population growth had by the 1950s created a land crisis in the African areas. And so the argument for reform of land use and tenure in the African areas, which was advocated as early as the 1930s by some individuals, was at last given practical consideration.

The blue print for the colonial administration programme of land reform was what is popularly remembered as the Swynnerton Plan - "A plan to intensify the development of African agriculture". To the mind of Swynnerton, who was at the time Assistant Director in the Department of Agriculture, the crisis in the African areas was not

the product of lack of enough land. It was the product of poor land use, and the main factor responsible for this poor land use was African customary tenure and land use. Thus he says in paragraph 14 of his Report about African land areas:

" . . . suffering from low standards of cultivation and income and, in particular, and as a result of African customary land tenure and inheritance, from fragmentation whereby any one family may possess several, and in recorded instances 10 to 29 small to minute fields scattered at wide intervals so that they cannot be economically developed either to the system of farming best suited to the area or to the inclinations of the farmer himself. It is impossible in such circumstances to develop sound farming rotations . . . in any satisfactory manner . . . " 1

The solution as advocated by Swynnerton was land reform whereby African tenurial and land use methods would be swept away. In their stead would be introduced individual title and modern and scientific methods of farming. Swynnerton saw individual ownership of land as the best method in the situation. He argued that individual title would not only give the African possessed thereof incentive to better and harder work, but also security of borrowing with a view to further improving his land. In paragraph 13 of his report:

" . . . 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 against such financial credits as he may wish to secure . . . " 2

But lurking behind the purportedly good intentions of the colonial administration in introducing land reform were political factors. The Kikuyu had asked for introduction of individual title in their homeland as early as the 1930s but it was not until the 1950s when the colonial government was faced with a war for independence that steps towards such reform were taken. The reasons why the colonial government chose this particular time to initiate land reform are not far to seek and are effectively summarized by the author Harbeson:

" Land consolidation became an essential element in the government campaign to create a stable middle class of politically conservative Kikuyu who would become a counterpoise against the full re-emergence of militant nationalism". 3

What Harbeson says of consolidation equally holds for land registration and individual title since the three processes were part of the same programme. Indeed even before Swynnerton had been commissioned to report, or necessary legislation to legalise the reforms had been passed, the local administration of the Central Province, from which most of the Mau Mau fighters and supporters came, had already commenced the three-fold process of adjudication, consolidation and registration that were the hall-mark of land reform.

The first legal provisions for the process of land reform were the Land Tenure Rules 1956. The rules, besides retroactively validating what the local administration had done without sanction of law, proceeded to give the details for the process of adjudication, consolidation, and registration of titles in such areas as the minister concerned declared in the government gazette. The African Courts (Suspension of Land Suits) Ordinance 1957 suspended all legal actions on land in court. The implication of this was that any African who had been deprived of his land during the process of land reform could not seek the assistance of the courts. It also implied that another African who had been registered as individual owner of land that was not really his either through fraud or mistake could not be made to relinquish

it by the courts or other process. The type of draconian and unfair effects against which an institution like the equitable customary trust had to be conceived to fight were already in the budding.

But it was really the Native Lands Registration Ordinance 1959 which was the high water mark of the reforms introduced in the 1950s. A lot of the provisions in this Ordinance were adopted by the Registered Land Act 1963. In fact the latter is the child of the former. The Ordinance was an Ordinance to provide for the ascertainment of rights and interests in, and for the consolidation of, land in native lands; for the registration of titles, and of transactions and devolutions affecting such lands. It validated all the steps undertaken by the administration under the Land Tenure Rules and prior to that. By Section 37 the title conferred by registration was:

" an estate in fee simple in such land together with all rights and privileges belonging or appurtenant thereto".

and by Section 38 such title as registered in the proprietor:

" . . . when acquired by first registration or subsequently for valuable consideration or by an order of court, shall be rights

not liable to be defeated except as provided by written law and shall be held by the proprietor, together with all the privileges and appurtenances belonging thereto free from all other interests and claims whatsoever, but subject as follows, that is to say:

- (a) subject to the leases, charges and other encumbrances and to conditions and restrictions, if any, shown in the Register;
- (b) unless contrary is expressed in the Register, subject to such liabilities, rights and interests as affect the same and are declared by Section 40 not to require registration:

Provided that nothing in this Section shall be deemed to relieve a proprietor from any duty or obligation to which he is subject as a trustee".

Section 40 contained overriding interests. Section 89 limited rectification by the court only to cases other than first registrations and even in cases of subsequent registration, there was limitation concerning the bona fide purchaser for value without notice under Section 89(2).

The above provisions of the 1959 Ordinance are set out at length in an attempt to show their striking similarity to the provisions obtaining under the subsequent Registered Land Act 1963. The sections of the Act, namely 27, 28, 30, and 143 are of similar substance to the provisions from the Ordi-

nance quoted above. The inequitable nature of the provisions of the Ordinance were soon to be confirmed in the case of District Commissioner, Kiambu v. R. Exparte Njau⁴ where sections 38 and 89(1) respectively were reiterated by the court to defeat the unregistered rights of the applicant in a manner not very dissimilar to that in Obiero v. Opiyo and Esiroyo v. Esiroyo, infra.

The similarity, of the provisions of the Native Lands Registration Ordinance, 1959 to those of the Registered Land Act has already been noted. It was mainly in these provisions, and the manner they were interpreted by the courts that the crying need arose for equitable intervention. This was because the new system of land tenure as finally embodied in the Registered Land Act proved unfair and caused suffering in its application. In the first instance the new system was an attempt to impose individual tenure on African communities that had hitherto seen land as communal property in which nobody could claim absolute individual rights to himself. Of course the argument is bound to rise again that the Africans had by this time slowly evolved towards individual tenure. The Kikuyu are an example. But it is submitted that this stage in African thoughts about land was still in its infancy. People still owned land as families and clans,

if not among the Kikuyu at the material time, at least among the majority of the other tribes to whom the new laws were extended. Coldham's study of the Luo is revealing in this respect. He found the Luo community in which he conducted his research to be still guided by customary attitudes towards land.⁵

Because of this difference of conceptual outlook on land- individualistic under the new laws, and communalistic under African eyes, the situation arose whereby, during the process of adjudication, consolidation and registration of land rights, not every person having customary rights in land would go forward to have them adjudicated and registered. Instead members of a family would only let one person register as the proprietor of the family land. Such person was intended to be a nominal proprietor of the family land so that the other family members would continue to use and enjoy the land as they were accustomed to do under customary law. However, such a person once registered, later realised the full implications of the act of registration and set up sections 27, 28, and 143 respectively to deny the other members of the family their rights.

The courts, when called upon to settle the ensuing dispute, the manifest fraud and inequity of the situation

notwithstanding, supported the usurper. Thus in Obiero v. Opiyo and Others⁶, of a widow and four stepsons living on a piece of land in Nyanza which had been registered in the name of the widow in 1968 and the customary rights of the step-sons had not been registered, the widow sought to evict the four step-sons as trespassers and pleaded the indefeasible title vested in her by Sections 27, 28, and 143 of the Act. The sons replied that they were in possession of the land because they were owners at customary law, secondly that the plaintiff's registration had been procured by fraud. The High Court of Kenya did not find on the evidence that the four sons had customary rights in the land or that the plaintiff had been registered through fraud, but held by way of obiter dicta that even if fraud had been proved, Section 143(1) would have made the plaintiff's title indefeasible by virtue of that fraud since it was a title by first registration, further that even if the sons had proved that they had previously held customary rights in the disputed land, those rights being unregistered would have been extinguished by the act of registration.

Similarly in Esiroyo v Esiroyo and Another⁷, the plaintiff was the father of the two defendants. The court on the evidence found that under Luhya customary

law, all the litigants being Luhya, the two defendants sons were automatically entitled to a share of the land in dispute since it was family land which the father, now turned plaintiff had inherited from their ancestors. The father based his action to evict his sons on the new laws contained in the Registered Land Act. He argued that being the registered proprietor his title was unaffected by the unregistered customary rights of the sons. Kneller, J. , as he then was, followed Obiero v. Opiyo⁸ and held that under Section 28 the plaintiff's title was free of encumbrances save those noted in the register. Damages were awarded to the father for the trespass of his own sons.

Such a situation as the above was unfair and hence the need for equitable intervention. Perhaps another cause of the unfairness of the new system of land tenure embodied in the Registered Land Act was borne of the political circumstances of the times when the programme of land reform was actually started. The 1950s saw a raging nationalist war. Many Africans were in the forests fighting for independence while others were languishing in detention. It was precisely at this time that the colonial government started the programme of reform - and the reasons as earlier pointed were political , to reward the collaborators and punish the freedo

fighters. The state of affairs meant that many individuals were not present to have their own rights adjudicated and registered. Instead, relatives registered in their behalf with the implicit intentions of keeping the land for its rightful owners. However, when the detained and the freedom fighters returned the persons in whose names their land had been registered refused to transfer titles to the rightful owners and set up Sections 27, 28 and 143(1) to deny them the land. Thus in the dispute underlying the case of Gatimu Kinguru v. Muya Gathangi⁹ the plaintiff who had registered in his name the land of his detained brother refused to return the land to the brother upon the latter's release from detention and instead sought to rely on the said sections to evict his brother as a trespasser.

The registration exercise itself had several errors. Whereas by the process of adjudication which preceded actual registration all customary rights existing in a given parcel of land were to be ascertained and recorded in the adjudication register and finally in the land register, the whole process of ascertaining customary rights was erroneous in that the adjudication boards never bothered to determine exactly the extent of rights any customary holder had in land. The adjudication boards deemed every person they included on their registers to be an absolute owner of land. This was

often not the case because some people had rights falling short of full ownership. For example Mrs. Obiero in Obiero v. Opiyo¹⁰ though registered as an absolute proprietor had in Luo customary law only the rights of a widow in her deceased husband's estate which at most are a life interest. So the process of adjudication gave her an estate far exceeding the actual rights she had under customary law. There were minor interests like common pastures- where the animals of a given community could be grazed on the uncultivated lands without being called trespass which the process of adjudication in its haste never bothered to recognise. All these errors increased the injustice occasioned by the new laws.

