



REPUBLIC OF KENYA



**Njagi v Gichigo & another (Environment and Land Appeal  
E041 of 2023) [2025] KEELC 1410 (KLR) (20 March 2025) (Judgment)**

Neutral citation: [2025] KEELC 1410 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA  
ENVIRONMENT AND LAND APPEAL E041 OF 2023**

**JM MUTUNGI, J  
MARCH 20, 2025**

**BETWEEN**

**BEDAN MURIITHI NJAGI ..... APPELLANT**

**AND**

**CYPRIAN NJAGI GICHIGO ..... 1<sup>ST</sup> RESPONDENT**

**JANE WANJIRU KIBABA ..... 2<sup>ND</sup> RESPONDENT**

*(An appeal arising from the Judgment of Honourable. L.W Kabaria-PM, delivered on 24<sup>th</sup> November 2023 in the Principle Magistrate's Court in ELC No. 29 of 2021 at Gichugu)*

**JUDGMENT**

1. This Appeal arises from the Judgment delivered by Hon. Kabaria (PM), on 24<sup>th</sup> November 2023 in Gichugu PMCC No. 29 of 2021 where the Learned Magistrate entered Judgment in favor of the 1<sup>st</sup> Respondent on the following terms:
  1. A declaration is issued that the caution and restriction lodged by the Defendants on the parcel Ngariama/Thirikwa/952 are unlawful. The caution and restriction lodged against the title by the Defendant are hereby ordered removed.
  2. The Counterclaim fails and is dismissed.
  3. The Plaintiff will have the costs of the suit and counterclaim.
2. In the suit before the Lower Court the 1<sup>st</sup> Respondent claimed that the Appellant who was his son together with his other sons unlawfully registered a caution against the title of land parcel No. Ngariama/Thirikwa/952 which was jointly registered in the Respondents name and that of his late sister in law, Phyllis Muthoni Kanguru. He averred the Appellant had declined and/or refused to remove the caution. By the Amended Plaint dated 7<sup>th</sup> July 2022 the Respondent prayed for orders:-



- a. Declaration that the caution and restriction lodged by the Defendants on the Plaintiff's LR Ngariama/Thirikwa/952 is/are unlawful and illegal.
  - b. That the Land Registrar Kirinyaga be ordered to remove the said caution and restriction forthwith.
  - c. Costs of the suit.
3. The Appellant in his defence and Counterclaim with his brothers dated 10<sup>th</sup> September 2021 admitted registering the caution but averred he did so to protect his interest and that of his brothers claiming beneficial interest under customary trust over the suit parcel of land. The Appellant claimed the father held the suit property under trust having inherited the same from their grandfather. Hence under the Amended Defence and Counterclaim the Appellant prayed for orders that:-
- a. A declaration that land parcel No. Ngariama/Thirikwa/952 is ancestral and trust land held by the Plaintiff Cyprian Njagi Githigo jointly with Phyllis Muthoni Kanguru (deceased) in trust for the Defendants and the Counterclaimants in the suit.
  - b. That the Land Registrar, Kirinyaga does note the said trust on the register for Land parcel No. Ngariama/Thirikwa/952.
  - c. Costs of the suit.
4. The Learned Trial Magistrate after hearing the parties and evaluating the evidence rendered the impugned Judgment which has provoked the instant appeal to this Court.
5. The Appellant lodged his Memorandum of Appeal dated 18<sup>th</sup> December 2023 and filed the Record of Appeal dated 4<sup>th</sup> March 2024.
6. The Appellant's Memorandum of Appeal set out 9 grounds of Appeal. The grounds are summarized as follows: -
1. The Learned Magistrate erred in both law and fact by failing to recognize the existence of a customary trust over land parcel Ngariama/Thirikwa/952, Additionally, she failed to acknowledge that the suit land is ancestral land and that the Appellant and his brothers possess a beneficial interest in it.
  2. The Learned Magistrate made an error in law and fact by neglecting to recognize the existence of an implied trust and wrongly concluded that the suit land was held in common by the registered proprietor.
  3. The Learned Magistrate failed to protect the property rights of the Appellant and the other Defendants, thus breaching Article 40 of *the Constitution* of Kenya.
  4. The Learned Magistrate erred in law and fact when she failed to find that the suit land was held by the 1st Respondent on behalf of the Appellant and his siblings.
  5. The Learned Magistrate erred in law and fact by ignoring that the Appellant and his brothers were born on the suit land, had lived there for over fifty years, developed the land, and raised their families there. She similarly failed to acknowledge the Appellant and his siblings were under the threat of the 1<sup>st</sup> Respondent, who had threatened to sell and had already sold part of the land to third parties.



