'COMMENTS ON THE DEVELOPMENT OF THE CUSTOMARY TRUST IN KENYA.'

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INTRODUCTION

Land law as part of our history here in Kenya has generated a lot of interest and many learned writers have a different aspect of the law. It is as a part of this interest that I embarked on a study of but one small but very controversial aspect of land law. The issue of customary trusts and their relation, if any, to the English concept of trusts. I will attempt to determine whether the concept popularly known as a customary trust can be equated to the English concepts of either constructive or express trusts and the consequences that follow.

It will be appreciated that very little research has been done in this particular area and the few cases that are available do not offer much help in the search for concrete judicial reasons for the views that have been adopted.

The first chapter will briefly examine the customary property concept. It is essential that one understands the way in which property was held before the introduction of the new forms of property tenureship by the various land legistration.

CHAPTER ONE

THE CUSTOMARY PROPERTY CONCEPT

What is a customary trust? This is the question to which I will address myself throughout this paper. Put in another way, the question may be asked; how did the recognition of customary trusts arise? The answer to this question requires a detailed look at what the notion of African land tenure entailed.

The concept of a customary trust is not new in the African customary legal system. It was through this concept that land was held in the various tribal communities. A look at the characteristics of the customary land tenure makes this point clear.

The main characteristic of the African land tenure system was the dominant role of groups and communities in the tenure of land. Professor Allot[1] divides these groups and communities into social and political. The social organisation was closely linked with the use and exploitation of the land. There was tribal land and this belonged to a particular tribe. Within this tribal land there was a clan lineage or household control over the occupation and enjoyment of land by individual members of the clan. On the death of an individual member or holder, his land vested in his heirs who were the members of his family and in this way was family property. This procedure was very important as will be seen in later chapters. Thus the individual family members only had limited rights to the use of the family property vis-a-vis the rest of the family. For example, they could not alienate it without the consent of the family or the clan.

"Political or territorial groups", says Allot,"..... were of great importance. In many societies the occupation of land was controlled by political or land authorities; thus a man's claim to the free use of land depended on his membership of the particular community, tribe or clan"[2] This fact was emphasized by the establishment of a Council of Elders

headed by the Chief of the tribe. This Council served as an administrative body and any dealings of tribal land with other tribes had to be sanctioned by this Council. The communal[3] nature of the land holding occasioned this administrative body.

Under early customary law the system of land tenure fell into two broad categories. There was the tribal tenure in which ownership was vested in the ruler either as owner or trustee for the community. The second category was based on family or clan ownership. Here the land was a community asset and vested in the ruler either as trustee or an owner, individual holders having only unufractuary rights. In ae areas where the ruler held the land as the Chief or sub-Chief, he was responsible for the allocation and control of land rights.

In the clan system of tenure there was virtually no land that was not owned by a clan or lineage. The fundamental theory was that the land owning unit was the clan or the lineage and the tribe as such could not be said to own the land. In other words a piece of land was said to belong to the tribe only by virtue of the fact that it was owned by a particular clan within the tribe. It follows that lands which were not owned by a particular clan could not belong to the tribe. All the land belonging to a clan type of society whether or not they were inhabited were subject to the control of the particular clan. The distinction was not in the types of lands but between clan and non-clan members.

Control of the clan lands existed especially in respect of 'strangers'. This was because in practically every instance every clan member was deemed to hold his land rights in perpetuity. Such land rights reverted to the general reserve of the clan only if he died leaving no heir or if they were surrendered voluntarily in return for other lands or on permanent emigration from the locality.

The authority of the various clan heads was derived from this position as the territorial sovereign. The subordinates had greater or lesser position in the political and administrative hierarchy of the territory. In the case of clan tenure the authority over land control was derived from the position in the clan hierarchy of the person exercising that authority. In the ultimate analysis his power derived from the family heads who make up the councils of the sub-class.

Having briefly examined basic characteristics of land tenure in the customary society, we turn back to the issue of the customary trust and its development.

The idea of individual ownership of land in Kenya was introduced by the colonial administration.[4] It was the declared government policy to encourage individual ownership of land. Comprehensive legislation was introduced permitting the consolidation[5] and registration[6] of land held by the Africans. This was a process that had the effect of replacing the customary mode of land tenureship to the English mode of land tenureship. It was a process that was particularly rampant in the years between 1952 and 1956. During this period the Native Land Tenure Rules were made under the Native Lands Trust Ordinance[7] to govern the process of adjudication, consolidation and registration of land. The adjudication was done with the aid of elders who were versed in customary land law. This was a significant process since what was being done was to ascertain the peoples rights under their system of land tenure. The elders who were adjudicating knew nothing of the English land tenure system which they were helping to apply to the customary lands. Because of this, controversy of the greatest importance in Kenya land law arose, and still exists as to the nature of a persons rights once the process was completed.

One of the main reasons that underlined the promotion of individual land ownership was political. When land consolidation

started in the mid-fifties, the State of Emergency[8] was still in force and large numbers of freedom fighters were absent from their land either because they were in detention or fighting in the forests, The land rights of the absentees were often not protected; indeed land consolidation was used as a way of "rewarding loyalists at the expense of such absentees".[9] These political reasons were well set out by Herberson. He said:

> "The Administration began to recognise that land consolidation was an asset because it could be employed to reward the loyalty of the Kikuyu who allied themselves with the Colonial administration against the Mau Mau insurgents. Land consolidation became an essential element in the government campaign to create a stable middle class of politically conservative Kikuyu who could become a counterforce against any future re-emergence of militant nationalism." 10

In other words such a middle class would be so mindful of their land interests that they could not bother about the political uprisings.

Because of the nature of customary land tenure and the lack of understanding of the English land law that was being introduced the indigeneous people when registering their land gave the names of the family heads for the purposes of getting their title. The misunderstanding arose from the fact that the people did not understand the nature of the interest that they were vesting in the particular individual on registration. The indigeneous people cannot be blamed for this 'error' as it was due to a misconception of the purpose of the titles.[11] They saw the person in whose name the land was registered simply as one used to facilitate formalities and documentation. As far as the interest was concerned, in no way could he clain the land was his save for his rightful share as a family member. As for the land officers, they followed a strict adherence to the statute.

They were mainly Europeans and did not appreciate the nature of the customary rules of land tenure. They were only concerned with the person in whose name the land was registered, who had absolute proprietorship.

It is from this process of registration that we see the emergency of the customary trust concept.[12] The legislation of the time did not recognise this notion. The present land legislation does not give us any help either.[13] The substantive law that deal with land ownership in Kenya is the Registered Land Act (Cap. 300), hereinafter referred to as the R.L.A; and the Indian Transfer of Property Act 1882, (the I.T.P.A.). The latter statute still applies to those areas in Kenya that have not yet undergone the process of registration - which process would bring them under the R.L.A. It is the intention of the Government to have every piece of land registered which means that eventually the R.L.A. will be the only substantive law governing land ownership in Kenya.

The R.L.A., which now applies to the greater part of Kenya, has provisions that provide for absolute proprietorship. Section 27 deals with the interest conferred by Registration. It reads:

> "27. Subject to the provision of this Act
> (a) the registration of a person as the proprietor of land shall vest in that persons the absolute ownership of that land together with all rights and privileges belonging or appertinent thereto;
> (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appertinent thereto and subject to all implied and expressed agreements, liabilities and incidents of the lease." 14

Section 28 of the same Act reads:

> "The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of the court shall be rights not liable to be defeated except as provided in this Act and shall be held by the proprietor together with all privileges and appertinances belonging thereto, free from all other interests and claims whatsoever, but subject,
>
> (a) to the leases, charges and other encumberances and to the conditions and restrictions, if any, shown in the register, and
>
> (b) unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by Section 30 of this Act not to require noting on the eregister.
>
> 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."15

The proviso at the end of Section 28 is the closest that the legislature seems to get in recognising the notion of a customary trust. Though the section is far from clear on the issue, it has been used variably by different judges as shall be seen on examination of decided cases.[16]

It should be noted that the above provisions of this Act are reproductions of English land law. This land law was imposed on the Africans during the colonial rule because of political reasons by an unrepresentative minority administration. At the time that the land was being registered and the replacement of customary land law by English law was taking place, the adjudication committees and officers operated in the African mental world where the understanding was that the Africans rights to land under customary law were the ones being registered. This was the misunderstanding the writer referred to earlier. At the time of adjudication which preceded registration, the clan divided the land among the families. These families then chose the person whose name would appear on the register. Since the land was family

land the person who was registered for the first time held the land upon trust for himself and the family. Among the Kikuyu, that person was usually the father or the elder brother.

This tenure of land by the registered members is what can reasonably be described as the concept of customary trust.