In light of the foregoing, an inequitable situation had arisen to which the ordinary laws gave no adequate remedy. Therefore there was a need for the intervention of equity to do justice. Such equitable intervention came to be in the concept of the equitable customary trust. In the words of Mulli J., on the concept:

" The doctrine of equitable customary trust would be useful to mitigate the ruthlessness of the law by declaring the registered proprietor as trustee for and ordering him to transfer the land to those entitled".¹¹

FOOTNOTESCHAPTER ONE

1. Swynnerton Report, paragraph 14.
2. Ibid., paragraph 13.
3. Harbeson, Nation-Building in Kenya- the Role of Land Reform, Northwestern University Press, 1973, p.33.
4. (1960) E.A. 109.
5. See generally: Coldham, The Effect of Registration of Title on Customary Land Rights in Kenya, J.A.L. (1978), pp.91-109.
6. Supra.
7. Supra.
8. Supra.
9. The High Court at Nairobi, H.C.C.C. No.176 of 1973, unreported.
10. Supra.
11. Mulli, J., Problematic Aspects of Land Law, 1979, unpublished, p.9.

CHAPTER TWOCASE-LAW ON THE APPLICATION OF THE CONCEPT

Equity will not suffer a wrong to go without remedy. The injustice afflicting the holders of unregistered customary rights under the Registered Land Act and the unjust enrichment of those who were lucky enough to get registered titles was soon to face challenge in the courts.

However, the majority of court decisions that challenged this injustice, and attempted to find remedy to it by way of the concept of the equitable customary trust are unreported. Moreover, there is a lot of conflict in the views of various judges as to the nature and basis of the concept. These problems notwithstanding, this Chapter endeavours, falling short of the Court of Appeal decision in Alan Kiama v. Ndia Mathunya¹ which despite a few mentions deserves its own Chapter, to examine the leading cases that have applied the concept. The aim of this endeavour is to see whether the equitable customary trust is a creature nurtured only in the minds of academics, or a principle of law supported by judicial authority and therefore one on which both litigants and lawyers may rely in the conduct of their cases.

I

The first decision to espouse the concept was the High Court decision of Mwangi Muguthu v. Maina Muguthu². The facts of the case are rather unclear, but the court found the land disputed by two Kikuyu brothers to be "family land". This is a phrase the court did not define. The court further found that the land was bequeathed to the two brothers by their deceased father in equal shares. However, the land was registered in favour of the defendant, who was the elder brother, under a first registration. The defendant had resisted all efforts by his younger brother to have the land divided between them. Consequently, the younger brother brought this action seeking a declaration of trust over the land and that the defendant as registered owner was a trustee on behalf of himself and his brother. The defendant set up the indefeasible title vested in him by the provisions of the Registered Land Act, especially section 143(1) which makes a first registration indefeasible even on grounds of fraud or mistake. He argued that his registration being a first registration, the plaintiff could not claim any unregistered interest in the disputed land. Madan , J., (as he then was,) made the

declaration of trust and ordered the defendant as trustee to transfer half-share to the plaintiff. He saw the trust he had declared to be the product of the intention of the parties, a finding which made it akin to the express private trust in English law. The parties had created the trust in accordance with Kikuyu customary law whereby the eldest son, called the muramati, was normally made the administrator of his deceased father's estate on behalf of himself and his younger brothers. It was in conformity with this custom that the defendant had been registered as proprietor:

" He was registered as owner as the eldest son of the family in accordance with Kikuyu custom which has the notion of trust inherent in it. Ordinarily in pursuance of Kikuyu custom he would have transferred a half-share in Marango (the land in dispute) to the plaintiff". 3

One should take with caution Madan , J!s. categorisation of the land in dispute as " family land". In the context in which he uses it, the term refers to land which belongs to members of a certain family because it was inherited from their ancestors. But the term is an unhappy one because Madan, J., uses it without appreciating that the

African customary institution of the family is a very fluid one and has been described by some scholars as including " the dead, the living and the yet to be born".⁴ Secondly, the customary family is of the extended type and includes the most distant relatives. Whereas there is nothing obnoxious about such a conception of the family, to loosely label the land involved in these disputes as " family land" may lead to problematic issues like whether a trust declared over such land can ever be certain in its objects, worse still, whether it would not offend the rules against remoteness. Moreover, cases like Nthiga v. Nthiga, infra, show that land purchased by the head of a family with his personal money may also be loosely classified as " family land".

Madan, J., had opportunity to follow himself in the later decision of Gatimu Kinguru v. Muya Gathangi.⁵ The parties were two Kikuyu brothers. Both of them were living on land inherited from their father. The land, however, was registered under a first registration in favour of the plaintiff. The plaintiff by this action argued that his brother who had continued to live on the land was a trespasser and sought the court's redress in the form of a perpetual injunction restraining the brother from any future trespass, and damages for user. The defendant counter-claimed that the land in dispute had

been inherited by the plaintiff and himself from their father in equal shares, and the plaintiff became registered owner of the whole parcel of land partly on trust for him since he was in detention and could not have his rights registered personally. On a second ground he argued that since he had occupied the land in dispute for over 12 years without complaint from the plaintiff, he had acquired title therein by adverse possession under the limitation of Actions Act.⁶ Madan, J., judged in favour of the defendant on both grounds of the counter claim. He held that the plaintiff held registered title to the land on trust for himself and his brother on the strength of Kikuyu customary practice in these matters.

The view of the equitable customary trust as predicated upon the customary practice of the parties is again supported by the case of Samuel Thata Mishek v. Priscilla Wambui and Wanjiku⁷. The facts of this case were that 'family land' had been registered in the name of the elder brother of the four plaintiffs. On his death, the magistrate exercising powers under Section 120 of the Registered Land Act to determine the deceased brother's lawful heirs, ordered the land to go to the defendants who were the deceased's widow and mother respectively. Under Kikuyu customary law two of the four plaintiffs who were sons were entitled

to shares in the land and the other two who were daughters were entitled to life interests so long as they remained unmarried. By this action the plaintiffs wanted the court to declare that both defendants held the land on trust for all those entitled. The court granted the declaration as prayed on the grounds that the land in dispute had been registered in the name of the deceased brother as a trustee under Kikuyu customary law. The High Court, however, went on to make the confusing statement that the defendants were subject to the trust because it was implied by law as well as by the intentions of the parties that there should be such a trust under Kikuyu customary law. This statement is confusing because if at all there was an intention by the parties to create a Kikuyu customary law trust, then the trust created was an express private trust and it was not necessary for the law to imply anything. Probably the court by these ambiguous words meant a presumed resulting trust which, under English law, is a trust by operation of law whereby the court implies a trust obligation to exist from the presumed intention of the parties. If the court meant a resulting trust of the presumed type, then one has moved into the realms of English law and it is no longer true to base the equitable customary trust on customary law entirely, save probably to the extent such law can help to explain the conduct of the parties.

Another case that saw the nature of this trust to be customary was the decision of Mungora Wamathai v. Mugweru⁸. In this case an uncle who had registered in his name the land of his deceased brother was held to be a trustee for his nephew because the latter was at customary law entitled to the deceased father's estate.

Doubts as to whether the trust in question was of customary origin or of the English type again arose from the language of the Court in Nthiga v. Nthiga⁹. The court in that case found the two defendants, who were the plaintiff's wife and son respectively, to have been registered on trust for him since he was the one who had paid the money to purchase the land. The court held, per Muli, J.:

" . . . the first defendant acquired this land as an agent of the plaintiff and . . . she held it on trust for him which trust can be deduced from the intention of the parties or by implication of law".¹⁰ (emphasis added)

and in the summary of his judgment he found both defendants to be under obligation by virtue of a resulting trust, a finding which would tend to see the equitable customary trust as by operation of law under English equity rather than of customary nature. Other than these doubts, Nthiga v. Nthiga is an important case because it attempts to reconcile the

equitable customary trust to the rule against rectification of a first registration under Section 143(1) of the Act:

" The registration of Gaturi /Githimo/ 2059 and 678 (the land in dispute) are first registrations but the court is not asked to rectify the register on the ground of omission, fraud or mistake. What the court is asked to do is to order the registered proprietors to be declared as trustees of the respective pieces of land on trust for the plaintiff. The plaintiff is asking for the declared trustees to execute their respective duties and obligations by transferring the said pieces of land unto him since he is now back in Kenya. These orders as prayed do not amount to rectification of the register as required under Section 143(1) of the Land Registered Act (Sic!)." 11

It was the Cotran, J. decisions of Limuli v . Marko Sabayi ¹² and Imbusi v. Imbusi ¹³ that attempted to come out with the clearest formulation of the concept of the equitable customary trust. In Limuli v. Marko Sabayi, the respondent was the uncle of the appellant. He had a first registration over the land in dispute. The appellant claimed this land was left by his deceased father but that at the time of registration he and his brother were too young and so the land was registered in favour of the respondent as their

uncle on trust for them. On coming to age of majority, the appellant and his brother claimed their shares in the land but the respondent, while giving the respondent's brother his share, refused to acquit the appellant in similar manner. Hence the appellant's action in this case seeking a declaration of trust upon the respondent for a part of the land registered in his name. Finding such trust to exist, Cotran J. held:

"It is now generally accepted by the courts of Kenya that there is nothing in the Registered Land Act which prevents the declaration of a trust in respect of registered land, and there is nothing to prevent the giving effect to such a trust by requiring the trustee to do his duty by executing transfer documents. (See in Zephania Nthiga v. Eunice Nthiga, H.C.C.C. 1914 of 1976, Unreported; Muguthu v. Muguthu (1971) K.H.C.D.16; Wamathai v. Mugweru, Nyeri, H.C.C.C.56 of 1972, Unreported)".¹⁴

Cotran J., reiterated this principle in the case of Imbusi v. Imbusi.¹⁵

II

The cases so far discussed are all High Court decisions and uphold a concept of equitable customary trust in an effort to protect the holder of unregistered customary rights in land from the harsh provisions

of the Registered Land Act. Yet there are other decisions of the High Court cited earlier where the judges have in similar situations reached the opposite conclusion and held that unregistered customary rights in land are extinguished by the process of registration. Reference here is made to cases like Obiero v. Opiyo,¹⁶ Esiroyo v. Esiroyo¹⁷ and Mary Wanjiru v. Nganga s/o Wanjiru¹⁸.

The basic question is how the two incompatible views contained in the two lines of High Court decisions can be reconciled. The judges in the various decisions upholding the equitable customary trust did not address their minds to this problem, but several propositions are submitted for its resolution.

