



REPUBLIC OF KENYA



KENYA LAW
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**Ngotho v Njau (Environmental and Land Originating Summons
41 of 2020) [2025] KEELC 199 (KLR) (27 January 2025) (Judgment)**

Neutral citation: [2025] KEELC 199 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 41 OF 2020**

JG KEMEI, J

JANUARY 27, 2025

BETWEEN

MARGARET NGOIRI NGOTHO PLAINTIFF

AND

JOYCE NJERI NJAU DEFENDANT

JUDGMENT

The pleadings

1. This dispute was brought before the Court vide an Originating Summons filed by the Plaintiff against the Defendant on 29/6/2020 urging the Court to determine the following questions;
 - a. Whether the registration of Kabete/NYathuna/313 (suit land) in the name of Henry Njau Ngotho (deceased) on 20/10/1958 having been done under the Agikikuyu Customary law created an inherent notion of customary trust in favour of the Plaintiff.
 - b. Whether the transfer by transmission of the suit land should be declared null and void and the title deed issued in favour of the Defendant herein on 3/2/17 cancelled for non-disclosure of material facts and the beneficial interest of the Plaintiff determined.
 - c. Costs of the suit
2. The originating summons is supported by the affidavit of the Plaintiff of even date wherein she avowed that the suit land was registered in the name of Henry Ngotho Njau (Henry) in 1958 who died on 7/5/1997. That Rachel Kabura (Kabura), the Plaintiff, and Henry were the only three children of Gerald Ngotho Njau (Gerald) who died when the Plaintiff was six years old and their mother was expectant with Henry, their only brother. That upon demarcation and consolidation of the lands in the area their father's land was registered in the name of their brother Henry to hold in trust for Kabura and



the Plaintiff. That the said registration carried an underlying notion of customary trust and therefore Henry did not hold an absolute title.

3. She added that she returned home in 1965 upon the breakdown of her marriage and initially rented a ramshackle house at Nyathuna but her brother out of his generosity went for her and her children and showed her a portion of the suit land to construct a house on the suit land which she lives in today.
4. She stated that she sired 6 children who were born and bred on the suit land. On this very suit land, she now lives with some of her children and grandchildren while she buried one son namely John Njunge in 1983.
5. It was her case that the Defendant, the wife of Henry got married in 1963 way after the suit land was registered in the name of Henry as a trustee. That she lived peacefully with the family of Henry from 1965 to his death in 1997 but since the death of her brother the defendant has unsuccessfully attempted to evict her and her children from the suit land. Needless to state, she accused the Defendant of filing a succession cause in the estate of Henry behind her back excluding the defendant and the suit land from the said cause. She stated that the defendant was confirmed vide a grant issued on 26/7/2016 as the owner of the whole land based on non-disclosure of material facts which includes her entitlement of a portion of the suit land. That the Probate Court declined to entertain her claim on grounds of want of jurisdiction hence the filing of the summons herein. The Court was urged to cancel the title in the name of the Defendant and determine the share of the suit land in favour of the Plaintiff.
6. The suit is opposed by the Defendant who filed a lengthy replying affidavit sworn on the 15/5/23 where she deposed that she is the widow of Henry and the registered owner of the suit land. That she has lived and developed the suit land for the last 60 years since her marriage to Henry in the early 1960s. Contrary to the averments of the Plaintiff she was emphatic that the Plaintiff was fully aware of the succession proceedings and even filed a claim for dependency interest under Section 26 of [Law of Succession Act](#) in Succ cause No 663 of 1999. That the said claim was declined by the Court and accused the Plaintiff of reengineering a disguised suit under the same unsuccessful claim.
7. In addition, she impugned the timing of the claim of customary trust as the same is now being raised 23 years after the demise of her husband. That if indeed the Plaintiff was entitled to land by way of customary trust there is nothing that prevented her from asking for her share in the lifetime of Henry. That the Plaintiff was accommodated out of the goodness of her brother after her failed marriage and that at no time was she allocated land as claimed by the Plaintiff.
8. Further, she impugned the Plaintiffs claim on grounds that she was not present when the demarcation happened as she was married away in 1952; secondly under the Kikuyu customs, and at the time of land demarcation, married daughters were not considered for land; the claim of the Plaintiff is geared at disinheriting her of the land and or delay the distribution of the estate of her deceased husband.
9. The Defendant stated that the Plaintiff owns two parcels of land she bought and or acquired from her deceased husband namely Gichure and cannot claim to be landless.
10. She denied that the Plaintiff occupies the land nor raised her children therein and that her glamour for the land arose after the death of Henry. That she lives on parcel No Kabete/Nyathuna/T.340.
11. She urged the Court to dismiss the summons and protect her rights as the registered owner of the suit land under sections 24 and 25 of the LRA.