CHAPTER ONE - Footnotes

1. Allot A.N. 'Modern Changes in African Land Tenure'
2. Supra Footnote 1.
3. By communal land, it is meant that there was common ownership of land extending over the whole tribal land subject only to the rights of the present occupants which were not to be disturbed.
4. See Swynnerton R.J.M. 'A Plan to Intensify the Development of African Agriculture in Kenya: 1954'
5. Land Consolidation Act
6. Registered Land Act Cp. 300 Laws of Kenya
7. See Native Lands Registration Bill 1959
8. The reasons for the State of Emergency are set out in any book on Kenya's Independence struggle. The Mau Mau uprising was the main cause. See Kenyatta J.K. 'Facing Mount Kenya'.
9. Sorrenson 'Land Reform in Kikuyu Country' P. 107
10. Herberson, 'Nation Building in Kenya'
11. The person in whose name the land was registered acquired absolute proprietorship under sections 27 and 28 of the Registered Land Act
12. The aim of this paper is to try and define this concept
13. See generally Chapter 4
14. Section 27 of the Registered Land Act
15. Section 28
16. These are discussed in the next two Chacpters.

CHAPTER TWO

The Problem of the Customary Trust Concept

In the first Chapter the concept of a customary trust was introduced. A brief examination of the land legislation revealed that such a concept has not been accommodated and if it has the courts have chosen to ignore it entirely. In this Chapter the writer will examine the nature of the customary trust by examining the cases that expose the problem posed by this concept. This problem will be made clear during this examination. An attempt will be made to find an equation, if any, of the customary trust with the English concept of trusts.

Under English law, a trust has been defined as:

> "...an equitable obligation binding a person to deal with property over which he has control either for the benefit of persons of whom he may himself be one, and any one of whom may enforce the obligation or for a charitable purpose which may be enforced at the instance of the Attorney-General or for some other purpose permitted by law though unenforceable." 1

In other words the trustee is the nominal owner of the trust property, but the real or beneficial owner is the cestui que trust, or that the trustee is the legal owner and the cestui que trust the equitable owner.

This definition of a trust is, in principle, applicable in Kenya through its reception under the Judicature Act 1967.[2] The East African Orders in Council were predecessors to the Judicature Act. The 1897 Order in Council was passed to provide a legal basis for colonisation. It provides that the civil and criminal jurisdiction in connection with white settlers should be

(i) governed by the laws of India as they stood at the time

(ii) if there were provisions of the Indian law that did not

> cover a certain situation then subject to those Indian statutes, the substance of the common law doctrines of equity and statutes of general application in force in England on 12th August, 1897 should apply.

As time progressed, it was clear that the Indian statutes would not be appropriate. The 1921 Kenya Order in Council added provisions to the 1897 Order in Council. It recognised that Indian law, common law, and equity statutes were inadequate so there was added a proviso that common law, doctrines of equity and statutes of general application shall apply so far as the circumstances of Kenya and its inhabitants permit and subject to such qualifications as those circumstances may render necessary. Some provisions had to be made to determine the position of the Africans. The 1911 Order in Council catered specifically for the Africans. It provided that if an action in the courts involved Africans then in those circumstances the court should be guided by the principles of customary law insofar as those principles were not inconsistent with any written law or repugnant to justice and morality.

The present Judicature Act was enacted in 1967 and section 3(i) provides that the courts will apply:

> "... the substance of the common law, the doctrines of equity and the statutes of general application in force in England on the 12th August, 1897 ..... provided that the said common law doctrines of equity and statutes of general application shall apply so far only as the circumstances of Kenya and its inhabitants permit and subject to such qualifications as these circumstances may render necessary." 3

In addition the section requires the courts to exclude customary law if its application with a written law."[4] In effect the section adopts the English doctrines of equity not only as a part but also as a source of Kenya law.[5]

The only caveat is that it is subject to the local circumstances and to any local statute.

Two very important questions arise from section 3 of this Act. Firstly, what happens if there is a conflict of equity? Secondly, what if there is a conflict between equity and local customs and religions law? In answer to the first question, it was held in Souza Figueired v Moorings Hotel [6] that written law has preference over equitable remedies. Equity will not be used to override statutory provisions. As for the second question, then section 3[7] will apply. The section gives the court two options. In certain circumstances the English law will not apply while in others it will apply - with modifications.

In Kenya land is both the most valuable type of property and the most common source of wealth. Most of the equitable rules and remedies applicable to land are the one that are discussed before our courts of law.

What then is the nature of a customary trust? Can it be likened to anything that exists under the doctrines of equity? Is it, for example, similar in nature to a resulting trust, a constructive trust or even an express trust?

It would seem that the courts in Kenya have recognised two basic concepts of trusts. Those that are governed by the doctrines of equity and those as recognised under customary law. The latter concept is best illustrated by an examination of the cases.

In Sela Obiero v Opiyo and Others [8] the issue was as to the nature of the interest that is given by section 28 of the Registered Land Act and how this can be rectified under section 143 (i)[9] of the same Act. The plaintiff was the widow of a polygamist who was survived by four sons, the defendants, who were his and the plaintiffs co-wives.

The plaintiff was registered as the proprietor of a piece of land which was nine acres in area. This took place during the land registration in 1968. The register did not indicate whether she held the land as a trustee.[10] The plaintiff chose to use the fact of the registration to evict her other relatives from the land. She claimed "damages for trespass against the four defendants and an injunction to restrain them from continuing or repeating the acts of trespass complained of ..."[11] The defendants who admitted that they had been in possession of the land contended that they were the owners of the land under customary law, that the plaintiff did not have a title to it and that they had cultivated it from time immemorial. They argued that the plaintiff had had the land registered in her name by concealment or false representations. Entering judgement for the plaintiff Bennet J. held:

> "The only issue ... is whether, despite the fact that the plaintiff is the registered proprietor, the defendants have any right to occupy or to cultivate the land under customary law. I am not satisfied on the evidence that the defendants had any rights 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. Section 28 of the Registered Land Act confers upon a registered proprietor a title free from all other interests and claims whatsoever subject to the leases, charges and encumberances shown in the register and such overriding interests as are not required to be noted in the register. There are no encumberances noted on the land certificate and according to the evidence... the plaintiffs title is free of encumberances. Rights arising under customary law are not overriding interests. Had the legislature intended that the rights of a registered proprietor were to be subject to the rights of any person under customary law, nothing would have been easier than for it to say so. In my judgement the defendants have ceased to have any rights over the land in dispute, if indeed they were ever entitled to any interest in it, when the plaintiff became

> the registered proprietor .... (the defendants) have been cultivating the land in dispute or part of it without the consent of the plaintiff since she became the registered proprietor....." 12

The court also held that the register would not be corrected since rectification of the register is not allowed by section 143 (i)[13] in all cases of first registration.

It is clear that the judge relied solely on the provisions of the Registered Land Act for his decision. He did not support his judgement with any decided cases. There was no indication that he took into consideration the local circumstances surrounding the case in the form of customary law rights. However, it is clear that two views were in conflict. The first was that of the defendants who believed, and rightly so, that since the land was family land according to the customary laws of their community, the plaintiff could not possibly claim the land as solely hers. She held it on trust [14] for the other members of the family. She was a trustee under customary law. The second view was that of the court which held, inter alia, that the plaintiff had, through registration, acquired absolute proprietorship. Had the judge addressed himself to the circumstances surrounding the case he would have found that according to the African customary law, widows generally have only a life interest in land, exceptions exist in those rare cases where they have their own money to buy land. Again registration is always preceded by ascertainment of one's rights to land under customary law by a tribunal of elders as opposed to a western type of court.[15] Since the parties to the case were African belonging to the Luo community, how could the court ignore the obvious fact that land, whether registered or not, is held communally? In passing judgement for the plaintiff the court had given her land that did not belong to her alone but to the family communally.

It can thus be concluded that in this case the court clearly did not recognize the African rules of land tenure.[16] In fact the judge even doubted that there were such rights as customary rights to land when he said:

> "... if indeed they were evenenentitled to any interest in it..."[17]

As though to crown it all, the judge issued a perpetual injunction to "restrain the defendants, their wives, servants or agents from trespassing or continuing to trespass on the land"[18] on which they had lived with their ancestors from time immemorial.

This case was followed in Esiroyo V Esiroyo.[19] In this case the father, who was the registered proprietor of a piece of land under section 28 of the Registered Land Act, had inherited the land from his father who in turn had inherited from ancestors. In short, the land was family land that had been utilized by his ancestors for ages. The defendants were the two sons by his first wife. Even though the plaintif was not registered as a trustee of family property but merely as a proprietor, that was what he was under the Parties' customary law - Luhya customary law. The customary rights of the sons could be terminated if they were guilty of gross misconduct, which was not the case here. When the registration took place no members of the family was mentioned as it was not normal to do so under customary law. However, the defendants and the plaintiffs sought the consent of the Land Control Board under the Land Control Act, 1967[20] to have the land divided among his four sons. As the divisions proposed by the plaintiff were uneconomical the Board, acting under Section 9 of the Act, withheld consent. Subsequant offers of more economical divisions from the

Board were refused by the plaintiff. The relations within the family deteriorated and for some reason the plaintiff brought this action to eject the defendant, his sons, from the land which he, inter alia, claimed to be the sole owner by virtue of registration. The defendants, contended that the plaintiff, their father, was a mere trustee and they had rights to the land under Luhya customary law. Entering judgement for the plaintiff the court followed Obiero's case and held that though the defendants had rights to the piece of land in question under Luhya customary law these customary land rights were extinguished when the plaintiff was registered as an absolute proprietor under section 28 of the Registered Land Act.

This case overlooked the existence of the customary rules of land tenure.