The first of these propositions is derived from the rules of precedent. One of these rules is that a High Court judge is not bound by the decisions of his brother High Court judge. Such decisions are only of persuasive effect. Therefore the judges in the Muguthu v. Muguthu line of authorities were not bound to follow the Obiero v. Opiyo line of decisions. A second rule of precedent is that only the ratio decidendi of a case is binding. The ratio decidendi is that part of the judgment of a case which contains the rule of law upon which the decision was founded. This is as opposed to mere obiter dicta—chance remarks by the judge that have no bearing on

the factual issues of the dispute on trial.¹⁹ The rule stated by Bennett, J., in Obiero v. Opiyo that customary rights are extinguished by registration was mere obiter dicta, a chance remark and so of only persuasive authority. Said Bennett, J.:

" . . . I am not satisfied on the evidence that the defendants had any rights to the land under customary law, but even if they had, I am of the opinion that those rights would have been extinguished when the plaintiff became the registered proprietor". 20

It is this obiter dicta that Kneller, J., wrongfully followed in Esiroyo v. Esiroyo believing it to embody an authoritative statement of the law. It is therefore proposed that as judicial precedents, the cases that hold customary rights to land to have been extinguished at the time of registration are very weak.

However, if born weak, the statement of the law contained in the Obiero v. Opiyo line of cases has received the blessings and support of the Court of Appeal. In the case of Belinda Murai v. Amos Wainaina 21 that court expressed the opinion, per Potter, J.A.:

" I am of the opinion that no rights in land under customary law can survive or arise after the registration of that land under the Registered Land Act. Such rights as existed before registration are extinguished. I agree with the reasoning in this respect to be found in Esiroyo v. Esiroyo, I.v.I., Obiero v. Obiero (Sic!)." 22

In Alan Kiama v. Ndia Mathunya²³ the Court of Appeal again upheld Obiero v. Opiyo and Esiroyo v. Esiroyo. Since decisions of the Court of Appeal are binding on all lower courts,²⁴ the effect of the Court of Appeal's upholding of the decisions in the two cases is to turn the view that customary rights die with registration into an authoritative statement of law with which all Kenyan courts must abide. This in turn leaves the equitable customary trust on a shaky foundation.

A way to remove the concept from such a shaky foundation is to argue that Obiero v. Opiyo and Esiroyo v. Esiroyo, besides being based on a wrong interpretation of the Registered Land Act, are unconstitutional in that Section 75 of the Constitution of Kenya protects the right to private property. That right may not be taken away from an individual save only after an elaborate procedure partly enshrined in the Constitution and also found in the Land Acquisition Act.²⁵ The right

to property may only be taken away on grounds of public interest in which case full, prompt and adequate compensation must be paid to the victim. Customary rights in land being property rights any law which purports to extinguish them without such compensation is null and void under Section 3 of the Constitution for being inconsistent with the Supreme law in Kenya as contained in the Constitution. Indeed to argue that the Registered Land Act aimed to extinguish customary rights in land once unregistered is to put that Act on a collision course with the Constitution and risk its being declared a nullity under Section 3 thereof. However, the Registered Land Act need not be put to such risk as it is argued later in this paper that an interpretation of that Act that deems unregistered customary rights to have been extinguished by registration cannot be correct.²⁶

III

For the present, the cases upholding the equitable customary trust can be reconciled with those opposed to it by re-examining the kind of rights that the courts have held themselves to be protecting by way of such a trust. Two proposals come out about the rights being protected. The first of these is that they are unregistered customary rights. This seems rather

obvious because all the aggrieved parties in the cases where the concept was applied were persons who had customary rights in the disputed land but had either not bothered to register those rights or were ignorant of the effect of the Registered Land Act or were absent from their land following the turbulence of the Mau Mau war. It is also a view of the rights being protected that is implicit in the cases that have applied the concept. In Muguthu v. Muguthu²⁷ for example, Madan, J., had no illusions that he was declaring a trust in order to protect the plaintiff's unregistered customary rights. Indeed he saw the trust itself as a customary trust to the extent that he said:

" . . . He (the defendant) was registered as owner as the eldest son of the family in accordance with Kikuyu custom which has the notion of trust inherent in it". 28

Similarly in Wamathai v. Mugweru²⁹ the court was clearly protecting unregistered customary rights when it declared a trust to exist upon the uncle in favour of his nephew, concerning land that had formerly belonged to the latter's deceased father but had since been registered in the uncle's name, for the reason that, so the court argued, in Kikuyu customary law the nephew was entitled to inherit his

father's land. The same kind of customary rights are discernible as the ones being protected by the trust in Mani Gichuru and Kamau Mani v. Gitau Mani³⁰ where the court held the registered interests of the sons to their former father's land to be subject to a life interest in favour of their father, which life interest accrued to the father under Kikuyu customary law and at the time of judgment was not registered.

However, much as it may have already been argued that the Obiero v. Opiyo view that customary rights are extinguished by registration is wrong in law, one must concede that Obiero v. Opiyo and Esiroyo v. Esiroyo being supported by the Court of Appeal will by the rules of precedent continue to bind the courts of Kenya until they are overruled. Therefore a proposition of the rights protected as unregistered customary rights can have no basis for continued existence after the Court of Appeal upheld Obiero v. Opiyo and Esiroyo v. Esiroyo. It is in light of this fact that the second proposition as to what kind of rights are protected by the concept must be considered. This is the proposition that they are equitable rights. This is in fact the position taken by the Court of Appeal in Alan Kiama v. Ndia Mathunya³¹. But such a proposition, far from solving the problem, compounds it. For example,

how do these equitable rights arise and vest in the same individual whose customary rights ceased to be because they were unregistered? Madan, J.A. in Alan Kiama v. Ndia Mathunya,³² held them to arise as existing rights under Section 30(g) of the Registered Land Act which reads:

" 30. Unless the contrary is expressed in the register, all registered land shall be the subject of the following overriding interests as may for the time being subsist and affect the same, without their being noted in 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 and the rights are not disclosed".

But the occupation rights under Section 30(g) cannot exist in thin air.³³ The Court of Appeal in this case was using them as a mere fiction because the parties held to possess such rights were initially on the land in exercise of customary rights. The court dared not state that it was protecting unregistered customary rights and so resorted to a fiction.

The above analysis of the case-law must be read subject to the Court of Appeal decision in Alan Kiama v. Ndia Mathunya.³⁴ Despite a few mentions, this case is treated in detail in the following chapter.

Nevertheless, at this stage the many cases that have upheld the concept, the uncertainties about its nature therein inherent notwithstanding, go far to prove that the equitable customary trust is no product of academics but is well rooted in our law.

FOOTNOTESCHAPTER TWO

1. Court of Appeal at Nairobi, Civ. App. No.42 of 1978.
2. High Court at Nairobi, C.C. No.377 of 1968.
3. Supra, at page 8 of judgment.
4. Mbithia, supra, p.107
5. High Court at Nairobi, C.C. No.176 of 1973.
6. Cap. 22, Laws of Kenya.
7. High Court at Nairobi, C.C. No.1400 of 1973.
8. High Court at Nyeri, C.C. No. 56 of 1972.
9. High Court at Nairobi, C.C. No.1949 of 1975.
10. Supra, at page 8 of the judgment
11. Supra, at page 10 of the judgment.
12. High Court at Kisumu, C.C. No.222 of 1978.
13. High Court at Kisumu, C.C. No.72 of 1978.
14. Supra, at page 5 of the judgment.
15. Supra.
16. Supra.
17. Supra.
18. High Court at Nairobi, C.C.No.2497 of 1976.
19. See Glanville Williams, Learning the Law, Stevens 10th Ed. pp.62 and 72.
20. (1972) E.A., at p.228.
21. Court of Appeal at Nairobi, Civ. App. No.46 of 1977.
22. Supra, at page 2 of his judgment.
23. Supra.

24. This is on authority of Dodhia v. National and Grindlays Bank (1970) E.A. 195.
25. Cap. 295, Laws of Kenya.
26. Infra, chapter 3.
27. Supra.
28. Supra, at page 8 of judgment
29. Supra.
30. High Court at Nairobi, C.C. No.34 of 1977.
31. Op.cit.
32. Op.cit.
33. See infra, Chapter 3 for an expansion of this point.
34. op,cit.

CHAPTER THREETHE CONCEPT IN LIGHT OF ALAN KIAMA v. NDIAMATHUNYA:¹

The legal wrangle over the concept of the equitable customary trust, which had for so long been confined to the High Court, came for the first time to the Court of Appeal in 1981. This was in the case of Alan Kiama v. Ndia Mathunya² (hereafter called the Kiama Case). The Court of Appeal is the highest tribunal in Kenya and its decisions bind all courts below it in future disputes on similar facts. The importance of the Kiama case therefore need not be over-emphasized. Whatever may have been gathered about the equitable customary trust in the preceding chapter must be re-considered in light of the Court of Appeal decision in this case.

The land in dispute in the case was registered land that before the act of registration had belonged to a certain clan of the Kikuyu tribe called the Agaciku/Kabareki clan. The facts were that during the process of land adjudication, consolidation and registration in the 1950s members of the clan had decided that their land should be adjudicated, consolidated and registered in one title. They chose one member

of the clan called Karuru Kiragu to be the registered proprietor of such title. Karuru Kiragu was intended to be a nominee of the clan and his registration as proprietor was subject to the rights of the clan members. However, the trust thereby imposed on Karuru Kiragu's title was never indicated in the land register. Karuru Kiragu privately decided to exchange the clan-land registered in his name, which amounted to 47 acres for 15 acres in a transaction with the appellant. On the evidence, it was apparent that the appellant, who was an agricultural officer in the area where the land was situated, must have known of the clan rights in the land. Having successfully got title to the land in dispute under the exchange transaction, the appellant started this action as registered proprietor alleging that the respondents, who were all members of the Agaciku/Kabareki clan were trespassers who wrongfully continued to occupy and cultivate his land. He prayed the court to enter an order for the ejection of the respondents, a perpetual injunction prohibiting them from any future entries on the land, and damages occasioned to him by their trespass.

The respondents replied in defence that the land occupied by them had always been their clan land and they continued to occupy and use it not as trespassers but as members of the clan to which it belonged. They

alleged fraud against the appellant. The respondents therefore counter-claimed a declaration by the court that a trust existed where under the appellant held the land in question as trustee for their benefit and, in the alternative, that the appellant held the land subject to their rights of occupation. The appellant's title in this case was not under a first registration but was a subsequent title acquired through the exchange transaction with Karuru Kiragu. This fact should be noted because it meant that the appellant's title could, under circumstances of fraud or mistake, be rectifiable by the court under Section 143 of the Act unlike in cases of titles by first registration. In the High Court, Mulli J., gave judgment in favour of the respondents on the basis of a resulting trust. He took the view that the failure to indicate the trust in the land register by adding the words "as trustee" to Karuru Kiragu's first title, as provided under Section 126(1) of the Registered Land Act, was fatal to what was, on the evidence before the court, an express trust created by the clan members. He therefore said, in invoking the doctrine of resulting trust:

" He (Karuru Kiragu) was registered as the absolute owner of that clan land and no trust was recorded in the "register". This was a technicality which many people were not aware of during those days when the exercise was new. It would be iniquitous to deprive the entitled persons of their interest in the land because the trust was not specifically recorded in the register through no fault of their own - - - the resulting trust exists in circumstances such

as these that a trust was not recorded on the register. I hold that the trust existed under customary law when the members of the clan allowed Karuru to hold the land was not defeated by a subsequent registration of the suit land in the name of Karuru without recording the trust (Sic!).

