



REPUBLIC OF KENYA



KENYA LAW
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**Kahiu v Kahiu & 2 others (Environment and Land Appeal
E003 of 2023) [2025] KEELC 1240 (KLR) (13 March 2025) (Judgment)**

Neutral citation: [2025] KEELC 1240 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA
ENVIRONMENT AND LAND APPEAL E003 OF 2023**

**JM MUTUNGI, J
MARCH 13, 2025**

BETWEEN

SUSAN MUTHONI KAHIU APPELLANT

AND

ANN MICERE KAHIU 1ST RESPONDENT

JOSEPH MARINGA WAKAHUI 2ND RESPONDENT

ANTHONY MAINA KAHIU 3RD RESPONDENT

*(Being an Appeal from the Judgment and subsequent decree of Hon.
E.O. Wambo Principal Magistrate sitting vide Kerugoya MELC
Case No. E 052 of 2021 delivered and dated 30th November 2021)*

JUDGMENT

1. This appeal is against the judgment delivered by Hon. E.O. Wambo (P.M) on 30th November 2021 in Kerugoya CM ELC No. E052 of 2021. In his Judgment, the learned Magistrate ruled in favor of the 1st Respondent, the Plaintiff, in the Lower Court case. The Court determined that the 1st Respondent was entitled to a share of Land Parcel Kiine/Kacharo/2101 (referred to as the "suit land") and that the registration of the Appellant, the 2nd and 3rd Respondents, who were the Defendants, was in trust for themselves and the 1st Respondent.
2. The Appellant was dissatisfied with the Learned Trial Magistrate's decision and has appealed against the Judgment to this Court. The Appellant has set out 7 grounds of Appeal in her Memorandum of Appeal dated 14th February 2023 as follow:-
 1. The Honourable Learned Magistrate erred in law and fact by holding that the 1st Respondent had proved her case against the Appellant which finding was against the weight of evidence produced by the Appellant during the trial.



2. The Honourable Learned Magistrate erred in law and fact by finding that the 1st Respondent's case had disclosed and proved the existence of trust in absence of any admissible and sufficient evidence, there was no basis to grant and or issue any orders in favour of the 1st Respondent.
 3. The Honourable Magistrate erred both in law and fact by issuing orders that the Appellant, first and second Respondent do execute all necessary documents to facilitate subdivision and transfer of land parcel Kiine/Gacharo/2101 amongst the Appellant and the Respondents.
 4. The Honourable Learned Magistrate erred in law and fact by dismissing the Appellant's defence together with her evidence and submissions without giving any reasons.
 5. The Honourable Magistrate erred in both law and fact by not finding that the Appellant had tendered sufficient and admissible evidence to prove her defence and was entitled to orders sought in the defence.
 6. The Honourable Magistrate erred both in law and fact in disregarding the Appellant's evidence and holding there was no defence whereas a defence was not mandatory.
 7. The Honourable Magistrate erred both in law and fact in failing to consider or even adequately adopt and appreciate the written submissions of the Appellant.
3. The Appellant prays that the appeal be allowed; the Lower Court Judgment be set aside; and the costs of the appeal be provided for.
 4. The background of the matter is that the 1st Respondent, who is the daughter of the Appellant and the sister of the 2nd and 3rd Respondents, filed a claim in the Lower Court seeking a declaration of a trust over the suit land. According to her, the suit land was originally registered in the name of her late father, Kahiu Maringa. After the death of her father, the land was subsequently registered jointly in the names of the Appellant, as well as the 2nd and 3rd Respondents. The 1st Respondent's claim was that they were registered to hold the land in trust for themselves and herself. In the Plaint dated 22nd March, 2021 the 1st Respondent prayed for orders:-
 1. A declaration that the Defendants hold land parcel Kiine/Gacharo/2101 in trust for themselves and the Plaintiff and each party be entitled to an equal share of the L.R Kiine/Gacharo/2101.
 2. The Defendants be ordered to execute all necessary documents to facilitate the subdivision and transfer of LR Kiine/Gacharo/2101 amongst the Plaintiff and the Defendants and in default the Executive Officer of this Court be ordered to execute the same.
 3. Costs of this suit and interest at Court rates.
 4. Any other or further relief that this Court may deem fit to grant.
 5. The Appellant, the 2nd and 3rd Respondents, though they were served with summons failed to enter an appearance or file their defence and the suit proceeded for hearing ex parte before the Trial Court.
 6. After reviewing the pleadings, evidence, and written submissions of the 1st Respondent, the Learned Trial Magistrate concluded that the 1st Appellant was entitled to a share of the suit land and that the Appellant, the 2nd and 3rd Respondents were registered as proprietors of the land in trust for themselves and the 1st Respondent.
 7. The Appeal was argued by way of written submissions. The Appellant argued that she was denied her right to be heard. She claimed that she was not notified of the hearing date, which resulted in her