The Po dated the 19/3/22

12. On the 19/3/2022, the Defendant filed a Preliminary Objection on the following grounds;



- a. That the entire suit is bad in law, untenable and fatally defective, as it is an attempt at appealing the decision of the Milimani High Court Family Division in Succession No. 2096 of 1999 as consolidated with Succession Cause No. 1140 of 2002, and the decision of the Kiambu Magistrate Court in Succession Cause No. 210 of 1997.
- b. That the suit is an attempt by Plaintiff/Respondent to revoke the Grant issued on 29th July 1997 and confirmed on 26th July 2016 to the Defendant/Applicant, which offends Section 76 of the Succession Act.
- c. That this Honourable Court, therefore, lacks the jurisdiction to hear and determine the suit as it relates to a succession matter, whose jurisdiction only lies with the Family Court.
- d. That additionally, this Honourable Court, lacks jurisdiction to entertain this suit as outlined in Section 13 of the *Environment and Land Court Act*.
- e. That the claim by the Plaintiff/Respondent of existence of a customary trust upon the suit property falls short of the criteria outlined by the Supreme Court of Kenya in *Isack M'inanga Kiebia Vs. Isaaya Theuri M'lintari & Another* [2018]eKLR for determining existence of a customary trust.
- f. That the Originating Summons (O.S) dated 29th June, 2020 violates the rule of res judicata, since this matter has been before three Courts with competent jurisdiction, to wit Kiambu Magistrate Court in Succession Cause No. 2096 of 1999 and Succession Cause No. 210 of 1997 and Milimani High Court Family Division in Succession 1140 of 2002 on the same subject matter and the same parties.
- g. That the orders sought against the Defendant could only be sought in a substantive suit filed against the Estate of Henry Njau Ngotho (deceased) and not in a new matter against the Defendant/Applicant, factored as a land dispute against, hence the Defendant/Applicant herein lacks the capacity to be used in this matter.
- h. That this Court as constituted, does not adhere to the High Court Judgments and Rulings in previous matters, as it is of a similar rank, and therefore, paragraph d of the Plaintiff/Respondent's Notice of Motion should fail.
- i. That the entire claim/suit offends the express provisions of Section 45, 47 and 76 of the *Law of Succession Act* and Rules 27, 44, 49 and 73 of the Probate and Administration Rules which provides that:-

“Section 76 Revocation or annulment of Grant

A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the Court decides, either on application by any interested party or of its own motion-

- a. That the proceedings to obtain the grant were defective in substance;
- b. That the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;



- c. That the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently.”

13. With the consent, directions were taken on 19/12/22 that the Preliminary Objection be determined in the main judgement. I shall revert to this later in the judgment.