In Mwangi Muguthu v Maina Muguthu, [21] a father had directed that a piece of land be registered in the name of the elder brother who was to hold it upon trust for himself and for his brother. Under Kikuyu customary law which governed the community to which the litigents belonged, it is usual for the eldest son to act as a trustee (Muramati) administrator, and as a head of the family after the father's death. The plaintiff, who was the elder brother claimed a declaration of trust and an order to register half of the piece of land in his own name or in the alternative, judgement for shs. 24,820. It was clear that the defendant was taking advantage of the first registration to ignore his customary law obligations. As the plaintiff had not objected to the registration of the defendant as proprietor holding land without the requirement of indicating under section 126 (i) [22] of the Registered Land Act that it was held under a trust, he could not challenge the correctness of the record. This was prohibited by Section 143 (i) of the same Act.

Entering judgement for the plaintiff, Madan J. held that it was contrary to the Kikuyu custom for a father during his lifetime to give away all his land to one son to the exclusion of all the other sons and that there was no need to register the defendant as a trustee for he was registered as the owner

by the fact that of being the eldest son of the family in accordance with the Kikuyu custom. What Madan J. was saying was that there was no need to register a customary trust which might be described as a csutom of 'primegeniture' holding and by consent of everyone concerned.' The judge did not indicate how these rights would be protected. However in a recent Court of Appeal case[23] the same judge stated clearly that such rights could be protected by regarding them as equitable customary rights. These are discussed in later chapters.

It must be emphasized, as authorities on this topic[24] have continually done, that the courts in dealing with customary land cases have failed to understand the history and the process of registration which showed clearly that there was no intention of abolishing any land rights; the proprietor himself was a creature of customary law which was used in determining one's registrable rights.'[25]

In Mani Gichuru and Kamau Mani v Gitau Mani[26], the dispute was over land registration in the name of the defendant. The land, for a fact, belonged to the first plaintiff who was the father of the second plaintiff and the defendant. During demarcation of the land in the area, the land was registered in the name of the defendant in the absence ofhhis father. The father lived far away and his brother, the second plaintiff, was in detention. The court found, without dispute, that the effect of this registration was to make the defendant a trustee for the father and the brother.

The effect of the holding in Obiero's case and Esiroyo's case was to confer on the individual an interest in land known to English and not customary law. In Obiero's case it was held that the effect of the registration under the Registered Land Act was to extinguish all customary land rights of those people not registered as proprietors while

in Esiroyo's case the court held that the effect of registration was to extinguish the customary land rights of those who were not proprietors. It is submitted that registration does not abolish or extinguish customary land rights. 'These rights merely take a different form in that the proprietor becomes the trustee even where he would not have been appointed a trustee under customary land tenure'.[27] In Muguthu v Muguthu [28] we saw the elder of the two brothers was registered as the proprietor and he held the land upon trust for himself and for his younger brother regardless of what the register indicated. This it is submitted, was correct holding.

There are several other cases that deal with this problem of the customary trust. In Hosea v Njiru and Others,[29] the court, presided by Simpson J., recognised the existence of the customary trust and ordered the defendant to execute the transfer of documents in favour of the plaintiff. This was to avoid the prohibition imposed by section 143 of the Registered Land Act with the result that the order was not rectification of the register in respect of first registration.

What can be concluded from the decisions in the foregoing cases? Firstly, the courts have not come up with any definite stand as to how to interpret the statute law vis-a-vis the customary law. The decision in the cases wary with some judges electing to recognise the existence of the customary trust and others rejecting the idea altogether. It is not clear the basis on which the decisions are made since the reasons given, if any, are few. However, there seems to be a certain amount of influence derived from the general attitude of the judges[30] who appear to be divided in their opinions.

The examination of available case lawy only gives us a vague idea of the nature of a customary trust. For this reason a look at the equitable doctrines of trusts may enable us to make a comparative study of the two areas.[31]

Under the English law of trusts there are several categories of trusts that can be distinguished;

(i) the constructive trust;
(ii) the express trust;
(iii) implied trusts; and
(iv) resulting trusts.

Briefly, the main characteristic of a constructive trust is that it arises by the operation of law. It will be imposed with reference to the conduct of the parties. For example, A, who is the owner of property, is required to hold the propery on trust because of his conduct towards B. A can only become a constructive trustee if he is the owner of the property in question. In other words you will only be able too imply the owner of the property has committed a wrong whether legal or equitable. Lord Denning M.R. has held the view that the establishment of constructive trusts is too narrow. All that constructive trusts should do is justice to the parties. One has to simply decide what is equitable in the circumstances. One objection to Lord Denning's approach is that it does not recognise that there are people who may acquire interests later like third parties. When a constructive trust is imposed, the trustee is subject to all duties and obligations of an express trustee. Hence his activities affect all third parties. Thus when a trust is imposed you get a binding obligation.

Both of the above two approaches are capable of being supported by cases or justifying the same. What happens then where equity would impose a trust but subsequent to this the owner has changed the property to someone else? Where you have goods and there is a trust obligation and the owner sells them, the buyer may have no knowledge of the trust. In such cases a number of things can happen. First, if the property is disposed and the proceeds are available, the owner will be entitled to the money available.

Secondly, he may have property rights such as a right against the property itself. Lastly, the remedy could be in respect of goods, i.e. this depends on whether you can trace the ownership in terms of the purchaser. Because the goods are subject to the trust then they can only be sold under that condition thus making it impossible for a valid title to be passed. The remedies to the above situations depend on the facts of the case. They include the imposition of a trust, liability to account and tracing.

In Keetch v Sandford[32] there was a trust for the benefit of an infant. The property that was the subject matter of the trust was profits made at a market in U.K. The construction of the trust was such that the profits were subject to a lease. Hence the subject matter was available only as long as the lease was valid. When the trustee applied on behalf of the infant for a renewal of the lease, the lessor refused. The trustee then applied in his own name and the lessor granted a fresh lease to the trustee in his own right. The infant sued the trustee on two grounds. First the trustee was not allowed to profit from the trust, secondly, the trustee was not allowed to put himself in a position whereby his duty to the trust and his own personal interest would conflict. The court held that by acquiring the lease the trustee had made an unauthorised gain. The trustee was obliged to hold the lease on trust for the infant.

If a person acquires property with constructive but not actual notice of a trust, he will take a constructive trustee; the beneficiaries may enforce the trust against him but if he is not informed of their claim for some years, he will not be subjected to liability for failure to invest in trustee investments. The duties of a constructive trustee have not been made clear; they probably vary with the circumstances and will be greater for a fraudulent trustee than for the innocent purchaser.[33]

Since a person can only be a trustee if there is vested in him certain property which he holds upon trust, a constructive trustee can therefore only exist where the property in question is vested in the trustees as where a trustee of a lease obtains a benefit for himself by negotiating a renewal of the lease in his own favour, the new lease is vested in him and is held on constructive trust for the beneficiary.[34]

Sometimes persons, not appointed trustees, may intermeddle with trust funds or with the general administration of the trust. Here the general rule is that if the person not nominated as a trustee "has received trust property with actual or constructive notice that it is the trust property transferred in breach of trust, or because he acquires notice subsequent to such receipt and then deals with the property in a manner inconsistent with the trust,"[35] he is a constructive trustee.[36]

The second type of trust is a resulting trust. This is also a trust imposed by the operation of law. Resulting trusts are not required to conform to any formalities. It can be said that a resulting trust is a situation in which a transferee is required by equity to hold property on trust for the transferor or for the person who provided the purchase money for the transfer. The beneficial interest results, or comes back to the transferor or to the party who makes the payment. Resulting trusts are not subject to all the rules of express trusts. Their creation is not dependant on compliance with formalities; their objects do not need to be immediately identifiable; an infant may be a resulting trustee.

It may be added that there are two types of resulting trusts. First, there is the automatic resulting trusts. These occur where the beneficial interests under a trust

has not been completely disposed of by the settlor or testator. Secondly, there are presumed resulting trusts. These occur in circumstances where property is bought by one person and place in the name of another, or where property is voluntarily transferred by one person to another and where the law will presume that the person in whom the property is vested is to hold that property in trust for the other. This is, however, a rebuttable presumption. There are some examples.

Where there is a purchase of property by one person and the same property is in the name of another person, e.g. B pays for property and the ownership goes in the name of C, the general presumption is that B holds the property on a resultant trust for C.

Secondly, where there is the purchase of property by one person and the ownership is vested in that person and another, for example, B pays the purchase price but the ownership is inB and C, equity presumes that B and C should hold the property on a resultant trust in favour of B.

Thirdly, where there is a joint purchase of property and ownership of the property is in one of the parties. In such a case equity presumes that B who is not the owner but the contributor is said to be the proportionate beneficiary.

Finally, where there is a voluntary transfer from one person to another. B transfers property to C. Does it take the form of a gift or a resulting trust? Basically it is a choice between advancement and resulting trusts. If you are concerned with land then a voluntary transfer takes effect as a gift. If you are concerned with personal property there is a presumption of a resulting trust.

When does advancement operate? This applies in very limited circumstances. If the owner of property is under an obligation to support or provide for a person to whom property is given the law recognises three categories;

(i) where a father transfers property into the name of a ligitimate son, the law presumes a gift,

(ii) where a husband transfers property to his wife,

(iii) where any person transfers property into the name of another person where there is a relationship 'in loco parents'.