inability to appear before the Court to present her evidence or cross-examine the 1st Respondent in her evidence. She argued that by reason of not being afforded the opportunity to participate in the proceedings she was denied access to Justice and fair hearing as guaranteed under Articles 48 and 50 of the *Constitution*.

8. The Appellant further contended that the land in question was not trust land and had already been subdivided into several parcels, which were transferred to various individuals. Additionally, she argued that the 1st Respondent abused the court process by filing a claim that was barred by statute in the Lower Court.
9. I have reviewed the record of Appeal, the pleadings, and evidence in the Lower Court that gave rise to the impugned Judgment. This Court being an Appellate Court of first instance is obligated to consider and re evaluate the evidence and material that was before the Learned Trial Magistrate at the time he made the Judgment to satisfy itself that the Judgment of the Learned Trial Magistrate was justified. This was in keeping with the principle established by the Court of Appeal in the Case of *Selle & Another –vs- East African Motor Boat & Others* (1968) EA 123.
10. The issues to be determined in this appeal are whether the Appellant was afforded the right to be heard and whether the Learned Trial Magistrate made an error in concluding that the 1st Respondent was entitled to a share of the suit land as the Appellant and the 2nd and 3rd Respondents held the same in trust.

Whether the Appellant was afforded the right to a fair hearing.

11. The right to be heard before any adverse decision is made against a person is fundamental and essential to our Justice system (see *Onyango Oloo v. Attorney General* (1986-1989) EA 456) where the Court stated as follows.

There must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural Justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them. (See *Sangram Singh v. Election Tribunal, Kotah*, AIR 1955 SC 664, at 711 – Supreme Court of India)

12. In the case of *Ridge v Baldwin* (1964) AC (1963)2 ALL ER 66, the Court, while discussing the right to a fair hearing observed as follows:

“The principle of fairness has an important place in the Administration of Justice and is also a good ground upon which courts ordinarily exercise discretion to intervene and quash the decisions of a Tribunal or Subordinate Court made in violations of right to a fair hearing and due process.”

13. The record of the Lower Court shows that the 1st Respondent filed a suit by way of a plaint against the Appellant and the 2nd and 3rd Respondents on 9th April 2021. A return of service by Nicholas Mwangi Kinyua, an advocate, shows that the Appellant, along with the 2nd and 3rd Respondents, were served with the summons and pleadings. The Affidavit of service dated 20th May 2021 filed in Court on the same date gives elaborate details as to how the Appellant, the 2nd and 3rd Respondents were each served. The suit was fixed for formal proof hearing on 3rd June 2021 and Mr. Mwangi Kinyua Advocate once again effected service of the hearing notice on the Appellant, the 2nd and 3rd Respondents on 28th May 2021 and filed the Affidavit of service on 3rd June 2021.