The resulting trust was implied by law after the registration of the suit land in the name of Karuru Kiragu." 3.

The same trusteeship duties were extended to the appellant on the finding that the transaction between him and Karuru Kiragu had been fraudulent, and rectification was ordered by the court under Section 143 since the appellant was not proprietor under a first registration as to be exempted under subsection (1) thereof which reads:

" 143. (1) subject to subsection (2) of this section the court may order rectification by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake".

This leg of section 143 restricts the power of the courts to rectify the land register for reasons of fraud or mistake in the registration of a given title only to those cases where the title being rectified is not a title by first registration. In the Kiama case as already noted, the appellant's title was a subsequent title and so the court's power to rectify it was less restricted.

Section 143(2) of the Act further restricts the court's power of rectification with regard to cases of subsequent titles by incorporating the doctrine of the bona fide purchaser for value without notice. However, even this restriction on the courts power of rectification could not avail the appellant in the Kiama case since the judge was satisfied there had been fraud, a fact which negated lack of notice and good faith by the appellant.

In the Court of Appeal, against the above judgement of Mulli, J., the views of their Lordships - Corram: Madan, Law, Potter, J.J.A. are confusing but the following main holdings are discernible from their judgments:

- (i) Mulli, J.'s order that the appellant be deemed a trustee and rectification of the register made in favour of the respondents was maintained;
- (ii) the trust in question was by operation of law;
- (iii) the requirement of consent under the Land Control Act did not affect the said trust since that requirement concerned express trusts only and not trusts created by operation of law;

(iv) the views of Kneller, J., in Esiroyo v. Esiroyo⁴ that all customary interests in registered land were extinguished by the act of registration were upheld; and

(v) the rights of the respondents were rights in possession and actual occupation and so were overriding interests under Section 30(g), and could therefore bind registered title without themselves being registered under Section 28(b) of the Act.

There is no doubt that the above judgment of the Court of Appeal, by upholding the trust originally found by Mulli, J., and maintaining the order of rectification of the register in favour of the respondents, was just and fair on the particular facts of the case. The respondents had been on the land, in the words of Law, J.A. since 'time immemorial'. The appellant knew of their claims in the disputed land. It would have been inequitable to allow him to defeat the rights of the respondents by a secret registration in his favour. In the words of Madan, J.A., it was 'social justice' to deem him a trustee in the circumstances and protect the respondent's rights.

However, despite arriving at a just decision between the parties, there are certain aspects of the judgment that cannot escape criticism. The first is the nature of the trust imposed by the court in the circumstances. It was implicit in all the three judgments that the trust was not express but by operation of law. But what type of trust by operation of law was it? There are different types of trusts by operation of law- there are constructive trusts and resulting trusts. The latter, since Megarry, J.'s decision in Re Vandervell's Trusts⁵, are further divisible into automatic and presumed resulting trusts. The constructive trust applies in specific cases which are - cases where somebody gains an inequitable advantage or profit through a fiduciary position occupied by him in relation to another party or certain objects. So was the case in Keech v. Sandford⁶ where a trustee renewed the lease which was the subject of trust in his own name. The constructive trust also applies where a stranger intermeddles with trust property as is the position in the trust de son tort cases where a stranger takes upon himself the duties of a trustee with regard to trust property although he was never appointed trustee. Cases of fraud will also induce the court to apply the constructive trust as the case

of Ottaway v. Norman⁷ illustrates, or where the conduct of the defendant is so unfair that in equity a trust should be imposed on any gain obtained by such conduct.

The automatic resulting trust is applied in situations where property is conveyed to create an express trust but that trust fails due to lack of formalities, for example, lack of the Land Control Boards consent to the initial express trust created by the clan in Karuru Kiragu in the Kiama case, or having created a trust for a particular purpose that trust's objects are executed but there is a remainder of the trust property. In both cases, the law implies a resulting trust under which the trustee holds the property, for the benefit of the settler or testator's estate. The presumed resulting trust on the other hand is applied in cases where property is either transferred or purchased in the name of another without explicit intimation that such person is to hold it on trust but from the circumstances it is unreasonable to assume the transferor or purchaser was making an absolute gift. So the legal holder of the property is put under trust by the court in favour of the purchaser or transferor.

It is not clear which trust by operation of law the court relied on, and the views of different judges differed. Mulli, J. in the trial-court found a resulting trust, arguably of the automatic type since he was trying to fight the fraud of the appellant on the failure of the express trust created by the clan-members due to lack of the Land Control Board's consent. Potter, J.A. also found a resulting trust. He purported in that finding to have concurred with Mulli J. but this cannot be the case since the definition of resulting trust he relied on:

" A resulting trust is a trust arising by operation of law . . . (2) where property is purchased in the name or placed in the possession of a person without any intimation that he is to hold it in trust, but the retention of the beneficial interest by the purchaser or disposer is presumed to have been intended and is held to be equitable".⁸

found in Halsbury's Laws of England is a definition of the presumed resulting trust rather than the automatic resulting trust.

Law, J.A. found a constructive trust to exist. Madan J.A., while reiterating the need for equitable intervention in the case to do justice between the parties did not agree with Mulli, J's finding of a resulting trust but agreed with his order for

rectification on the ground that this was 'social justice' and the respondents had equitable rights by way of overriding interest. These differences between the judges who heard the appeal about the nature of the trust they were applying, and similar uncertainties noted in the judgments of the High Court judges who applied the concept, leaves one in suspense about the nature of the equitable customary trust.

Equally debatable was the Court of Appeal's upholding of the view of Kneller, J., in Esiroyo v. Esiroyo⁹ to the effect that customary rights in land are extinguished at the moment such land is registered unless registered. Whether such a view is supportable depends on what one feels the intentions of registration of title to land are. In this regard the views of the Mission on Land Consolidation and Registration in Kenya 1965-66¹⁰ are useful. The terms of reference of this Mission were to consider the suitability of land consolidation and registration and alternative types of tenure reform for different parts of the country and its recommendations were the precursor to the Land (Group Representatives) Act¹¹. The Mission observed the aim of registration of title in Kenya, as in England, was to facilitate conveyancing by providing a system of proving, and not changing, the title and simplifying dealings in land. This is in paragraph 30

of the Mission Report. The same Mission went on further to observe about the process of land adjudication upon which the final land register is based that this process merely involved ascertaining of the existing rights in the land. Said the Mission in paragraph 117:

" Adjudication is the means by which a final ascertainment is made of existing rights in land. Its cardinal principle is that it recognises and confirms rights which are actually in being; it does not alter or create rights, though it may substitute a right defined under statute for what is supposed to be an equivalent under customary law . . ."

This view of the aims of registration of title tallies with the intention initially expressed in the Swynnerton Plan¹² which were not that the African should be given a title completely different from the one he initially had in his land, but that his customary rights should be registered so as to give him valuable security for borrowing to improve his land and produce higher yields. The same view of the purpose of registration observed in the Mission Report is also held by academic writers like Gibson Kamau Kuria.¹³

The view of the aims of registration that Kneller, J., and his supporters take, unfortunately, is that registration of title involves the creation of a

a completely new kind of title, that it is all embracing and any remnant unregistered customary interests are extinguished by it. This view of registration of title cannot be supported if only because the judge did not bother to benefit from the views expressed in Mission Reports like the one already quoted which were highly instrumental to the legislations introducing registration of title in Kenya. There are authorities both in East African and England to support the position that such Mission Reports are relevant and usable by the courts when interpreting statutory provisions. In the Uganda case of A.G. of Uganda v. Kabaka's Government¹⁴ the judge held the history and surrounding circumstances to the enactment of a Statute may be used to interpret it. A Mission Report whose recommendations are used in drafting the statute in question surely forms part of its history. Similarly, the House of Lords in England has twice held that a Court may use the Report of a Select Committee to enable it interpret the Statutes that were enacted on basis of such a report. These are the cases of Davis v. Johnson¹⁵ and Black-Clawson v. Papier Werke.¹⁶

The view of registration of title as not all embracing so as to destroy all unregistered interests in land is, moreover, held by the courts in jurisdictions

like that of New South Wales in Australia with statutes in pari materia with the Registered Land Act of Kenya. The Real Property Act, 1900 of that territory has provisions for registration of title fairly similar to those of the Registered Land Act, but this has not hindered the courts of New South Wales to hold that unregistered interests continue to exist at least as equitable interests the owner of which may protect by the system of caveats or by getting them fully registered in which case his title becomes a legal title. For example, whereas Section 41 of the New South Wales Act would literally mean any unregistered transaction in land registered under the Act has no efficacy in the same way as Section 28 of the Registered Land Act stipulates, the New South Wales Courts in cases like Brunker v. Perpetual Trustee Co. Limited¹⁷ have evaded this effect by deeming the unregistered transaction to create an equitable interest, and the author Baälmanⁿ observes in this respect:

"On a literal construction, S.41 appears to deny any efficacy whatever to unregistered dealings. The courts, however, have consistently declined to give it a literal construction, and have recognised unregistered dealings as being capable of creating interests in land under the Act . . . enforceable in equity".¹⁸

Hence a system of registration of title cannot be said to extinguish any interests in the land that are unregistered.

Even less supportable is the view that customary rights are extinguished since the Court of Appeal never bothered to consider other High Court decisions like Muguthu v. Muguthu¹⁹ which held the contrary to Esiroyo v. Esiroyo.²⁰

The upholding of the view that customary rights are extinguished by registration begs the question what rights of the respondents the Court of Appeal was seeking to protect by a declaration of trust. This is because the counter claim of the respondent was that since time immemorial they and their forefathers as members of the Agaciku/Kabareki clan had lived on the disputed land and continued to live on it in pursuit of their clan's rights. This counter-claim was clearly a customary claim to the land. If customary rights are extinguished by registration then the claim of the respondents died with the registration of the disputed land in favour of Karuru Kiragu. Thereafter the respondents ceased to have any rights in the land except probably by adverse possession. For the trust to be declared, it must be in aid of certain rights of the aggrieved party which the court feels are inadequately protected by the common law. But

here there are no rights at all to protect because the rights the respondents used to have died at the time of registration. So no trust can be declared or should have been declared by the court!!