> 'An express trust is one intentionally declared by the creator of the trust who is referred to as the settlor. This is done by a manifestation of an intention by the settlor to create a trust' or by transfer to trustees.[37]

Express trusts can be further divided into various categories. First there are executed and executory express trusts. In executed trusts the settlor has normally marked out in the appropriate technical expressions what interests are to be taken by all the beneficiaries while with the executory trusts he has indicated to his trustees a scheme for a settlement and the details must be discovered from his general expressions. The difference between the two is that while the language of executed trusts is governed by strict rules of construction, executory trusts are construed more liberally.

Secondly, completely and incompletely constituted trusts. In every sense this heading is irrational. This is because there cannot be a trust unless such a trust is completely constituted. However, the heading is really a rule for distinguishing what is a trust from something that is void.

A trust can only be valid if the trustee has a valid

title to the trust property. Merely declaring that A holds certain property in trust for B is not enough to create a trust unless A has title to the property that is subject to the trust.

The trusts that we have examined are subject to certain formalities, for example, the requirement as to writing in the case of express trusts. These will be discussed in the next chapter.

Certain conclusions can be drawn at the stage. Firstly, the classification of trusts is not exclusive and there exists a certain amount of overlapping as regards the requirements of these categories. Secondly, it is an essential characteristic of trusts that the property that is subject to a trust is vested in persons or a person called trustees, which those trustees are obliged to hold for the benefit of other persons called the beneficiaries. Thirdly, the beneficiaries interest is proprietory in that it ceases to exist if the legal estate in the property comes into the hands of a bona fide purchaser for value.

On conclusion of the discussion on the various types of trusts, what can be said to be the nature of the customary trust? Is there any equation, if any, with the equitable trusts? In answer to these questions, while the writer cannot say the exact nature sought for, it is clear that the customary trust and the equitable doctrines passes characteristics that make the difference most pronounced in the names. The customary trust has characteristics that are credited to those trusts that are imposed by operation of lwa, namely constructive and resulting trusts but because of fine distinctions which will be examined in the next chapter, the writer cannot fit it comfortably into any one of these categories. It can, however, be said with confidence that although the customary trust has characteristics similar to those of the equitable trusts, the latter may not be said to be the former on a wholesale basis.

CHAPTER TWO - Footnotes

1. Equity and the Law of Trusts 4th edition P. Pettit Page 17
2. Section 3
3. Judicature Act 1967
4. Judicature Act Section 3(i)
5. Gibson Kamau Kuria, The Role of Customary Land Tenure in Rural Development in Kenya, Mimeo, a paper read at the Seminar on Law and Rural Development held at Kisumu July 18 - 22, 1977.
6. (1960) E.A. 926
7. Judicature Act 1967
8. (1972) E.A. 227
9. Section 143 (i) of the Registered Land Act reads:

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

10. It will be shown that the interest such as the one that she had was of a resultant or constructive trustee. I submit that this case was wrongly decided for reasons which are well enumerated in this paper.
11. Sela Obiero v Opiyo and Others (1972) E.A. 277
12. Supra. Page 228
13. Registered Land Act (Cap. 300)
14. 'Trust' here refers to the customary notion of trusts.
15. Supra. Footnote 5
16. An outline of these rules is given in the First Chapter.
17. Supra. note 11 page 228
18. Supra. note 11 page 229

19. (1973) E.A. 388

20. Cap. 302 of the Laws of Kenya

21. H.C.C.C. No. 377 of 1968

22. Section 126 (i) of the Registered Land Act reads:

> "126(i). 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 particulars of any trust in the registers."

23. Alan Kiama v Ndia Mathunya & Others. C.A. No. 42 of 1978.

24. See generally: H.M. Mulli 'The English Doctrines of Equity and Trust' LL.B Dissatation 1978; G.K. Kamau. The role of Customary Land Tenure in Rural Developmant in Kenya.

25. Gibson Kamau Kuria, Supra. Note 5

26. H.C.C.C. No. 340 of 1977

27. G.K. Kamau, 'The Role ofCustomary Land Tenure in Rural Development in Kenya

28. H.C.C.C. No. 377 of 1968

29. (1974) E.A. 526

30. See generally: Lord Devlin 'Judges and Law Makers' 1976 Modern Law Report 1: G.K. Kamau Legal Profession ..... in Kenya

31. These are the customary concept and the equitable doctrines of trusts.

32. Keetch v Sandford (1726)2 Eq. Cases 741

33. Hanbury, 'Modern Equity' 10th Edition page 309

34. Footnote 33

35. Per Brightman J. Karak Rubber Co. Ltd. V Burden (No. 2) (1972).

36. Footnote 33

37. Hanbury, 'Modern Equity' 10th edition page 132

CHAPTER THREE

The Classification of Trusts and the Customary Law

In Chapter two, we looked at the equitable concept of trusts and the customary concept of trust with the aim of examining the attributes that two have in common. It was observed that there exist similarities and differences. It is these that we are going to examine in the following chapter. We will begin with an examination of the calss classification of trusts to discover whether the customary trust can conveniently be placed in any particular category.

There is no generally agreed classification of trusts.[1] Different writers have adopted their own classification. However, it has become important to classify trusts[2] into particular categories. As a general rule, a declaration of trust of land must be evidenced in writing.[3] This rule does not apply to the class of trusts generally referred to as implied, resulting and constructive trusts. Although the appointment of an infant as an express trustee is void,[4] he can hold property as a trustee upon a resulting trust. An express trust is prima facie one where the settlor has expressed his intention to set up a trust and if it relates to land it must be evidenced in writing.[5]

The term implied trusts is used in more than one sense. An implied trust may arise where the intention is not directly expressed but presumed. Precatory trusts are implied trusts in this sense though some writers[6], probably rightly, consider they are essentially express trusts in that the trust is expressed, albeit in ambiguous and uncertain language. Many resulting trusts depend upon the implied intention of the grantor. There are four cases in point. First, where a man purchases property and has conveyed or transferred it into the name of another or the joint names of himself and another. Here the beneficial interest

will normally result to the man who put up the purchase price. Secondly, where there is a voluntary conveyance or transfer into the name of another or into the joint names of the grantor and another where likewise there is prima facie a resulting trust for the grantor. Thirdly, where there is a transfer of property to another on trust which leaves some or all of the equitable interests undisposed. Lastly, there is a resulting trust where the reason is that there is no attempt to dispose of part of the equitable interest as where property is given to the trustee on trust for X for life and nothing is said as to what is to happen after X's death.

This class bears a very strong similarity with the concept under discussion. And though the customary concept is not divided into any defined cases, it will be seen that in fact the courts have tended to use the term resulting trust when referring to the customary concept.[7]

Underhill classifies trusts into two groups;[8]

(a) those where the resulting trust depends upon the presumes or implied intention of the grantor. Underhill treats these as express trusts. This will be the position in the first two types of cases referred to to above and in the third type where there has been no attempt to dispose of part of the beneficial interest which is consequently held upon a resulting trust, and

(b) those where the declared trust is void for uncertainty or illegality, when they are to to be treated as constructive trusts.

It is to be noted that some writers treat resulting and

implied trusts as synonymous with constructive trusts.

A constructive trust is one imposed by a court of equity regardless of the intetion of the owner of the property. "The term is ... used as including resulting trusts and by Underhill as comprehending all trusts which are not express in his wide definition of that word."[9] The most important cases are where a stranger to a trust, not being a bona fide purchaser for value without notice is found in possession of trust property, which he will be compelled to hold as part of the trust property. Apart from these cases, whenever the legal and equitable ownership of property is separated and there is not trust express, implied or resulting, equity will view the person in whom the property is vested, in the absence of fraud, as a constructive trustee for the beneficial owner.

Under express trusts we see that the essential requirement is that of evidence in writing. The Law of Property Act 1925 section 40 (i) provides:

> "No action may be brought upon any contract for the sale or other disposition of land or any interest in land unless the agreement upon which such action is brought, or some memorandum or not thereof is in writing and signed by the party to be charged or by some other person thereunto by him lawfully authorised." 10

This section deals with a contract to create a trust and a contract to dispose of a subsisting equitable interest. It does not require the actual contract to be in writing. It merely requires that appropriate writing must be in existence as evidence of the contract at the time when the action commenced. It must contain all material terms of the contract and also an express or implied recognition that a contract has in fact been

entered into. The absence of writing, however, does not make the contract void but merely unenforceable by action.[11]

The Law of Property Act 1925 also provides for declarations of trusts inter-vivos. These are th situations where the owner[12] of the property declares that henceforth he will hold it on certain trusts. There are two situations. Firstly, where the settlor was the owner of the property both at law and in equity, he remains the legal owner while the equitable title is vested in the beneficiaries under the trust. Secondly, where the settlor was merely the equitable owner before the declaration of the trust. In both cases section 53(i) (b)[13] provides:

> "A declaration of trust respecting any land or any interest therein must be manifested and proved by some writing signed by some person who is able to declare such trust.."