The evidence of the Parties

14. PW1 – Margaret Ngoiri Ngotho testified and relied on her supporting affidavit sworn on the 29/6/2020 as her evidence in chief and produced documentary evidence marked as PEX NO 1-4 in support of her case.
15. Without laying any evidence in support, she informed the Court that the suit land belonged to her father namely Gerald and that during demarcation the land was registered in the name of Henry to hold in trust for his siblings. That she lives on the suit land and with the permission of Henry even buried her son therein. Without adducing any evidence, she stated that after the death of Henry her house and pit latrine was demolished but had to rebuilt them. She stated that the Defendant has a house on the land and as to whether she lives there or not, she was uncertain.
16. In reexam she clarified that she does not live at Nyathuna but at her Kabocha land.
17. PW2 – Muigai Wamue testified and relied on his witness statement dated the 22/2/22 as evidence in chief and stated that he knows both parties in the suit as he lives with them in Kabocha, Nyathuna. In addition, that he is the village elder since 2005 having been appointed as such by the local area chief. That as a village elder one of his roles is to arbitrate on land disputes in his locality. That he was 14 years during the demarcation of the suit land and was acutely aware of the demarcation process which was carried out by a committee comprising of members namely Andrew Kogi, Mbugua Ndome, Njau Waititu and others who have since passed away. When asked about the name of the adjudication section of the land, the witness hesitated and responded that he knows the area well. He stated that since the parents of Henry were long deceased the committee decided to allocate the land to Henry to hold it in trust for his siblings. That the decision of the committee was based on the Agikuyu customs that permitted the eldest son in a family to be registered as owner of land and since Gerald was deceased it fell on Henry his only son to be so registered. That said, the witness informed the Court that he is not an expert in Kikuyu traditions and customs and neither was he a member of the demarcation committee and that he did not attend any of the meetings of the committee and that he got the information from his parents. He added that he did not have minutes of the committee either.
18. Further he stated that Henry and his two siblings lived on the land. That the Plaintiff was married to a man namely Wanjohi and he heard that her marriage experienced problems and she returned to her home though he was not present when she came back. Interalia he stated that the plaintiff was given land to construct her house by Henry on her return home.
19. PW3- Henry Njau Ngoiri testified and relied on his witness statement dated the 22/2/2022 as his evidence in chief and produced documents marked as PEX No 7-11 in support of his evidence.
20. He stated that he was born on the land in 1970 and has lived there for the last 53 years. That the plaintiff is his mother and that Henry gave him one of the shops to run a hotel business on the suit land. That Henry died in 1989 and the dispute arose thereafter. That the plaintiff is demanding her share of her father’s land from the defendant which was held by Henry in trust for her.



21. DW1 – Joyce Njeri Njau stated in evidence that she is the wife of Henry and that the Plaintiff is her sister in law. She relied on her witness statement dated the 14/4/23 and Replying Affidavit sworn on 15/5/23 together with exhibits annexed thereto all marked DEX No 1. (pages 14-119 of the Defendants trial bundle).
22. The witness stated that she lives on the land, having constructed her residence as well as rental units thereon. That the suit land was registered in the name of Henry her husband in 1958 and upon his death the said land devolved to her absolutely. She was issued with a title in 2016. The dispute arose after the death of Henry. That she got married to Henry in 1963 when he was already the owner of the suit land and she does not know the circumstances in which the suit land became registered in his name. That by the time she got married Henry's parents had all died and therefore she did not meet them. That she has been on the land for a period of over 60 years
23. She stated that the Plaintiff is Henry's sister who previously lived on the land after she came back from her marital home. But later she relocated to her own land where she currently lives leaving behind PW3 who lives on the suit land. That in 2017 she sought orders for the eviction of the Plaintiff whereupon the plaintiff vacated and left her son behind PW3.
24. In addition, she added that the sister of the Plaintiff namely Racheal Kabura has never demanded the land as she is married in Rironi.
25. She admitted that though the Plaintiff buried her child on the suit land with the permission of her son, the mere gesture of allowing the burial on the land does not entitle the Plaintiff to the land. She stated that the Plaintiff never sought land from Henry in his lifetime because she was aware that the land belong to Henry absolutely.

The site report and written submissions

26. At the close of the Defendants case, on application of the parties and with the leave of the court, a site visit was made and a report filed in Court which I have read and considered.
27. Parties filed written submissions which I have equally read and considered.

Analysis and determination

28. The key issues for determination are;
 - a. Whether the registration of Kabete/Nyathuna/313 (suit land) in the name of Henry Njau Ngotho(deceased) on 20/10/1958 having been done under the Agikikuyu Customary law created an inherent notion of customary trust in favour of the Plaintiff.
 - b. Whether the transfer by transmission of the suit land should be declared null and void and the title deed issued in favour of the Defendant herein on 3/12/17 cancelled for non-disclosure of material facts and the beneficial interest of the Plaintiff determined.
 - c. Costs of the suit
29. The parties in this suit are related. The plaintiff is the sister in law to the defendant. The Defendant is the wife of Henry Deceased, the only brother of the Plaintiff. The Plaintiff's case as can be gleaned from the pleadings and the evidence adduced during the hearing is that of land entitlement through customary trust. It is noted that throughout her pleadings and evidence the Plaintiff did not state the size of the land nor the position she is claiming save that the Court should determine her beneficial interest on the land on the basis that her brother Henry, deceased held the land in trust for her.