The Court of Appeal, however, finds fast answer to the inquiry what kind of rights are protected in Section 30 (g) of the Registered Land Act. It argues the rights of the respondents to be overriding interests and so valid despite being unregistered. They are overriding interests by virtue of possession and actual occupation under Section 30(g). The trust imposed by the court is in favour of such rights and not, arguably, customary rights. The order for rectification also is to get such overriding rights of the respondents registered. This, prima facie, is a good solution to the puzzle. Nevertheless, there are a number of loop holes in it. In the first instance in the case of Esiroyo v. Esiroyo²¹ the defendants whose customary rights were argued to have been extinguished had been in actual occupation in which case the court should have similarly found them to have an overriding interest. The court did not, which makes Esiroyo v. Esiroyo an erroneous decision upon which the Court of Appeal could not rely and quote without contradicting itself.

A bigger loophole is found in the overriding interest theory of the Court of Appeal when one examines what kind of rights Section 30 (g) envisages. Is possession or actual occupation per se enough to enable the occupier to have an overriding interest under Section 30(g) ? Surely the possession or occupation must be backed up by some lawful right to occupy before it can be protected by Section 30(g). The actual occupier's occupation does not hang in thin air. Were it to be the case then the absurd situation would arise whereby a trespasser or other person who unlawfully occupies the land would be protected by Section 30(g). This is not so because, it is submitted, the person in actual occupation must be in such occupation pursuant to some lawful right or interest which, however, is unregistered. This is a submission supported by decisions from England where the Land Registration Act, 1925 has a similar provision in its Section 70(1)(g).

The English courts have especially had to define that provision in cases concerning the "deserted wife's equity". The general facts of these cases are that a deserted or divorced wife, who in some cases may have contributed to the purchase price of the matrimonial home though it was registered in the husband's name, continues to live in that home. Meanwhile the husband has disposed of the property to a third party who never bothered to check out the

claims of the people in actual occupation of that property as is required by the section. In one such case, National Provincial Bank v. Ainsworth,²² the House of Lords upheld the views of Russell, L.J. which had been in minority in the Court of Appeal to the effect that:

" . . . Section 70 in all its parts is dealing with rights in reference to land which have the quality of being capable of enduring through different ownership of the land, according to the normal conceptions of title to property. - - - Nor should the mind be distracted by the fact that the owner of the rights under Section 70(1)(g) is identified as a person in actual occupation. It is the rights of such a person which constitute the overriding interest and not his occupation. A squatter by virtue of his mere possessory occupation may have some rights in reference to the land to resist trespass, but those rights cannot, of course be an overriding interest under section 70(1)(g)."²³
(Emphasis added).

Therefore the Court of Appeal in the Kiama case, other than holding the respondents to be holders of an overriding interest by virtue of occupation under Section 30(g), should have addressed itself to the question what are the rights or interests of the respondents which back up their occupation. In the process of answering this question the court would inevitably find itself face to face with the ghost of the customary rights it had sentenced to death by upholding Esiroyo v. Esiroyo. The origin of the respondents occupation of the land in the Kiama case was their customary rights in that land. In practice therefore the court's declaration of trust

to protect the overriding interests of the respondents is ultimately a protection of unregistered customary rights. The Court of Appeal would therefore have saved more face by being brave, as the High Court judges in the Muguthu.v. Muguthu²⁴ line of cases had been brave, and holding customary rights not to have been extinguished by registration but are capable of subsistence either as overriding interests or as equitable rights under a trust.

The above are only a few of the many contradictions that an examination is bound to draw out of the Court of Appeal judgment in the Kiama case. What are the implications of this case to the concept of the equitable customary trust? The contradictions already noted mean that the concept has gained very little by way of clarification. The Court of Appeal's ruling that all customary interests die with registration brings the name of the concept in question. Is it still appropriate to refer to the concept as a 'customary' trust? It is submitted that the name under which the concept passes should not be a serious issue of debate. What is more important is to find out whether the gist of the concept survives the decision. It is submitted that it does survive. On facts very similar to those of the Muguthu v.

Muguthu line of cases, the Court of Appeal did find a trust in favour of parties who had held customary rights in the disputed land but had not bothered to register them and ordered rectification of the register to show that they were the owners. The only dissimilar respect was that the appellant in this case did not hold under a first registration, but this dissimilarity is not material since Mulli, J., whose judgment was substantially upheld by the court, had also found the first registered proprietor of the land to have held on trust.

However, despite upholding the concept, the Kiama case by virtue of the fact that it is a Court of Appeal decision will have certain effects on the manner the concept is invoked. First of all, the aggrieved party if he hopes to succeed will have to prove that at the material time of registration of title to the disputed land, he was in actual occupation of the land. This would put him within the ambit of Section 30(g) as against the party registered as owner. Secondly, it could help him protect his title by the doctrine of adverse possession as cases like Kinguru v. Muya Gathangi²⁵ and Belinda Murai v. Wainaina²⁶ show in which case he need not rely on the concept but on the Limitation of Actions Act²⁷. Such actual occupation would be hard to prove where the holder of unregistered customary rights was detained or away in an urban area during the process of registration. Secondly, all litigants who rely on the

concept and the Kiama case will have to cease describing the rights they are pursuing as customary rights. The case rules unregistered customary rights to have died, and the concept itself can no longer be seen as a customary trust, but as a concept based on the English doctrines of equity.

FOOTNOTESCHAPTER THREE

1. Op.cit.
2. Op.cit.
3. Op.cit., at pages 5-6- of Madan, J.A. Judgment in Court of Appeal .
4. Supra.
5. (1969) 1 All E.R. 1056.
6. (1726) 2 E.Q. Cas. Abr. 741.
7. (1971) 3 All.E.R. 1325
8. Halsbury's Laws of England , 3rd Edn. para. 1451.
9. Supra.
10. An Africana material, in Gandhi Library, University of Nairobi.
11. Cap. 287, Laws of Kenya.
12. Supra.
13. See Kamau Kuria, The Legal Profession in Kenya, 1981, Unpublished, pages 17-18.
14. (1965) E.A. 393.
15. (1978) 1 All E.R. 1132, per Lord Salmon at p.1153, para.(h)
16. (1975) A.C. 591, per Lord Reid at p.614, Lord Wilberforce at p.629, and Lord Diplock at p.638.
17. (1937) 57 C.L.R. 555
18. Baalman, The Torren System in New South Wales, Melbourne 1974, at p.170.
19. Supra.
20. Supra.
21. Supra.
22. (1965) 1 All E.R. 472, H.L.
23. (1964) 1 All E.R., 688, at 696, C.A.
24. Supra.
25. Supra.

26. Supra.
- 27 Cap.22, Laws of Kenya.

CHAPTER FOURTHEORETICAL BASIS OF THE CONCEPT

This, the final, chapter of the paper addresses itself to the theoretical basis of the concept of the equitable customary trust. The case-law previously analysed leaves a lot of uncertainties and inconsistencies touching crucial aspects of the concept like its juridical basis and its nature - that is, is it a creature of African customary law or is it an application of the English doctrines of equity? If it is the latter, then with which of the different types of trust known to English law, is it akin? Or is it a concept sui generis, of its own kind and identifiable neither with customary nor English law notions of trust entirely?

There are also issues as to the formalities if any, necessary to create the trust envisaged by the concept and how the concept can generally be fitted into the scheme of the Registered Land Act since it was espoused in reaction to the provisions of that Act. All these aspects are the subject of discussion in this chapter.

I

The Juridical Basis of the Concept

The types of laws which apply in Kenya and their hierarchy are set out in section 3 of the

Judicature Act. ¹ They are:

- i) the Constitution;
- ii) subject thereto, written laws;
- iii) where the written laws do not extend or apply, then the substance of the common law, doctrines of equity, and statutes of general application in force in England on the 12th August, 1897 are to apply with the proviso that such common law, doctrines of equity and statutes of general application are modifiable by the local circumstances of Kenya;
- iv) By section 3(2), African customary law applies in civil cases where one or both parties are subject to or affected by it. Such custom should not be repugnant to justice or morality or contrary to any written law.

The concept of the equitable customary trust must fall within at least one of the above clauses of section 3 of the Judicature Act in order to have any juridical or legal basis for application in and by the courts of Kenya. One clause in the section that can contain the

concept is the one which provides that English common law, doctrines of equity and statutes of general application apply in Kenya. It can be argued that the equitable customary trust is an application of the English doctrines of equity. Another clause which can contain the concept is section 3(2) which seeks to apply customary law. The argument here would be that the equitable customary trust is known to customary law. The issue is as to which of the two clauses in section 3 provides the legal basis for the concept.

The view of the concept as an institution of customary law has already been discerned in cases like Muguthu v. Muguthu² where Madan, J., as he then was, held the defendant to hold on trust on the grounds that being the oldest son he was in fact registered as a trustee pursuant to Kikuyu custom which had a notion of trust inherent in it. The holders of such a view would see the concept as based in law on section 3(2).

However, this view is not without its problems. In the first instance there linger doubts in spite of Madan, J.'s initial judgment in Muguthu v. Muguthu whether in fact customary law recognises the institution of a trust. An attempt to dismiss this doubt has been made by referring to the Kikuyu concept of the muramati. Under this concept, when the head of a family dies, his

estate is vested in his oldest son, called the muramati, who looks after it on behalf and for the benefit of the whole of the deceased's family. This Kikuyu concept has been argued to contain a notion of trust and used to support the view that there are trusts in Kikuyu customary law. However, it is an argument that is rebutted by the counter-argument that the muramati is more of a concept of succession law whereby the eldest son becomes the administrator of his deceased father's estate. Moreover, proving trusts to exist in Kikuyu customary law does not take us far since the equitable customary law has been applied not only to Kikuyus but to all other tribes of Kenya like the Luo and the Luhya among whose customary laws an element of trust remains to be proved.