The requirement of writing here is only required as evidence of the declaration of trust and need not therefore be contemporaneous with it. The requirement of writing is generally thought to be the same as under section 40(i). However, where the owner of the property declares himself to be a trustee thereof, he is clearly the person who must sign the writing. Where there is a separation of the legal and equitable interests and the declaration of trusts takes the form of a direction to the trustees by the equitable owner, it is the equitable owner who must sign the writing if it is to be effective.[14]

Section 53 (i) (c) provides:

> "A disposition of an equitable interest or trust subsisting at the time of the disposition, must be in writing signed by the person disposing of the same or by his agent thereunto lawfully authorised in writing or by will."

Unlike the provisions of sections 53 (i) (b) and section 40, section 53 (i) (c) requires that the disposition shall actually be in writing and not merely evidenced in writing. Absence of writing makes the purpoted disposition void.[15]

All these statutory provisions have their origin in the Statute of Frauds 1677, the purpose of which was to prevent the injustice that was thought likely to occur from perjury or fraud when oral evidence was admitted.

In Rouchefoncauld v Boustead [16] it was said:

> "... that the Statute of Frauds does not prevent the proof of fraud, and... it is a fraud on the part of the person to whom land is conveyed as a trustee... to deny the trust and claim the land himself. Consequently... it is competent for a person claiming land conveyed to another to prove by parol evidence that it was so conveyed upon trust for the claimant, and that the grantee, knowing the facts is denying the trust and relying upon the form of conveyance and the statute in order to keep the land himself."

The fraud which brings the principle into play arises as soon as the absolute character of the conveyance is set up for the purpose of defeating in express trusts.

The requirement as to the formation of implied, resulting and constructive trusts differ from those in express trusts.

Constructive trusts arise by operation of law. As already noted, a constructive trust is a relationship in respect of property under which one person, known as a trustee, is obliged as of law to deal with property vested in him for the benefit of another person, the beneficially.[18] A constructive trust is imposed by the court as a result of the conduct of the trustee and therefore arises independantly of the intention of

the parties.

When and on what grounds a constructive trust will be imposed depends on the attitude of the courts towards the person upon whom the trust is to be imposed i.e.the constructive trustee. It is worthy of notice that American law has long adopted the attitude that a constructive trustee has been unjustly enriched at the expense of the constructive beneficially i.e., all that has to be shown is that the constructive trustee has received some benefit, which as against the constructive beneficiary, he cannot justly retain. Paragraph 60 of the American Restatement of Restitution provides:

> "... where a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain, a constructive trust arises."

This provision represents the attitude of the American judges. As Cardozo J. has remarked:

> "A constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee" 19

English law has, generally speaking, only been prepared to impose a constructive trust where the conduct of the person upon whom the trust is to be imposed amounts to a legal wrong i.e., where a cause of action against the constructive trustee has arisen independantly. Recent decisions suggest that a constructive trust:

> ".... is a trust imposed by law whenever justice and good conscience require it... it is an equitable rememdy by which the court can enable an aggrieved party to obtain restitution."[20]

Implied trusts are covered in a wide range of situations. Cases of mutual wills are, in this respect, generally regarded as a case of implied trusts. Mutual wills arise where two persons, usually husband and wife have made an agreement as to the disposal of their property and each has in accordance with the agreement executed the will. The two wills containing more or less similar provisions, such wills are known as mutual wills. They give the survivor a life interest and sometimes an absolute interest.

In order to establish the trust it is not sufficient to establish an agreement to make mutual wills followed by their due execution; it is essential that an agreement not to revoke the mutual will is established. A trust is not created at once and indeed may never arise at all since the parties are free and may release each other from their bargain by mutual agreements, and may during their lifetime invoke the will separately provided each gives notice of revocation to the other. Such other party thereby acquires an opportunity to alter his own will and the ground upon which a trust is raised ceases to exist. It is the death of the first to die, leaving his will unrevoked by which he carries part of the bargain into execution and makes his will irrevocable that brings the trust into operation. The creation of the trust does not depend upon the acceptance by the survivor of the benefits given to him by the will of the first to die.

Resulting trusts arise whenever a man buys either real or personal property and has it conveyed or registered or otherwise put into the name of another or of himself and another jointly. It is presumed that that other holds the property on trust for the person who has paid the purchase money. In Dyer v Dyer [22], Eyre C.B. said:

> "The clear result of all the cases without a single exception is that the trust of a legal estate, whether freehold, copyhold or leasehold, whether taken in the names of the purchasers and others jointly, or in the names of others without that of the purchaser- whether in one name or several, whether jointly or successive- results to the man who advances the purchase money."

There is no need for the conveyance or other instrument of transfer to contain any reference to the fact that the purchase price has been paid by someone other than the transferee. Parol evidence is always admissible to determine who advanced the money. The fact of evidence must be satisfactorily proved by evidence which may be circumstantial evidence such as the nominal purchaser had not the means to provide the purchase money. Evidence must show that the money was intended to be advanced by the person alleging the resultant trust in the character of purchaser. If the evidence merely established a loan of some money there would be no resultant trust and the person lending the money would be a mere creditor. The presumption of a resulting trust applies equally where the parties were at the relevant time husband and wife

From the foregoing, it can be seen that there are two ways in which the term 'trust' is used in English jurisprudence. First the term embraces all the matters of confidence and serves as a general synonym for a fiduciary relation. In this sense agents, guardians and other fiduciaries are all trustees. If in describing a head of a family, under customary law, as a trustee it is meant that he holds office as a trustee in the general sense then the analogy is acceptable. The head is entrusted with the administration of the family property for the benefit of family to whom he owes some fiduciary duties. The exact nature of these obligations will become clear as the chapter progresses.

Under English law the legal title to trust property was detachable and distinguishable from the beneficial interest in property. The trustee could not exploit his standing at law to the detriment of the beneficiary. Thus there was the concept of dual ownership which allows the trustee to hold the title while the beneficiary retains the right to beneficial enjoyment.

Generally under customary law, there is no distinction between title and beneficial enjoyment. The family head, like the trustee, has control of the family property but title and the right to beneficial enjoyment are both vested in the family.[23] The managerial powers of the head are strictly distinguishable from the title to the property. The right to manage the family property and to alienate it resides in the group acting corporately and not in individual members. In most tribal groups the eldest male member is usually the head of the group. He takes office automatically and without ceremony upon the death of his predecessor. The family head presides over the meetings of the descent group. He has jurisdiction over all the matters pertaining to the group, including its land. As the executive head of the group, he may issue orders but is nevertheless subject to the will of the group and may not override the decisions of the group. He cannot be deposed, though if unpopular he may be ignored by his family members and recognition as leader given to his immediate junior in age.

Any dealing in family land must be conducted by the family head. Only he may take action to court to protect the interests of the family and he always sues on behalf of the family. All documents should be signed by him.

In those descent groups possessing a hereditary chieftancy title, the control of family land and particularly its alientation has often passed into the hands of the chief. The roles of the family head and of the chief are quite distinct - the former has jurisdiction only within the descent group while the latter is its representative in the local

authority. The chief thus acts as the family head but he has no more power than the family head though his influence is usually such that members acquiesce in his sole dealings in land.

In regard to the distinction between the mangerial and the title aspects of property, the position of the family head is similar to that of the life tenant under the English settled Land Act of 1882 who was deemed to be a trustee in respect of his wide powers of dealing with the settled land although the legal estate was not vested in him. Before 1926 the legal estate was neither vested in the trustees of the settlement or split up between the beneficiaries, but the Act of 1882 struck at the doctrinal fetters upon the alienation of the property by conferring wide powers of disposition upon the tenant for life. The settled Land Act 1925 completed this process of liberation by vesting the legal estate in the tenant for life, thus making his fiduciary position more like the usual common law trustee as regards the location of title.

At equity one or two trustees have the title and effective powers of control. Both economic and conveyancing notions favour them. This is very l unlike the customary concept under which, as we have seen, embodies a pervading collectivism that tends to emphasize 'corporate' tile and to circumscribe the powers of control which a single individual may weild over 'corporate' property. However, new economic and social phenomena have caused a significant increase in the heads powers of disposition.

The usual conception of a trust is a dispositive scheme whereby title to property is vested in one person upon trust to hold it for another. The trustee is thus depicted as enjoying no beneficial interest in the trust. There is, however, no doctrinal impediment to a trustee being a beneficiary. There can be no trust where a person is not at once sole trustee and sole beneficiary; equity does not counternance the spectacle of a person

discharging the full panoply of a trustees obligations to himself. But the validity of a trust will not be vitiated by the mere circumstance that a sole trustee is one of the beneficiaries. Where the trustee is also one of the beneficiaries, his position is clearly analogous to the head of the family who is a trustee and also one of the beneficiaries. A head of a m family is by definition a member of the family he administers unto and is as much entitled to participate in the enjoyment of family as any other member. His 'trusteeship' is therefore a 'highly interested trusteeship.'

As far as creation is concerned, in the English trust, it depends upon the settlers intention. But the intention is irrelevant to the establishment of fiduciary relations between the head and members of the family.[24] The head voluntarily assumes his office but is placed in a fiduciary position by virtue of the office and without respect to his intentions. Thus there is no analogy here with either an express or implied trust - the former is predicted on the overt intention of the settlor, the latter on his inferred expectations. The analogy with a constructive trust is valid to a point; both fiduciary situation arise by operation of law. In England the modern tendency is to regard the constructive trust as a purely remedial device which comes into operation when an act savouring the unjust enrichment is committed. The customary fiduciary relationship is based on an affirmative duty, not on any remedial theory.