6. The Learned Magistrate erred in law and fact by determining that the registered proprietor held the suit land in common rather than in joint ownership, and she failed to recognize that the rights of the deceased proprietor were extinguished upon her death.
7. The Learned Magistrate erred in law and fact by disregarding the evidence on record and instead considering irrelevant matters.
7. The Appellant prayed that the Appeal be allowed and the Judgment of the Learned Principal Magistrate in Gichugu PM in ELC No. 29 of 2021 be set aside with costs.

### **Evidence in the Trial Court**

8. To contextualize the Appeal, it is necessary to set out albeit briefly the evidence adduced before the Lower Court. The 1<sup>st</sup> Respondent, PW1, testified that he and his late brother's widow were the registered owners of a piece of land that they inherited from his father. He stated that his children, the Defendants in the Lower Court, live on this land. He stated he brought the case to Court because the children were not allowing him to set aside the land for his brother's children as per his late father's wish. He stated that before his father passed away, he directed that his deceased brother's family should receive one and a half acres out of the suit land. Since there was no money for the subdivision, his father suggested that they sell one and a half acres to fund the transfer. The Respondent testified that he owns seven acres of land and has given part of it to his sons while keeping the portion meant for his brother's children.

9. During Cross-examination, the 1<sup>st</sup> Respondent confirmed that his father got the land from the clan and that his brother died in the 1980s. He explained that his sons occupy one and a quarter acre each on the land, with his permission and that they all lived on the land with their families. He further indicated that several family members, including his parents, two of his brother's children, and his daughter Nancy, are buried on the land.

The 1<sup>st</sup> Respondent while affirming his sons reside on the suit land also stated he resided on the land with his wife. He further testified that the land was jointly registered in his name and his late brother's widow's names pursuant to succession proceedings. He reiterated he wanted to honour his father's wish and give his brother's children their entitlement of 1 ½ acres from the suit land and thus prayed that the cautions placed against the land by the Appellant be lifted.

10. Five witnesses (all brothers) testified for the Defendant, stating that the 1<sup>st</sup> Respondent was their father and they feared that he wanted to sell the suit land. They stated they all resided on the land with their families. DW1 and DW3 confirmed they had placed a caution and a restriction, respectively, on the suit property because their father wanted to sell it to third parties who claimed they had purchased it. They accused their father and Phyllis of secretly selling one and a half acres of land and stated that their father wanted to sell more, but they made a report to the police. The Defendants testified that they each lived on one and a quarter acres of the land for fifty years or more and stated they had permission from their father to build their homes on their designated portions of land. They stated they were apprehensive that their father intended to sell the land and disinherit them. They thus sought a declaration that their father held the land in trust and prayed that the trust be severed and they be issued their individual titles.
11. During cross-examination, DW1, DW2, and DW4 explained that their father inherited the land from their grandfather. They noted that the land was registered in their father's and Phyllis' names, but they explained that Phyllis had her own land, which she was buried in, and her children had received land from the clan. DW4 stated that Phyllis wasn't claiming the land and claimed that her name was on the title just to help their father sell it.