Even when a notion of trust is conceded to exist in African customary laws, other problems arise against a view of the equitable customary trust as predicated on customary law. There is an evidential problem. By the Court of Appeal decision in Kimani v. Gikanga,³ any litigant who seeks to rely on a customary rule has the burden of proving to the court the existence of such a rule unless such a rule has been applied by the courts so many times that it

will take judicial notice of it. Thus if the equitable customary trust, is an institution of customary ^{law} the aggrieved parties would not only have the burden of proving the fact that a trust existed upon the defendant but also that in their customary law there is a notion of trust, and the rights and liabilities attached to such a notion by their customary law. Decisions like Joseph Kamere v. Ndungu Kiiru⁴ which followed Ayoub v. Standard Bank⁵ to say:

"- - - the courts will not imply a trust save in order to give effect to the intentions of the parties. The intentions of the parties to create a trust must be determined before a trust will be implied".⁶

make it that much harder to prove a customary trust to the courts. Hence in Mwangi Kariebu v. Mwangi Kariebu⁷ the plaintiff sought a share in land formerly belonging to his deceased father but now registered in the defendant's (his elder brother) name by alleging a trust to have existed. Simpson, J., despite finding the defendant's evidence in denial of the trust untruthful, did not declare the trust because the implication of a trust was not to be taken lightly and the plaintiff's evidence as to its existence was insufficient.

There is a further problem to the view of the concept as envisaging a customary trust in the fact that some of the cases, an instance is Nthiga v. Nthiga,⁸

saw it as a resulting trust, which would imply that it is a trust by operation of law. So, even if there is a notion of trust in customary jurisprudence, issue arises whether that notion also envisages a situation where it is the judicial tribunal rather than the parties who are creating the trust as is the case in trusts by operation of law. This issue is in fact raised by Madan, J.A., the judge who held a notion of trust to exist in Kikuyu customary law, when he said in the Kiama case:

" - - - in any event it was not proved by expert evidence that Kikuyu customary law contains the concept of resulting trust within its jurisprudence".⁹

Perhaps the greatest obstacle of all to the view that the equitable customary trust is a creature of African customary law under section 3(2) of the Judicature Act is the holding in Esiroyo v. Esiroyo,¹⁰ as upheld by the Court of Appeal in the Kiama case, that registration extinguishes unregistered customary rights. The logic of this view has already been questioned but nevertheless, it is a view which is supported by the highest court in Kenya and to which the concept must be reconciled. This holding defeats any view of the equitable customary trust as a product of customary jurisprudence.

In light of the above obstacles to a view of the concept as a creature of customary law, one must resort to the doctrines of equity in section 3(1) (c) of the Judicature Act to explain the concept's legal basis. The concept is an application of the English doctrines of equity in Kenya. In fact in the Kiama case the Court of Appeal saw the trust it was applying to be clearly of the English type. It is also the view of the legal basis of the equitable customary trust that is supportable from the court of Appeal decision in Belinda Murai and Others v. Amos Wainaina.¹¹ The Court in that case was faced with a dispute over registered land in which the respondent claimed title by adverse possession. The respondent had been allowed to use the land in question by the deceased father of the appellants. The appellants argued that he had been permitted to use the land as a muhoi - who is a person under Kikuyu customary law permitted rights in land akin to those of a tenant at will under English common law. The Court of Appeal, Miller, J.A. dissenting, held all unregistered customary rights in land to have been extinguished after registration such that the rights of a muhoi under Kikuyu customary law could not affect registered land. Instead, the court relied on section 163 of the Registered Land Act which provides

" 163. Subject to the provisions of this Act and save as may be provided by any written law for the time being in force, the common law of England, as modified by the doctrines of equity, shall extend and apply to Kenya in relation to land, leases and charges registered under this Act . . ."

to hold that the respondent occupied the land as a licensee or tenant at will as is known in English common law and had acquired a title by adverse possession.

The opinion of the Court of Appeal in the Murai case was that registered land was in no way affected by customary law but was governed by the legal rules in the Registered Land Act and any lacunae in that Act were to be filled in by English Common law and equity under Section 163. The concept of the equitable customary trust, by extension of the Court of Appeal's views in the Murai case, as an institution espoused to fight certain unfair aspects resulting from the application of the Registered Land Act, could only be based in the English doctrines of equity either under Section 163 of that Act or Section 3(1)(c) of the Judicature Act.

II

The Concept and the Provisions of the Registered Land Act

In the Court of Appeal for East Africa decision of Souza Figueredo v. Moorings Hotel Limited,¹² the doctrines of equity, as received in Uganda under Section 2 (b) (i) of the Judicature Act of Uganda,¹³ were held to be subject to and must not be inconsistent with the provisions of a written law. This interpretation of the Uganda provision extends to Section 3(1) (c) of Ken Act because the two are similar. Indeed, it was held by Chesoni, J. in Wamarite Mwirikia v. Mata Wangati that:

" The doctrines of equity apply in Kenya only when the Constitution and all other written laws of Kenya do not extend or apply . . . the learned Magistrate certainly fell into a grievous error in purporting to apply the doctrines of equity to overrule the express provisions of a statute".¹⁴

In like manner, the equitable customary trust must be reconciled with the provisions of the Registered Land Act since being a creature of the doctrines of equity, it cannot be used to overrule the express provisions of that Act however unjust those provisions may seem. This reconciliation is much the harder since the concept was initially espoused as a measure to fight the injustices inherent in the provisions of the Act.

Some legal circles view the Act to have condoned the unfair situation the concept seeks to combat.

Thus Coldham observes about claims based on the "customary trust" in his article:

' By upholding such claims the courts are undermining the basic principle of land adjudication that the adjudication record is a comprehensive record of all rights existing at the time that adjudication is completed . . . customary land rights which are not recorded in the adjudication record are extinguished and therefore in the 'customary trust' situations discussed earlier the courts are giving effect to rights that no longer exist". 15

The gist of Coldham's argument, and of others who feel the Registered Land Act condones the injustices inherent in its application is that the Act embodies the hallowed 'mirror principle' of the Torrens system, which principle is defined by Ruoff:

' The mirror principle involves the proposition that the register of title is a mirror which reflects accurately and completely and beyond all argument the current facts that are material to a man's title, This mirror does not reveal the history of the title, for disused facts are obliterated . It does not show matters (such as trusts) that are incapable of substantive registration. And it does not allow anyone to view and consider facts and events which are capable of being registered and ought to have been registered but which have not in fact been registered. In other words, a title is free from all adverse burdens, rights and qualifications unless they are mentioned on the register". 16

(Emphasis added)

However, it is submitted, the Registered Land Act, if not explicitly, implicitly accommodates the concept of the equitable customary trust. Section 27 of the Act vests absolute ownership in the person registered as proprietor of land. Section 28 defines the rights attaching to that title to be indefeasible and only affected by registered interests and overriding interests as set out in section 30. The absolute and indefeasible rights defined in Section 28 are subject to the important proviso

" 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".

The issue is what construction is to be put upon this proviso? The case-law on the proviso is sparse. Only Mulli, J., considers it in Nthiga v. Nthiga¹⁷ where he holds the rights given to a registered owner in Section 28 are subject to trust obligations if such owner holds the legal title as a trustee.

In the law of interpretation, provisos are given a special position. For example, if a section of an Act is subject to a proviso, and the two are repugnant to each other, the rule of interpretation is that the proviso shall prevail over the section. Thus says Craie

"It sometimes happens that there is a repugnancy between the enacting clauses and the provisos and saving clauses. The question then arises, how is the Act, taken as a whole, to be construed? The generally accepted rule with regard to the construction of a proviso of an Act which is repugnant to the purview of the Act is that laid down in Att. Gen. v. Chelsea Waterworks, namely, "that where the proviso of an Act of Parliament is directly repugnant to the purview, the proviso shall stand and be a repeal of the purview, as it speaks the last intention of the makers" ' 18.

The above quotation shows how important the proviso to Section 28 is to any interpretation to be put on the main part of that Section. For example an interpretation of Section 28 that construes a registered proprietor not to be bound by the duties of a trustee even when one exists upon him would be repugnant to the proviso and so wrong in law. The proviso shows that equity's distinction between the legal and the beneficial estate in a given property is maintained by the Registered Land Act. Above all it shows that judges who have declared trusts to exist upon registered proprietors are not wrong in law to have done so.

The Act does not go further to explain what types of trust are envisaged by the proviso to Section 28. In such silence of the Act on the matter, reference can be made to Section 163 of the Act and principles of Common law and equity invoked, so that all types

trusts recognised in English equity can validly exist within the ambit of the proviso. It has already been submitted that the equitable customary trust is predicated upon the English doctrines of equity and so qualifies to join the types of trusts envisaged by the proviso. To that extent the concept is accommodated by the Registered Land Act and beneficial rights arising under it will qualify a registered proprietor's title in appropriate cases. This is as it should be for even in the Craddeband of the Torren system, the New South Wales jurisdiction of Australia, the 'mirror principle' has been seen by both courts and textwriters to be qualified by unregistered equitable interests.¹⁹

In addition to the proviso to Section 28, the Registered Land Act can also be argued to accommodate the concept of the equitable customary trust under Section 126. The Section provides:

" 126(1). A person acquiring land, a lease or a charge in a fiduciary capacity may be described by that capacity in the instrument of acquisition, and if so described, shall be registered with the addition of the words 'as trustee' but the register shall not enter any particulars of any trust in the register".

This Section again reveals an acceptance of the possibility of an interest in a given parcel of land being split between the legal and the equitable so that the registered proprietor has the legal title

but without the equitable title. It acknowledges that trusts can exist in land registered under the Act. One of such trusts can be the equitable customary trust.