The family heads' powers of control and management are in many ways similar to those of a trustee. Like a trustee he can take such steps and incur such expenses as are reasonable to preserve the family property. But unlike a trustee a head of a family is personally liable to the costs of litigation in respect of family property. The basis is that members of a family are jointly and severally liable for the whole of the debts of the family and, therefore, each member of the family is personally liable for the whole

of the costs incurred in litigation.

It is a fundamental fiduciary principle that the trustee must not place himself in a situation where there is a conflict between self-interests and his duty to the beneficiaries. Customary law also acknowledged the paramountcy of the family's interests over the self interests of the head of the family; the heads obligation to administer family property in the interest of the family is a fundamental legal principle and a basic tenet of traditional religious ideas. Deviation from this norm constitutes an outrage upon the ancestral spirits and attracts drastic sanctions of disposition. However, customary law has no eleborate rules to deter the conflict between self-interest and duty to others. By virtue of his position the family head commits himself to the preservation of family property. With this duty to preserve, the idea of buying off the rest of the family from the family estate violently offends the very basis of customary tenure. Equally repugnant is the idea of selling his own property by the head to himself as family head; the family ties which bind the head and members do not admit of such unabashed commercialism.

As for accountability, traditionally customary law in many places was bound up with the cult of ancestral worship. A basic tenet of this cult was that the living were strictly accountable to the ancestral spirits for their actions. This idea of strict accountability to the ancestral spirits was an effective means of social control but it was particularly significant in the administration of family property, since such property was an ancestral trust. Thus although the head of the family was immune from liability to account to the members of the family, this is in no way detracted from his accountability to the ancestral spirits. The defects in the mundane legal

procedures were cured by the efficacy of religious sanctions. However, it must be appreciated that the efficacy of the customary fiduciary institution was strictly anchored on strict adherence to religious tenets. With the erosion of the cult of ancestral worship it is imperative to devise an effective down to earth machinery for transplanting this fundamental idea of accountability into social reality.

Having determined the various aspects of the nature of the customary trust we can draw certain conclusions. A customary trust is based on and indeed must be examined in the light of the customary rules of inheritance and landholding. Such rules vary from one tribe to another in the minute details of procedure, but otherwise they are the same in substance. Furthermore, when dealing with cases involving this conept it is important to bear one thing in mind. The development is still undergoing changes, such changes being directly related to the socio-economic development of the country. In earlier times, one could talk of the early form of customary trust where the family infrastructure, which we have looked at in detail, played an indispensable role. In this period of its development there was no requirement as to writing in order to establish the trust. Furthermore, the land had to be vested in a particular lineage, tribe, clan or family. The head of the family needn't have been the father though in most cases he was. Also, the land was entrusted to the sons. Widows had only a life interest wiwhich reverted to the family lineage on her death. During this period the intention of the trustee in the creation of the trust was irrelevant. Land automatically fell into thehands of the trustee. However, gradual developments are slowly changing the face of this concept.

Nowadays, even though the basic principles of the

concept still apply, the courts are playing a more important role in the determination of disputes. The intention of the trustee is gaining a more prominent role. With the introduction of the western mode of production, the extended family infra-structure is fast breaking down. Land is in short supply which means that the handing down of land by inheritance is fast becoming a thing of the past and this is obviously going to radically change the major attributes of the customary trust concept that we have examined

CHAPTER THREE - Footnotes

1. Pettit 'Equity and the Law of Trusts' 4th edition page 44
2. This classification is occasioned by the different formalities that are required for the formation of the trusts and the differing consequences that accrue therefrom.
3. Law of Property Act 1925 s. 53(2)
4. Law of Property Act 1925, s. 20
5. Supra. Footnote 3
6. E.g. Underhill, Law of Trusts and Trustees, 12th edition page 11
7. Discussed fully in Chapter 4
8. Supra. Footnote 6
9. Pettit page 46
10. See, Cheshire, Modern Real property, 12th edition page 115; Meggary and Wade, The Law of Real Property, 4th edition, pp. 545
11. See. Timmins V Mareland Street Property Co. Ltd (1957) 3 All E.R. 265.
12. It siffices to bear in mind at this point that under customary law the head of the family cannot be said to 'own' the property over which he is the chief administrator.
13. Replacing s.7 of the Statute of Frauds 1677
14. The Law of Property Act 1925 s. 53(2) expressly provides that s. 53 does not affect the reaction or operation of resulting, implied or constructive trusts.
15. Grey v I.R. Commrs (1959) 3 all E.R. 603
16. (1897) 1 ch. 196 C.A. page 206
17. Bannister v Bannister (1948) 2 All E.R. 133, page 136
18. Oakley A.J. 'Constructive Trusts' page 1
19. Beatty v Geiggenheim Exploration Co. (1919) 225 N.Y. 380, 386.
20. Hussey v Palmer (1972) I.W.L.R. 1286, 1290.
21. Re Hagger (1930) 2 Ch. 190
22. (1788) 2 Cox Eq. Cas 92, 93
23. Lloyd P.C. 'Yoruba Land Law' as presented in Readings in African Law by Contran E.
24. Pnevill D.J.: 'Akamba Family Life'

CHAPTER FOUR

The Customary Trust Determined

The foregoing chapter discussed the aims[1] that the trust concept purports to fulfil. But can the present law accommodate this principle and the aims?

In chapter one it was revealed that the Registered Land Act[2] does not sufficinetly accommodate this concept. However, recent cases have shown that the courts are willing to interpret this Act to fulfil these very aims. A cas in point is Alan Kiama v Ndia Mathunya and Others[3] - hereby referred to as Kiama's case. Briefly the facts were that the appellant claimed to be the owner of some parcels of land which were governed by the Registered Land Act. During 1958 and subsequent thereto the respondents had wrongfully and unlawfully utilised the land in all respects and thus the plaintiff sought to eject the respondents from the land.

In their defence the respondents denied that the appellant was the registed owner of that land and that they were trespassers. They further submitted that the appellant had obtained the title thereto fraudulently through the assistance of Karuru Kiragu, the original registered proprietor.

The trial judge said that Kiragu 'held the land subject to the rights of the clan...' and that there was a trust by implication of law and Karuru Kiragu held the land subject to that resulting trust under Kikuyu customary law. It was further held that though no trust was recorded on the register, the 'trust' which existed under customary law was not defeated when the lclan members allowed Karuru Kiragu to register the land in his name.

On appeal, the Court of Appela upheld the decision of the trial court that the land was registered in the name of Karuru Kiragu as owner and trustee for the members of the respondent clan. However, the reasons for reaching this decision were completely different.

In his judgement the trial judge overcame the barrier posed by Section 126 of the Registered Land Act by saying that it was:

> "...a technicality which many people were not aware of during those days when the exercise was new..."4

He went on to add that it would be:

> "... inquitious to deprive the entitled persons of their interest in land because the trust was not specifically recorded in the register, through no fault of their own....." 5

He then held that:

> "... the trust existed under customary law when the members of the clan allowed Karuru to hold the land in the name of Karuru without recording the trust. The resulting trust was implied by law after the registration of the suit land in the name of Karuru Kiragu." 6

Having found the transaction between Karuru and Kiragu fraudulent, the court ordered rectification of the register under section 143 of the Registered Land Act.

Madan J.A. of the Court of Appeal rejected the reasoning of the trial judge. He said that:

> "... the clan members themselves claimed to have decided to register the land in the name of Karuru Kiragu as trustee. They themselves created the trust therefore there was no trust resulting or otherwise by implication of law or und Kikuyu customary." 7

He further added that even if we supposed that the creation of a trust was not a dealing in land, then, sections 126 and 143 of the Act prohibited the rectification of the register so as to affect the title of the appellant as he acquired the land for valuable consideration from Karuru Kiragu, who was deemed to be absolute proprietor thereof due to his being registered first.

Rejecting the argument of the trial court that the land was transferred to the appellant subject to a resulting trust and subject to the respondents existing rights, Madan J.A. held that:

> "... registration under section 28 of the Act was subject only to such liabilities, rights and interests as affect the same and are declared by section 30 of the Act not to require noting on the register."8

Section 30 enacts:

> "30. Unless the contrary is expressed in the register, all registered land shall be subject to such of the the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register:-
>
> (g) the rights of a person in possession or actual occupation of land to which he is entitled in right only of such possession or occupation, save where inquiry is made and the rights are not disclosed."9

In other words the land was subject to the overriding interests of the respondents as persons in possession or actual occupation under section 30 (g).

The rights described by the trial court as 'customary' rights were, on the authority of Esiroyo v Esiroyo,[10] held to have been extinguished by section 28 of the Act. In this case, the facts of which have been stated earlier,[11] Kneller J. held that:

> " Rights arising under customary law are not among the interests listed in section 30 of the Act as overriding interests."12

Madan J.A. went on to adopt a different interpretation in order to afford justice to the parties. He said that since

section 30 (g) could not refer to customary rights, it must refer to 'equitable rights' as the overriding interests. Further, such overriding interests which arisie in right only of possession or actual occupation without legal title are equitable rights which are binding on the land and therefore, on the registered owner of it. They possess legal sanctify under section 30 (g).