14. The Appellant, the 2nd and 3rd Respondents were therefore served with copies of Plaintiff, summons to enter Appearance and the other accompanying documents filed by the 1st Respondent simultaneously with the Plaintiff. The summons required the Appellant, the 2nd and 3rd Respondents to enter appearance in the suit within 15 days of being served. They never entered appearance and the 1st Respondent was at liberty and entitled to proceed with the prosecution of the suit their absence notwithstanding. The Learned Trial Magistrate therefore properly proceeded with the hearing *ex parte* on 3rd June 2021 when the same was fixed for hearing as neither the Appellant or the 2nd and 3rd Respondents had appeared and/or filed any pleadings.
15. Grounds 4, 5 and 6 of the Appellant's Memorandum of Appeal in so far as they contend the Appellant had tendered a defence and adduced evidence which the Trial Magistrate failed to consider and/or take account of are misleading as the Appellant did not file a defence and/or adduce any evidence before the Trial Court. The grounds are clearly not substantiated and are for rejection.
16. The Appellant and the 2nd and 3rd Respondents were served with the pleadings of the case before the Subordinate Court. The Appellant and the 2nd and 3rd Respondent were afforded the chance and opportunity to appear and defend the suit which they failed to take. The Appellant cannot claim that she was denied the opportunity to present her case and/or defence when it is her who chose not to respond to the suit. It is of note that even after getting to know Judgment had been entered against her and the 2nd and 3rd Respondents in *ex parte* hearing, she did not seek to have the Judgment set aside for any reason but rather filed the instant appeal on 14th February, 2023.
17. The Appeal as the Memorandum of Appeal attests is against the Judgment of Hon. E. O. Wambo delivered on 30th November, 2021. The record of appeal does not show that any leave was sought and granted to file the appeal out of time. Under Section 79G of the *Civil Procedure Act*, Cap 21 Laws of Kenya, appeals from the Subordinate Court to the High Court or the ELC have to be filed within 30 days from the date the decree or order appealed from was made. Section 79G of the *Civil Procedure Act*, provides as follows:-
 - 79G. Time for filing appeals from subordinate Courts Every appeal from a Subordinate Court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the Lower Court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the Appellant satisfies the Court that he had good and sufficient cause for not filing the appeal in time.

Section 16A of the *Environment and Land Court Act*, 2011 provides that Appeals from Subordinate Courts and Local Tribunals shall be filed within 30 days from the date of the decree or order appealed from provided however an appeal may be admitted out of time if the Appellant satisfied the Court that he had a good and sufficient cause for not filing the Appeal on time.
18. In the present case the Appellant filed the Appeal on 14th February 2023 while the decree appealed from was made on 30th November 2021 which was more than 1 year from the date when the decree was made. The Appeal having been filed out of time without leave was an abuse of the Court Process. On this ground alone the Appeal ought to be struck out for being incompetent.
19. However even considering the merits, the finding of the Learned Trial Magistrate that the Appellant and the 2nd and 3rd Respondents held the suit land in trust for themselves and the 1st Respondent cannot



be faulted. The 1st Respondent was the Sister to the 2nd and 3rd Respondents while the Appellant was their mother and wife of their father, Kahi Maringa (deceased) who was the initial registered owner of land parcel Kiine/Baricho/2101.

20. The suit land constituted family land and there was no reason why the 1st Respondent was omitted when the Appellant and the 2nd and 3rd Respondents were registered as proprietors. In terms of Section 28(b) of the [Land Registration Act](#), 2012 the 1st Respondent had an overriding interest under customary trust that needed not to be noted in the title register. The Supreme Court in the Case of Isack Kiebi M'irianga –vs- Isaya Theuri M'Lintari & Another (2018) eKLR elaborately set out a criteria that has to be applied in determining whether a customary trust exists. They 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 is for the benefit of other members of the family, then a customary trust would be presumed to have been created in favour of such other members, whether or not they are in possession or actual occupation of the land. Some of the elements that would qualify a claimant as a trustee are:

1. The land in question was before registration, family, clan or group land.
2. The claimant belongs to such family, clan, or group.
3. The relationship of the claimant to such family, clan or group is not so remote or tenuous as to make his/her claim idle or adventurous.
4. The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances.
5. The claim is directed against the registered proprietor who is a member of the family, clan or group.”

21. The upshot is that I find the Appellant's Appeal lacks merit and I dismiss the same. The parties being family members I make no order for costs. Each party to bear their own costs of the Appeal.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT KERUGOYA THIS 13TH DAY OF MARCH 2025.

J. M. MUTUNGI

ELC - JUDGE