12. After reviewing the evidence, the Trial Court delivered the impugned Judgment, allowing the 1<sup>st</sup> Respondent's claim and dismissing the Appellant's Counterclaim. The Learned Trial Magistrate examined whether the 1<sup>st</sup> Respondent held the suit land in trust for the Appellant and his siblings and she rejected the claim of a customary trust, stating that the principle of intergenerational equity was violated when the suit land was transferred to a daughter-in-law following the succession proceedings. According to the Trial Magistrate, this transfer disrupted the continuity of property passing from one generation to the next for the benefit of the succeeding generation. The Learned Trial Magistrate further held that the first respondent and his siblings did not object to this change. In her Judgment, the Learned Magistrate asserted that the nature of the registration of the suit land, in the names of the 1<sup>st</sup> Respondent and his sister-in-law, extinguished any existing customary trust. The Learned Magistrate questioned which specific portion of the suit land the Appellant and his siblings claimed under the trust. She was uncertain whether the Defendants were asserting a claim over their father's undefined portion or the entire suit land, and wondered whether the Defendants claim excluded the family of the co-owner. The Learned Magistrate ultimately determined the Defendants claim was unfounded and dismissed the Defendants Counterclaim.
13. The Appeal was canvassed by way of written submissions. The Appellant filed his written submissions on 26<sup>th</sup> August 2024. He argued that he had placed a caution on the disputed land to protect his and his siblings' rights to it. He contended that the 1<sup>st</sup> Respondent was in the position of a trustee holding the land for its beneficiaries. He submitted the land was ancestral land passed down from the 1<sup>st</sup> Respondent's father, who is the Appellant's grandfather. The Appellant contended the land being ancestral land should eventually go to the Appellant and his siblings, respecting family traditions.
14. The Appellant further submitted that after Phyllis passed away, her share of the land was transmitted to the 1<sup>st</sup> Respondent. The Appellant pointed out that the caution was meant to safeguard the beneficiaries' interests, especially since the 1<sup>st</sup> Respondent had already sold part of the land. He noted that they had lived on this land for over fifty years, developed it, and had nowhere else to go. He submitted that the Trial Court's orders could leave them and their families homeless. The Appellant placed reliance on the cases of *Gathiba Versus Gathiba* (2001) eKLR and *Isaak M'inaga Kieba V Isaaya Theur M'lintari & Another* (2018) eKLR, to support his stance.
15. The 1<sup>st</sup> Respondent filed his written submissions dated 6<sup>th</sup> November 2024. He argued that when the Appellant and his brother filed a caution and restriction, over the suit land, they asserted a licensee interest, which does not constitute a right in trust. He contended that the Appellant and his brothers failed to provide any evidence that they would be rendered destitute and noted that the Lower Court's Judgment did not direct their eviction from the suit land. In refuting the customary trust claimed by the Appellant and his siblings, the 1<sup>st</sup> Respondent relied on the case of *Mbui Mukangu v. Gerald Mutwiri Mbui* (2004 eKLR), where the Court of Appeal stated that "customary trust is a concept of intergenerational equity, where the land is held by one generation for the benefit of future generations."
16. The 1<sup>st</sup> Respondent further submitted that the land was held in common tenancy between himself and Phyllis consequent to the succession proceedings. He pointed out that the Appellant appeared to disregard the interests of Phyllis's children, who were not involved in the Lower Court proceedings. Additionally, the 1<sup>st</sup> Respondent stated that the Appellant and his siblings were not being evicted from the suit land and argued that trust cannot be determined when all registered proprietors are not involved in the case. He relied on the Supreme Court case of *Isack Kieba M'inanga v. Isaaya Theuri M'lintari & Ano* (2018) eKLR to support his argument. He urged the court to dismiss the appeal with costs.



## Analysis, evaluation and Determination

17. I have examined the evidence, the Record of Appeal, and the rival submissions of the parties. The issues that invite the determination of the Court as follows:-

1. Whether the 1<sup>st</sup> Respondent held Ngariama/Thirikwa/952 in trust for the Appellant and his siblings?
2. Whether the suit land was held in common or jointly owned by the 1st Respondent and Phyllis Muthoni?
3. Whether or not the caution and restriction lodged by the Appellant and his sibling on Ngariama/Thirikwa/952 was illegal and unlawful.