> ".... without being noted on the register; they have achieved legal recognition in consequence of being written into the statue; they are not subject to interference or disturbance such as by eviction save when inquiry is made and they are not disclosed." 13

Since the respondents were in possession and actual occupation of the land and also cultivated it to the knowldege of the appellant, there existed overriding interest which are so crated and are entitled to protection because they are equitable rights. It was then held that the land was transferred to the appellant subject to the respondents existing rights rather than subject to a resulting trust.

What was the basis of interpretation in the approach adopted by either trust?

In the trial court the judge was adopting the customary trust concept. He said that a customary trust is a resulting trust which is implied by law and arises out of the relationship between registered proprietor and the clan, in this case Kiragu and the respondents. By implication he rejected the judgement in Esiroyo v Esiroyo[14] on the same basis as was argued in the previous chapters. He argued that:

> "... the Judicature Act provides for decisions of cases of this nature to be according to substantial justice and without technicality of procedures. There is no repugnance to the decision met (so that) the resulting trust exists in circumstances such as these that a trust was not recorded in the register." 15

What the judge was really saying was that the customary trust was a creature of customary law and not related to the English express and constructive trusts.

The Court of Appeal rejected wholesale the concept of customary trust as '... a concept.... which was born in the conscience of the learned judge because he was determined to do justice."[16] The Court accepted the holding in Esiroyo v Esiroyo as regards section 30 (g) and commented on the use, by the trial court, of the provisions of the Judicature Act by saying that a judge has to do justice within the limits enacted by statutes and ordered procedures, in other words, according to the law. In interpreting section 30 (g) the Court of Appeal took the section to refer to equitable rights. These were overriding interests that arise in right only of possession or actual occupation without legal title and as equitable interests they are bidning on the land and therefore the registered owner.

Which then is the correct approach, if any? In answering this question it is evident that the basis of approach depends very much on the basic philosophy of life of the presiding judge.[18] In the trial court the judge expressed an appreciation of the customary rules of land and inheritance, and this was clearly reflected in his interpretation. It is this appreciation that was the deciding factor that determined the approach.

One line of approach was open for the appeal court. Having rejected the reasoning in the trial court but recognising the injustice caused to the respondents, the court overcame the obstacles created by the Act by adopting the equitable rights idea. This seems to have been adopted from the doctrines of equity and is justifiable under section 163 of the Registered Land Act. Fortunately both interpretations had the same end result.

Avoiding much repetition of what was said in chapter two, the writer feels that a further comparative analysis of the customary property concept with the equitable doctrines of trust may further our understanding of this discussion. In this respect the question may be asked as to whether the equitable customary trust (as defined by Madan J.A. in Kiama's case) expresses the same aims as the customary law rights. The decision in the Kiama case suggests the affirmative. Can this equitable customary trust be compared to an express, resulting, or constructive trust? This has been a major question throughout this paper and the answer has to be seen in light of the socio-economic structure has changed the function of this Council and the way of thinking of the people. Whereas in those days the intention did not matter in the recognition of the head as a 'trustee', nowadays it plays a big role in determining the creation and existence of a trust. This is well illustrated in cases[19] that have come before the courts.

In Zephania Nthiga v Eunice Wanjiru and Samuel Njeru Nthiga,[20] the plaintiff filed a suit for a declaration that, inter alia, the defendants held two parcels of land on trust for him. The court held that on the evidence the 1st defendants "acquired the said land as an agent for the plaintiff and she held it on trust for him, which trust can be deduced from the intention or agreement of the parties or by implication of law."[21]

The Council of Elders is rapidly being replaced by the courts in determining the more serious land disputes. The money economy and concept of individual title has also perpetuated the importance of the intention of the family head as this paper has attempted to show.

In view of the minimal help afforded by the Acts[22] it is not easy to determine whether the equitable customary

trust is comparable to an express trust. In the Kiama case the issue arose as to whether the dealing such as the clan members embarked upon constituted an express trust under Section 6 (2) of the Land Control Act.[23] This section provides:

> "6 (2). For the avoidance of doubt it is declared that the declaration of a trust of agricultural land situated within a land control area is a dealing in that land for the purposes of sub-section (1)." 24

Law J.A. in his judgement held that only dealings involving express trusts would be invalid, in the absence of consent, under this section. This seems to imply that such a transaction would have to be either on a written instrument or evidenced in writing, expressing the trust.

The Judicature Act section 3 (1) applies the doctrines of equity and statutes of general application to our law. Though the Law of Property Act of England of 1925 does not qualify as a statute of general application, the sections 53 (1) (b) and 53 (i) (c) are reproductions of the provisions of the Statute of Frauds 1677. Is this a statute of general application? The date of enactment suggests that it does hut the Law of Contract (Ammendment) Act 1968[25] expressly says that the statute of Frauds 1677 does not apply. How can the two be reconciled? Case Law does not appear to have decided the issue but one may proceed on the assumption that the Act of 1968 was making reference to contracts only but not trusts. As the issue still remains undecided I will proceed on the assumption that the Statute of Frauds is applicable at least to trusts. The above mentioned sections of the Law of Property Act as reproduced from the Statute of Frauds 1677 require that the creation of an express trust must be evidenced in writing.

At the time of registration, the rural society was not acquainted with writing. Since the statute requires evidence in writing, how do we overcome this problem? Section 3 (2) of the Judicature Act affords us a solution. It applies the statutes of general application so far only as the local circumstances allow. It can be argued that at the time of registration the local circumstances did not allow for the application of this requirement hence it could be disregarded.

One of the main reasons for the enactment of the Statute of Frauds, as the name suggests was to prevent the use of fraud in land dealings. For instance, if a plaintiff is unable to produce the required evidence in writing, he may nevertheless succeed in obtaining the equitable remedies where he has done acts referable to the land in relation to their agreement and in reliance on the defendants promise. This is provided that these acts are such as to indicate on the balance of probabilities that they were preferred in on an agreement with the defendant which was consistent with the agreement alleged.

In the light of the above discussion it can be argued that the holding of land by the head of the family can be construed to be an act referrable to land and part of his duties towards the rest of the family. This will suffice as evidence of a trust.

The leading case of Rochefoucauld v Boustead[26] held that:

> "... the Statute of Frauds does not prevent the proof of a fraud; that is a fraud on the part of a person to whom land is conveyed as a trustee and who knows it was conveyed, to deny the trust and claim the land for himself. Consequnetly, notwithstanding the statute, it is competent for a person

> claiming land conveyed to another to prove by parol evidence that it was so conveyed upon trust for the claimant, and that the grantee knowing the facts is denying the trust and relying upon the form of conveyance and the statute in order to keep the land himself."

In this case the Court of Appeal was actually enforcing the express trust notwithstanding the absence of writing and thepprovisions of the Statute.

Consequently cases like the above have been treated as cases of constructive trust as in Bannister v Bannister[27] In this case, on the plaintiffs oral undertaking that the defendant would be allowed to live in a cottage rent free for as long as desired, the defendant agreed to sell to him at a price well below the contemporary value of the two cottages, that and an adjacent cottage. The conveyance executed in due course contained no reference to the plaintiffs undertaking. Subsequently the plaintiff claimed possession of the premises occupied by the defendant, and claimed that the alleged trust contained in the oral understanding was defeated by the absence of writing.

Though Rouchefoucauld v Boustead [28] did not impose a constructive trust, in the event of the express trust being unenforceable because it is not in writing, the court will impose a constructive trust to carry out the terms of the express trust. However, it would be much better to reach the same result by a straightforward application of the principle laid down in Rouchefoucauld v Boustead, namely that in a case of fraud, equity will allow an express trust to be established by parol evidence notwithstanding the statute.

On the strength of this detailed look at the requirements for the creation of an express trust, it would be justifiable to classify the equitable customary rights as falling in this category.

On examination of the cases, we find that the courts have repeatedly referred to resulting and constructive trusts interchangeably.

In Zephania Nthiga v Eunice Wanjiru and Another[29] Mulli, J. held that the 2nd defendant held the disputed parcel of land on trust for the plaintiff and subject to the rights, duties, and obligations as trustee for the plaintiff who was the beneficial owner of the said land in the resulting trust. The same judge held in the Kiama case that the "resulting trust was implied by law after the registration of the suit land in the name of Karuru Kiragu.[30] Law J.A. in the Kiama case held:

> "... the learned judge found in favour of the respondents on the basis of the English equitable doctrine of an implied, constructive or resulting trust arising out of the relationship between Kiragu and respondents...." 31

The learned judge made further reference to a constructive trust in his judgement saying:-

> "Under the constructive trust which in my opinion arose between Kiragu and the respondents in the circumstances of this case...." 32

From the extracts it may be concluded that the courts make no apparent distinction between resulting and constructive trust. Indeed this may be because both arise out of fiduciary relations and are implied by the law.