From the above arguments, it is submitted that the equitable customary trust is accommodated by the provisions of the Registered Land Act. However, Section 143(1) deserves a paragraph under this head. This section provides that the courts, whereas they have a general power of rectification of the register in cases of fraud or mistake, have no such power where the registration in question is a first registration, whether such registration is obtained by fraud or not. This section was given its literal meaning in Obiero v. Opiyo²⁰ where Bennett, J., held that even if the defendants had proved fraud against the plaintiff, the latter's title would not have been capable of rectification for that fraud since it was a first registration. The effect of this section on the equitable customary trust was reconciled by Mulli, J. in Nthiga v. Nthiga²¹. He ruled that in the cases where a court found a trust to exist upon the registered proprietor and required the land to be registered in the names of the actual beneficiaries, the court is not ordering rectification of a first registration contrary the rule in section 143(1), but only requiring the registered proprietor

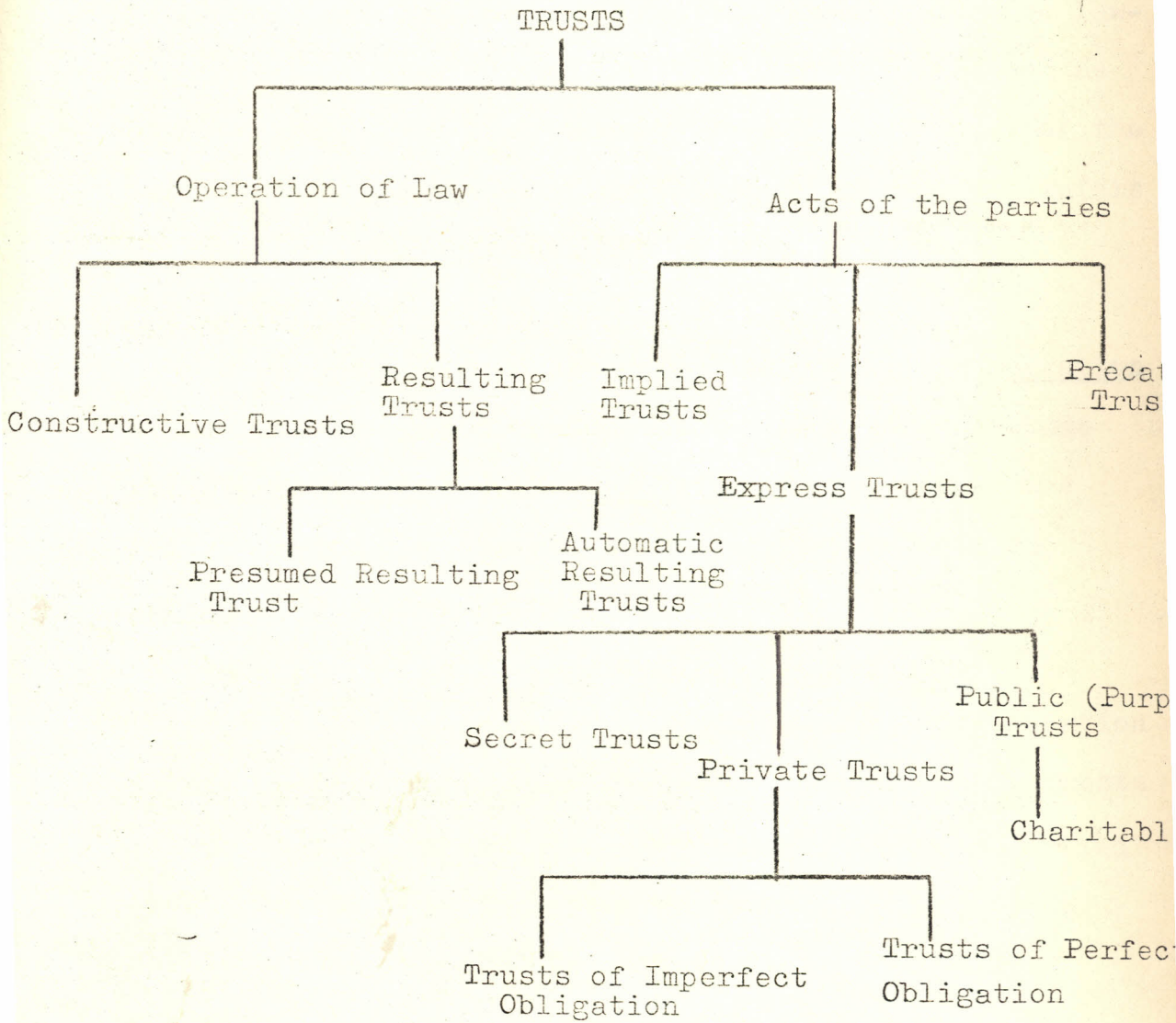
to execute his duties as trustee by transferring the registered land in question to its rightful beneficiaries and owners.

III

The Type of Trust the Equitable Customary Trust is:

A view of the concept of the equitable customary trust as a creature of customary law has already been found wanting in face of strong judicial decisions culminating in the Court of Appeal decision in the Kiama case. So the inquiry as to the type of trust the concept is akin to in this section addresses itself to the categories of trusts known to English law. Following is a diagram showing the categorization of trusts in English law. (See overleaf)

From the diagram it is clear that there are many categories of trusts in English law. However, the main categorization is into trusts by act of the parties and trusts by operation of law. The trusts by act of the parties are those trusts where the obligation of trust is created by the individuals themselves. They include express trusts which are trusts created intentionally and explicitly by an owner of property either upon himself by expressly declaring himself to henceforth hold

KINDS OF TRUSTS

The source of this table is Mr. Salter's lecture notes to the 1980-81 LL.B.(II) class, Faculty of Law, University of Nairobi

the property he owns as trustee or upon another individual to whom he transfers legal title to the property to be held for the benefit of a third party or some lawful object. Trusts by act of the parties can also be of the implied category whereby from the conduct of the parties in a given situation the court reasonably infers a trust to have been intended by them.

The other main category, the trusts by operation of law was mentioned in Chapter three. They include the constructive and the resulting trust with the latter having two variables, the presumed and the automatic resulting trust.

It should be noted that the above categorization is not water-tight. The different categories of trusts are in fact co-extensive. For example whereas implied trusts in the diagram appear as trusts by act of the parties, they can also be argued to be trusts by operation of law of the presumed resulting type since in both cases it is the court that is in fact creating the trust obligation by reference to the conduct of the parties before coming to court. Similarly the sub-category of express trusts called 'secret trusts' has been argued by some scholars to be a species of the constructive trust rather than a trust created by the acts of the parties inter se. 22

In which of the two main categories does the equitable customary trust fall? The concept can be argued to be a trust by the acts of the parties. The trend of this argument is to the effect that before the registration exercise, family or clan members would meet and agree to one nominee to be adjudicated and registered as the proprietor of the 'family' or 'clan' land. Such registered nominee was clearly to hold on trust in favour of all the 'family' or 'clan' members. This was arguably the case in the Kiama case where the Agaciku/Kabareki clan appointed one in their mongst to be registered on their behalf.

However, this view is fraught with difficulties. In the first instance, not all the cases which have been argued to uphold the concept can bear out an agreement to create a trust to have actually been made. There are cases where the person in whose favour a trust was declared by the court was in detention, an example is Kinguru v. Muya Gathangi²³ or away in an urban area as was the position in Imbusi v. Imbusi²⁴. In such cases the aggrieved party could not have reasonably argued to have made an agreement with the party in whose name the land was registered creating a trust.

Of more importance to the argument that the equitable customary trust is a trust created by act of the parties is the issue concerning the formalities necessary for the creation of such a trust. In English law there are certain formalities incumbent upon a person who may wish to create a trust. Reference is especially made to the English Law of Property Act, 1925 which in Section 53 provides certain formalities before a valid trust can be created in land. The declaration of the trust must be evidenced in writing which writing should be signed by the person who is able to declare such trust or be in his will. Section 53(2) of the same Act dispenses with such requirements where the trust in question is a resulting, implied or constructive trust. So the question arises as to what are the formalities for the creation of a valid express trust in land in Kenya, and do the circumstances surrounding the equitable customary trust satisfy such formalities

Save only in Section 126(1) where it is provided that a person registered as proprietor who is subject to a trust can be indicated on the register as subject to such a trust by adding the words 'as trustee' to his title, the Registered Land Act is silent on the formalities of creating a trust under the Act. The 'as trustee' clause of Section 126(1) has been construed by the courts to be directory only and so its omission

will not render a trust void. Thus Mulli J., said in Nthiga v. Nthiga.

" There is no requirement under the Act that the beneficiary of registered land held on trust be entered in the register or the particulars of trust under the registered trustee acquired the land in a judiciary capacity (sic!!) 25

In the silence of the Registered Land Act on the matter of formalities, one can seek assistance from other written laws that have relevance to land registered under the Act and in the final event fall back on section 163 of the Act and Section 3(1) of the Judicature Act to inquire what formalities English common law, equity, and statutes of general application provide as to creation of trusts in land. As to other written laws, only the Land Control Act ²⁶ is of assistance. The Act provides in Section 6 that all agricultural land cannot be the subject of dealings without the consent of the Land Control Board. Section 6(2) makes it clear that the creation of a trust constitutes a dealing in land. The Kiama case considered this Section of the Land Control Act and held that the requirement of consent affects express trusts only and not trusts implied by the courts. There is no other statutory provision on formalities for the creation of trusts in land.

In view of this statutory silence, sections 163 of the Registered Land Act and 3(1) of the Judicature Act are invoked so that the common law, doctrines of equity and statutes of general application can be used to fill in the gap left by the statutory law. Even here rules of formality are lacking unless the Statute of Frauds, 1677 can be argued to be either a statute of general application or to embody doctrines of equity. Section 9 of that statute was the forerunner to Section 53 of the Law of Property Act, 1925 of England. If the Statute of Frauds applies to Kenya, then under section 9 it would require any declaration of trust in land to be evidenced in writing, signed by the declarer or in the alternative indicated in his will. So the issue is whether the Statute of Frauds applies to Kenya.

The main argument in favour of the Statute of Frauds applying in Kenya is that it is a statute of general application in force in England as on the 12th August 1897. However, when is an English statute a statute of general application? The case-law on the matter is sparse, but in the Nigerian case of Attorney-General v. Holt²⁷ it was held that two issues to consider in deciding whether a given English Statute is a Statute of general application are: by what courts in England

it is applied and to what class of the community in England it applies. If the statute is applied by all the courts of England and also to all classes of the community, and is consistent with the reception date, then it may be considered a statute of general application. The same views are proposed by Professor Allot in his 'Essays on African law'.²⁸ In Kenya it was held in the 1917 case of Bennett v. Garvie²⁹ that the Statute of Frauds is not a statute of general application. But Bennett v. Garvie should not be taken as conclusive on the matter because in a later Kenyan case, Thaker Singh v. Keser Kaur,³⁰ the court cautioned about statutes of general application that changes over time may necessitate a present day court to declare an English statute to be one of general application although such a statute had been held by another court earlier in legal history not to be a statute of general application. In a more recent case in Tanzania, Parry v. Carson³¹, the court did find the Statute of Frauds to be one of general application in Tanzania. The same could be said to-day in Kenya.

Alternatively, the formalities in the Statute of Frauds may be argued to extend and apply to Kenya by reason of the Statute of Frauds being part of the general doctrines of equity. Such a view of the Statute of Frauds

would have to be predicated upon a wider perception of the 'doctrines of equity'. The latter term would be seen not merely as referring to the rules developed in the court of chancery to mitigate the harshness of the common law but as general rules of fairness aimed to do justice between the parties.

From the above discussion, formalities for the creation of trusts in land emerge as the requirement of consent under the Land Control Act and, subject to the courts finding the Statute of Frauds to apply in Kenya, written evidence of the declaration of trust signed by the declarer or indicated in his will.