18. This Court, being a Court of Appeal of first instance, must re-evaluate the evidence presented before the Trial Court in keeping with the principle in the case of *Selle & Another vs. Associated Motor Boat Co. Ltd & Others* [1968] EA 123 to ascertain whether the decision reached by the Trial Court was justified on the basis of the evidence adduced. In the case, the Court of Appeal stated as follows:-

“----- This Court is not bound necessarily to accept the findings of fact by the Court below. An Appeal to this Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.”

19. In the case of *Peter Gitonga Versus Francis Maingi M’lkiara* (2007) KEHC 1392 (KLR) the Court stated as follows respecting the registration of and/or creation of a trust:-

“A “trust” can be created under customary law and the circumstances surrounding registration must be looked at to determine the purpose of the registration.” This was what led Muli J. to say this;

“Registration of titles are a creation of law and one must look into the considerations surrounding the registration of titles to determine whether a trust was envisaged” See HCCC 1400 of 1973 as quoted in *Mwangi –vs- Mwangi* (1986) KLR 328 at 332, by Shah JA.

20. The concept of customary trust has received strong support from the Supreme Court of Kenya in the case of *Issack Kieba M’inanga v. Isaaya Theuri M’lnturi & Another* (supra). In this case, the Lord Justices of the Supreme Court stated as follows:

“Each case has to be determined on its own merits and quality of evidence. It is not every claim of a right to land that will qualify as a customary trust. In this regard, we agree with the High Court in *Kiarie v. Kinuthia*, that what is essential is the nature of the holding of the land and intention of the parties. If the said holding were for the benefit of other members of the family, then a customary trust would be presumed to have been created in favour of such other members, whether or not they are in possession or actual occupation of the land. Some of the elements that would qualify a claimant as a trustee are: the land in question was before registration, family, clan or group land; the claimant belongs to such family, clan, or group; the relationship of the claimant to such family, clan or group is not



so remote or tenuous as to make his/her claim idle or adventurous; the claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances; the claim is directed against the registered proprietor who is a member of the family, clan or group.”

21. The legal burden to prove the existence of a trust lies with the person asserting a right under customary trust law. To fulfill this burden, the individual must demonstrate that the disputed property was ancestral or clan land; that during the adjudication and consolidation process, one family member was designated to hold the land on behalf of the family; and that the registered individuals were the designated family members responsible for holding the land parcels for the family. See the case of Issack Kieba (Supra).
22. The Appellant's case, along with that of his siblings in the lower Court, was based on customary law. They argued that their father, the 1<sup>st</sup> Respondent, holds the disputed land in trust for the family. It is undisputed that the deceased Warui Njeru, the father of the 1<sup>st</sup> Respondent, received the land from the clan during land demarcation. Additionally, it is not contested that the 1<sup>st</sup> Respondent and Phyllis Muthoni inherited the land from the deceased, Warui Njeru through the process of succession. In his testimony, the 1<sup>st</sup> Respondent stated that Phyllis Muthoni inherited a portion of one and a half acres out of the seven acres of the disputed land because she was the wife of his brother, who died in the 1980s. She must have been registered as a co-owner because her husband, the 1<sup>st</sup> Respondent's brother, who would otherwise have been registered, was deceased.
23. There is no dispute that the 1<sup>st</sup> Respondent was the Appellant's and the father to all the Plaintiffs/Counter claimants in the suit before the Lower Court. It was also not disputed that land parcel Number Ngariama/Thirikwa/952 was initially registered in the name of Warue Njeru (deceased) father of the 1<sup>st</sup> Respondent and grandfather to the Appellant. It was the 1<sup>st</sup> Respondent's evidence that he had a brother called Joseph Kanguru who died in the 1980's and that Phyllis Muthoni was his wife and that it was his father's wish before he died that his brother be given 1 ½ acres out of the suit land. The 1<sup>st</sup> Respondent affirmed that all his children live on the suit land and each has been allocated approximately 1 ¼ acres which they utilize.
24. The 1<sup>st</sup> Respondent confirmed that his father died in 1991 and that his brother (1<sup>st</sup> Respondent) had died earlier. The 1<sup>st</sup> Respondent affirmed following his father's death they carried out succession and land parcel Ngariama/Thirikwa/952 was registered in his names and the name of Phyllis Muthoni, who was his brother's wife. He indicated Phyllis Muthoni had also passed away. The 1<sup>st</sup> Respondent contended he had instituted the case to have the caution removed so that he could give effect to his late father's wishes to give 1 ½ acres to his brother's children.
25. I have scrutinized the abstract of title (green card) for land parcel Ngariama/Thirikwa/952 exhibited by the Appellant before the Lower Court and it reveals as follows:-
  1. That the register for the parcel was opened on 12<sup>th</sup> July 1990 and that Warui Njeru was the 1<sup>st</sup> registered owner under Entry No. 1.
  2. On 9<sup>th</sup> March 95 Cyprian Njagi Gichigo and Phyllis Muthoni Kanguru were registered as co tenants vide succession cause No. 149 of 1991 (Kerugoya).
26. The register does not specify whether the registration was in any specific shares or joint. The 1<sup>st</sup> Respondent however was insistent in his evidence that his brother's share was to be 1 ½ acres. Under Section 91 (2) of the [Land Registration Act](#), 2012 where an instrument of transfer of an interest of land