The customary trust concept has developed in a way that enables it to be regarded as an express trust, or a resultant or constructive trust either by operation of law or by the principles enumerated in Rouchefoucauld v Boustead [33] and Bannister v Bannister.[34]

In which category the courts would actually fit the concept depends on the interpretation of the facts by the courts. Cases tend to favour the second category of resulting and constructive trusts, but this is for disputes that arose many years ago. As the community becomes more aware of legal requirements and procedure, the courts may have the opportunity of adopting the Rouchefoucauld v Boustead principle which can be applied using section 163 of the Registered Land Act. This section was held in the Kiama case to render the Registered Land Act "subject exclusively to the 'common law of England' as modified by the doctrines of equity." 35

Having examined the development of the customary trust concept up to this stage, the writer would like to examine another aspect of the development, namely the shortcomings in relation to the socio-economic development that has taken place over the years. Once again the writer is persuaded into using a method of analogy with the English trust concepts in order to help in a clear understanding of the various propositions put forward. This is not to say that one or the other is the better but in their development, legal concepts benefit more from lessons learnt in different legal systems. The application of the doctrines of equity in the Kenya courts lends weight to the justification of the comparative approach.

In trusts the delimiting factor is the trust instrument, which is still alien in the customary legal system. Instead the customary legal system adopts the institution of the Council of Elders which serve as a delimiting factor. The difference in the two lies in the enforceability. Under the family property concept there is only a summons to the Council where those summoned give reasons why they should not be deposed as head of the family property in the light of any accusations levelled against them.

"The object of this procedure among

> the Kamba is not to seek redress for breach of fiduciary relations or the specific performance thereof but to demand an effective answer to an indictment on pain of disposition." 36

The trust instrument is, on the other hand, enforceable by beneficiaries under statute law. This raises the question as to whether the principles of enforcement in the customary concept are adequate to protect the beneficiaries. In the past the fear of ancestral spirits and a strong sense of moral duties caused the head to perform his fiduciary duties. Today the rapid socio-economic development has opened up the avenues for the heads to exploit their fiduciary position as was evidenced in the cases discussed. It would be inadequate and ineffectual to assume that the family head will be constrained by the norms of the customary society in the performance of his duties and obligations. Disposition neither restores misappropriated property nor affords recompense thereupon. Nowadays people resort to the courts, but as the law does not accommodate this concept satisfactorily, injustice is reampant in the courts interpretation. For example, in the Kiama case the court applied equitable principles to achieve a just result, but also reject the whole idea of a customary trust concept.

Considerations of the statutes should not be allowed to thwart the enforcement of the head's fiduciary obligation. In former days, the immunities enjoyed by the head were matched by a high sense of responsibility in respect of his obligations towards the family. Privilege was not a license for exploitation but an opportunity for serving the family to the full. With the dimunition of this sense of duty, the case for retaining the symbols of statutes is no longer tenable, the head no longer

commands the traditional authority he formally wielded but has however not been denuded of the legal privileges founded in his former standing within the family. Their retention is as incongrous as it is unjust.

Our comparative study has disclosed the effectiveness of the methods whereby equity holds the trustee to his fiduciary duties. A beneficiary can invoke the aid of the courts of equity in either compelling the trustee to specifically perform his obligations or restraining a threatened breach or procuring redress for a breach. Customary law could profit in its development from lessons learnt by equity.

The anomalies examined call for reform in the course of development. Firstly, the head should be made accountable to members of the family in respect of family property. This is basic to the concept of a fiduciary relection. This does not, however, mean the adoptation of the equitable conception of a duty to account. Expecting the head to keep meticulous accounts expected of a trustee or transacting of business in the atmosphere where any familymember can insist on an oppressive to the head. However the head should keep adequate accounts and be able to furnish members of the family with satisfactroy explanations of his dealings with family property when called upon to do so.[37]

To expect the head oto administer the family property in the primary interest of the family is ineffectual unless it is fortified by more thorough rules designed to subordinate the heads personal interest to that of the whole family. In addition the courts should be more ready to recognise the right of the family to menforce the obligations of the head.

Finally, individual family members should have the

right to prosecute claims against the head unencumbered by the desires of the majority. This does not threaten family solidarity and unity. An aggrieved individual should address his complaints to the local elders but his ultimate right to invoke the aid of the courts must be guaranteed, for whatever the legal standing of the elders there is no doubt that a head with a forceful personality can browbeat complainants into submission. The individuals ultimate right of access to the courts is the best guarantee against exploitation by the head.

CHAPTER FOUR - Footnotes

1. Chapter Three
2. Cap. 300
3. Civil Appeal No. 42 of 1978 - unreported
4. Per Muli J. in H.C.C.C. No. 998 of 1969
5. Supra
6. Supra
7. C.A. Judgement of Madan J.A.
8. Supra
9. Sec. 30 R.L.A. Cap. 300 of Lwas of Kenya
10. Esiroyo v Esiroyo (1973) E.A. 388
11. See Chapter 2
12. (1973) E.A. 388 page 390
13. Per. Madan J.A.; Kiama's case
14. Footnote 10
15. Supra. Note 4
16. Footnote 7
17. Footnote 10
18. See generally; Lord Devlin 'Judges and Law Makers' 1976 M.L.R.I.; G.K.K. 'Legal Profession....
19. Esiroyo v Esiroyo (1973) E.A. 388; Obiero v Opiyo & Others (1972) E.A. 227; Mwangi Muguthu v Maina Muguthu H.C.C.C. No. 377 of 1968
20. H.C.C.C. No. 1949 of 1976
21. Per Muli J. In Zephania Nthiga v Eunice Wanjiku & Another, supra.
22. Registered Land Act Cap. 300; Land Control Act Cap. 302
23. Cap. 302 as enacted by the Statute Law (Repeal and Miscellaneous Ammendment) Act 1980. Kenya Gazette Supplement No. 79 Act. No. 9 of 1980
24. Foo Note 23
25. See section 9
26. (1897) 1 Ch. 196, 206
27. (1948) All E.R. 133 C.A.
28. Footnote 26. This case was decided that way because of the Limitation Acts in force at the time.
29. Noon

29 Footnote 20

30. Footnote 15

31. Per Law J.A. in Kiama case

32. Footnote 31

33. Footnote 27

34. Footnote 27

35. Sec. 163 Registered Land Act Cap. 300

36. Mulli H. 'The English Doctrines of Equity and Trust' LL.B Thesis 1978

37. Archibong v. Archibong 18 N.L.R. 113

CONCLUSION

Throughout this thesis the writer has attempted to show the development of the customary concept of trust. This development did not start with the birth of concept but rather with the awareness of its existence by the legal system.

The present legal structure was imposed on the indigeneous people by the colonialists without reference to the then existing legal structure with regard to land i.e. the customary land holding system. This can be attributed partly to the racial arrogance of the colonialists who failed to recognise customary law as comprising a legal system. They introduced the various pieces of legislation, especially land legislation, in absolute disregard of the existing land tenure systems.

The African land tenure systems and more broadly the whole family structure, revealed the existence of a concept, similar in many ways to the English notion of trust but different in its aims. The colonial land legislation did not accomodate this conept. The problem was brought out well, for example, in the cases of Sela Obiero v Opiyo and others (1972) E.A. 227 and Esiroyo v Esiroyo (1973) E.A. 388 . In these cases the courts attempted to solve customary land disputes using the existing legislation when in fact that legislation did not accomodate this concept.

The courts have been seen to adopt two approaches when dealing with these disputes. The first approach was to accept that there existed this concept called a customary trust. The particulars had their roots in the African land holding system where the family head served as trustee. In dealing with the problems that arose the courts ignored the legislation provisions especially the proviso to section 28 of the Registered Land Act (Cap 300), and held that the registered proprietor held the land on trust for the family members.

The second approach is that which is presently favoured by the Court of Appeal as was evidenced in Kiama's case. In this case the court treated the disputes using equitable principles as remedies. The family 'beneficiaries' are said to have equitable rights over the disputed land. Followers of this second approach reject the idea of a customary trust.

It is submitted that both approaches make fundamental mistakes. The first approach is static. It does not take into account the changing trends of today's society. As was suggested when discussing the faults of the customary trust and the remedies, the approach should accomodate the socio-economic development that is constantly taking place. For instance, the family structure that is envisaged has to a large extent disintergrated. This is so in most of the cases that are likely to appear in court. The increasing literary rate together with the economic changes means that less trust can be given to the family head and thus checks and balances need to be strengthened to ensure that the head does not abuse the trust given to him.

On the other hand the second approach completely ignores the existence of customary rights to land. It interprets the existing legislation strictly and this, as we have seen, does not recognise the existence of the concept. The courts choose instead to use the notion of equitable rights to do justice.

The development of this concept has not been one of formulating new rules and standards, but rather one of trying to accomodate this customary trust idea has most meaning to the indigeneous people. It is submitted that as a compromise to the two approaches presently adopted, any attempts to change its fundamental

characteristics will have to be in consonance with the changes of the ways of life of the indigenous people. This means in effect that the legislation has to be changed to take into account the much valued customary land holding rules. At the same time those customs that have been outdated by the speedy socio-economic development will have to be dropped. This includes the rejection of any system whereby land disputes are solved solely by clan elders or by the courts. The two institutions must compliment each other. Problems involving the customary trust ought to be solved by the courts in consultation with the various locational leaders who are apt to be more conversant with the facts. This way of solving the disputes will ensure justice to the parties until such a time as the development of the concept takes a recognised and definite course.