If the equitable customary trust is a trust created expressly by the parties themselves, it must conform to these requirements or else fail. Whereas lack of writing may be tempered by the proviso to Section 3(1) (c) of the Judicature Act to the effect that the Statutes of general application can be modified to suit local circumstances of Kenya, those circumstances being that the majority of people are illiterate, the requirement of Land Control Board's consent is absolute and will defeat any express trust created without it. A scrutiny of the disputes behind the equitable customary trust cases reveals that none of the parties ever

complied with the above formalities and therefore if the concept envisages a trust expressly created by them, such trust would certainly fail for lack of formalities.

In light of this fact, the concept should be re-examined as a trust by operation of law. Such a perception of the concept has the advantage that the equitable customary trust will not be affected by lack of the formalities seen above since, on authority of the Kiama case, such formalities concern only express trusts. The Kiama case itself clearly applied a trust by operation of law and not an express trust. Returning back to the problem initially put in chapter 3, is the equitable customary trust a resulting or a constructive trust? The trust can be argued to be of a constructive type in that here equity is fighting fraud because the registered owner desires to use the provisions of the Registered Land Act to unjustly enrich himself. This is the argument put by Coldham in discussing this trust.³² This may well be the case because when one looks at cases like Kiama, where the appellant could in fact be argued to have been a stranger who intermeddled with trust property, or even Muguthu v. Muguthu³³ where the eldest brother in occupation of the fiduciary position of muramati tried to use it to disinherit his brother, there was a strong case for invoking the doctrine of

constructive trust.

At the same time, however, cases like Nthiga v. Nthiga³⁴ where the plaintiff bought the land in the name of the defendants not intending to make a gift to them and generally those cases where the holders of customary rights left one person to be registered as proprietor without intending to thereby make a gift of their land to him must not be forgotten. Such cases tend to link the concept to the presumed resulting trust rather than the constructive trust. The same cases may in fact be used to argue a case for a trust implied from the conduct of the parties since the presumed resulting trust cannot be divorced from the behaviour of the parties but is based upon it.

It is hard to come out in definite terms and argue the trust to be solely of the resulting or of the constructive type. The courts themselves have not been helpful in this regard and we must await their further ruling on the matter. However, for present purposes, it is enough that the concept has been clearly identified as envisaging a trust by operation of law. Whether the court in a given case applies a constructive trust or a resulting trust will not materially affect the aggrieved parties since in both cases an order upon the registered owner to transfer the title to the beneficial owners and thereby execute the obligations of trust imposed

upon him by the court will be made and justice done
between the parties.

FOOTNOTES - CHAPTER FOUR

1. Act 16 of 1967, Cap. 8, Laws of Kenya.
2. Op.cit.
3. (1965) E.A. 735.
4. Court of Appeal at Nairobi, Civ. App.No.43 of 1976.
5. (1963) E.A. 619.
6. Supra, at page 4 of Law, V.P's judgment
7. High Court of Kenya at Nairobi, C.C.No.1425 of 1975.
8. Supra.
9. Op.cit., at page 6 of his judgment.
10. Supra.
11. Supra.
12. (1960) E.A. 926
13. Cap.34, Laws of Uganda, Revised Edition 1964.
14. High Court at Nairobi, Civ. App. No.18 of 1975, at page 5 of judgment.
15. S. Coldham, The Effect of Registration of title Upon Customary Rights in Kenya, (1978) J.A.L. 91, at p.109.
16. Theodore B.F. Ruoff, An Englishman Looks at the Torrens System, London 1957, at page 8.
17. Supra.
18. Craies on Statate Law, 6th Edn. Sweet & Maxwell 1963, at page 29.
19. See Baalman, supra, pp.170-1.
20. Supra.
21. Supra.
22. See : Hanbury and Maudsley , Modern Equity, 10th ed. pp.215-8.
23. Supra.

24. Supra.
25. Supra, at page. 9 of judgment
26. Cap 302, Laws of Kenya.
27. (1910) 2 N. L.R. 1
28. Allot , Essays in African Law, London, Butterworth 1970, at page 50.
29. Vol.7 E.A.P.L.R. 48, (1917)
30. 17 K.L.R.1
31. (1963) E.A. 91
32. Coldham, supra, at page 107.
33. Supra.
34. Supra.

CONCLUSION

From the thickets of case-law and statute discussed in the main body of this paper, several findings emerge clear about the concept of the equitable customary trust. This conclusion seeks to recapitulate the highlights of those findings for the reader.

A case for reform is also put.

I

A Summary of the Findings

The factors that necessitated the concept were the unfairness of the situation that emerged out of the Land reform programme of the 1950 - 60s as finally enacted in the Registered Land Act. The aims of that programme, and the Registered Land Act today, was to introduce individual tenure in the African areas of Kenya. This was done by a process of adjudication of all existing customary rights in given land and thereafter the registration of those rights. Not everybody who had customary rights in land was indicated on the register because the Africans did not fully understand the new laws. They therefore clung to their customary notions of property in land which are communal rather than individualistic. This in turn led to a situation where only one out of

many holders of customary rights in a given parcel of land would be registered, but his registration was intended to be nominal since the original right holders continued to enjoy the land as they had been accustomed to do under their customary laws. On realising the full import of the new laws, the registered owner would try to use them to deny the unregistered rights of the other persons.

The fact that the land reform programme coincided with the emergency period also was contributory. It meant that the many persons who were in the forest fighting for freedom or in detention could not be present to have their rights adjudicated and registered personally. So their land would be registered in the names of certain relatives who, however, after the emergency used the new laws to refuse to return such land.

The above should have posed no problem to courts in a legal system predicated upon the English common law tradition where principles of equity mitigate any harsh law. The courts in Kenya took an unduly literal and positivistic interpretation of the Registered Land Act and in the initial cases of Obiero v. Opiyo and Esiroyo v. Esiroyo held all unregistered customary rights to have been extinguished

by registration. They saw the Registered Land Act as creating a completely new legal regime in any land registered under its provisions. The unfairness of the registered proprietor dispossessing the unregistered persons in the given circumstances notwithstanding, the courts judged in favour of such registered proprietor contrary to some of the most cherished principles of equity like that the courts will not lend themselves to an inequitable claim and that they will not allow a statute to be used as an engine for fraud.

Under these circumstances, it became necessary for equitable justice to intervene. This came to be by way of the concept of the equitable customary trust. The concept has its legal basis in the doctrines of equity as received in Kenya both under Section 163 of the Registered Land Act and Section 3(1) of the Judicature Act. This is a finding arrived at in view of the persistent insistence by even the highest court in Kenya that customary rights in land are extinguished by registration. Such a view has made it hard to perceive the concept today as a creature of customary jurisprudence. It has also led to confusion about the rights being protected by the trust in the concept. The rights are really unregistered customary rights but since the Kiama

case must be seen as equitable rights arising out of actual occupation under the overriding interests theory.

To the arguments of critics that the concept goes against the spirit of the Registered Land Act in that the Act condones the injustice suffered by the holders of unregistered customary rights, attention is drawn to the proviso to Section 28 and Section 126 of the Act. These sections show that the Act recognises trusts under which unregistered interests in land may subsist. The equitable customary trust is just one of such trusts recognised by the Act and so cannot be argued to be contrary to it.

The trust in the concept was found to be akin to those trusts in English law called trusts by operation of law. This is a finding predicated upon both actual cases like that of Kiama, the circumstances in which the trust is implied by the courts, and practical considerations like the likely effect of lack of formalities were the concept to be seen as envisaging an express trust. It is hard to make a choice between whether the courts are applying the doctrine of the resulting trust or that of the constructive trust, the two concomitants of trusts by operation of law, partly because the courts themselves are unclear and the cases can support both views. However, which ever of the two is applied, our interest is that justice is done between the parties, and this can be so

which ever of the two is applied.

II

A Case for Reform

The uncertainties as to the nature of the concept have already been seen. These uncertainties would call for the courts to come out with a more precise formulation of the concept. Certain terms like what is 'family Land' or the name of the concept itself- is it correct to call it a 'customary' trust, deserve to be reconsidered.

More important , however, the equitable customary trust offers a chapter on the debate on the role of judges. Their role is not merely to find the law and apply it to a given dispute like robots because the law is not always ' there', ready and clear for the judge to apply. The law on a given subject sometimes is unclear if only because its not expressed in mathematical formulae but in words that often are ambiguous and with different meanings. In the hard cases where the exact legal rule to apply is not certain, the judge's role is not merely to find the law but to use his discretion to decide what the law should be. When doing this, the judge should not forget that he is a social worker upon whose final decision the happiness or misery of many depends. He must

be guided by those principles of equity and justice that are the pride of any legal system.

The equitable customary trust meets all these expectations of our judges and should stir genuine pride in Kenya society towards its judiciary. But the positivistic view of the judge as a slot machine, a mere finder of the law remains rampant in the Kenya judiciary. It explains many decisions that are law in Kenya today like that of Bennett, J. and Kneller, J. that unregistered customary rights are totally extinguished. Therefore a submission of a case for reform, especially in the area of the equitable customary trust, should stress reform of judicial attitudes as much depends upon them. Our judges must change their attitude and be ready to do justice in the cases rather than rigidly apply the law. This is the more so since most of Kenya's laws are imported from England where the culture and technological advance of the society is in total disparity to the situation obtaining in Kenya.

Reforms in the concept need also to address themselves to the fact that most people whom the concept seeks to protect are poor, illiterate, rural peasants who are not clear about their rights and are too poor to hire lawyers. This means that the likelihood of them bringing their grievances to court is remote. There are also delays in the ordinary judicial process. In the Kiama case,

for example, the action commenced in 1968 and was not settled until 1981. These are problems common to all forms of litigation in Kenya and not land disputes alone.

Initiative has been taken with respect to land disputes by the Magistrates Jurisdiction (Amendment) Act, 1981. This Act tries to meet the poverty of the litigants which makes them fail to hire lawyers, the delay in the ordinary courts, and the injustices of the general law on land by removing land disputes from the ordinary courts to tribal elders. Such elders know who is entitled to what land in their home areas and would not let a selfish man dispossess other entitled members because they are unregistered. But one must be cautious in praising this Act as it is still new and has not been seen in application. Tribal elders are likely to yield to political pressure from which the ordinary courts are insulated. The more prudent thing to do, seeing how land is at the centre of Kenyan politics, may have been to create a special division in the ordinary courts to specifically deal with land disputes rather than to throw them at panels of elders under the guise of whose decisions injustice may continue to be done.

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