to two or more persons does not specify the nature of their rights the presumption is that they hold the interest in common in equal shares.

Section 91(2) provides this:-

- (2) Except as otherwise provided in any written Law, where the instrument of transfer of an interest of land to two or more persons does not specify the nature of their rights there shall be a presumption that they hold the interest as tenants in common in equal shares.

27. While there was no doubt the 1<sup>st</sup> Respondent's father was given the suit land by the clan and therefore held the same subject to customary trust, such customary trust was halted when the said Warui Njeru died and his estate was subjected to succession proceedings. The succession proceedings relating to the estate of Warui Njeru determined who the beneficiaries of his estate were. The Appellant and his siblings would only be entitled to lay claim to what was inherited by their father from his grandfather. They could not contest the entitlement of Phyllis Muthoni, their Uncle's wife in these proceedings.
28. Although Section 91 (2) of the *Land Registration Act*, 2012 in the absence of any specific share of the land in favour of Phyllis Muthoni's estate would allow a presumption of equality, such presumption could be rebutted with evidence as the 1<sup>st</sup> Respondent asserts his late father had expressly indicated his brother's children were to be given 1 ½ acres. Following the death of Phyllis Muthoni her estate would have to be made party through her personal Legal Representative for her estate to be distributed. By admission of the 1<sup>st</sup> Respondent, his registration together with Phyllis Muthoni as proprietors of the suit land was not joint so that the doctrine of survivorship would be applicable. The proprietorship was in common and therefore, the distribution of the interest held by Phyllis Muthoni would be subject to succession proceedings.
29. On evaluation of the evidence, I am satisfied the 1<sup>st</sup> Respondent and Phyllis Muthoni did not hold the suit land subject to any customary trust in favour of the Appellant and his siblings. The Learned Trial Magistrate in my view appropriately analysed and evaluated the evidence and the applicable Law and came to the correct decision. The Learned Trial Magistrate rightly upheld the 1<sup>st</sup> Respondent's claim and rightly dismissed the Appellants Counterclaim.
30. The Appeal is without merit and I dismiss the same. I take cognizance that this matter is basically between a father and his sons. As regards costs I would in the circumstances order that the parties bear their own costs of the Appeal and of the Court below.

Orders accordingly.

**JUDGMENT DATED, SIGNED AND DELIVERED AT KERUGOYA VIRTUALLY THIS 20<sup>TH</sup> DAY OF MARCH 2025.**

**J. M. MUTUNGI**

**ELC - JUDGE**