30. The Defendant denied the claim of the Plaintiff and averred that she is the registered owner of the land, it having been devolved to her by way of succession of the estate of Henry her deceased husband and previous registered owner. She categorically refuted all claims that Henry held the suit land under a notion of customary trust in favour of the Plaintiff.
31. It is trite that he who alleges must prove. The burden of proof in civil cases is on a balance of probabilities. It would be recalled that even in uncontested suits, the burden of proof on a claimant is not lessened in any way. See the case of *Kenya Power and Lighting Company Limited v Nathan Karanja Gachoka & another* [2016] eKLR.
32. The legal framework on the question of the onus and the standard of proof is set out in Sections 107 – 109 of the *Evidence Act* which provide;
107. Burden of proof
- (1) Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
108. Incidence of burden
- The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.
109. Proof of particular fact
- The burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
33. The Court of Appeal in the case of *Mbuthia Macharia v Annah Mutua Ndwiga & another* [2017] eKLR explained that the legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. That constitutes evidential burden. The learned Judges cited with approval the same principle of law as amplified by the learned authors of the leading Text Book; - *The Halsbury's Laws of England*, 4th Edition, Volume 17, at paras 13 and 14:
- “The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose.
14. The legal burden of proof normally rests upon the party desiring the Court to take action; thus a claimant must satisfy the Court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues.”
34. The Court is being called upon to determine whether the Plaintiff being the principal claimant has proved her case on a balance of probability.
35. I shall now examine the legal parameters that guide the Court in determining a question of customary trust as pleaded by the Plaintiff. Customary trust is a concept through which land may be acquired



in Kenya. It is anchored in both the Constitution and statute. It is an overriding interest in land which need not be registered.

36. Under Article 60 (1) (a) of the Constitution customary trusts are loosely categorised as part of intergenerational and intragenerational equity. It is imperative to note that the title to the suit land was registered issued in 1970 under the Land Registration Act. Trusts including customary trust are provided for under Section 28 (b) of LRA as follows;

i. Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register—

ii.

(a)

iii.

(b) trusts including customary trusts;

37. The provisions of Section 27 & 28 of Registered Land Act, Cap 300 state that the rights of a registered proprietor of registered land under the Act are absolute and indefeasible and only subject to rights and encumbrances noted on the register or overriding interests which are set out under section 30 of the Act. The provisions of 27 & 28 are similar to the provisions set out in section 24,25 26 & 28 of the Land Registration Act, 2012.

38. Section 30 of the then Registered Lands Act provides:

Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same without them being noted on the registers:

.....;

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 of such a person and the rights are not disclosed.

One of the overriding interests under Section 30 (g) is the right of the person in possession or actual occupation of the registered property

39. In *Mwangi & Another –v – Mwangi*, (1986) KLR 328, it was held that the rights of a person in possession or occupation of land are equitable rights which are binding on the land and the land is subject to those rights and the absence of any reference to the existence of a trust in the title documents does not affect the enforceability of the trust since the provisions of Section 126 (1) of the Registered Land Act as to the reference to a trustee are merely permissive and not mandatory.

40. In the case of *Kanyi Vs Muthiora* 1984 KLR 712 CA, the Court held that the registration of land in the name of a proprietor under the Land Registration Act did not extinguish rights under Kikuyu Customary law and neither did it relieve the proprietor of the duties or obligations as trustee. A customary trust need not be registered on the title. It is an overriding interest that subsists on the land. It is binding on the land.



41. In the case of Njenga Chogera –vs- Maria Wanjira Kimani & 2 Others [2005] eKLR which quoted with approval the holding in the case of Muthuita –vs- Muthuita [1982 – 88] 1 KLR 42, the Court of Appeal held that customary law trust is proved by leading evidence on the history (root) of the suit property and the relevant customary law on which the trust is founded and the claimants subscribe to.
42. Similarly in the case of Peter Gitonga Vs Francis Mainigi M’ikiara Meru HC.CC NO. 146 OF 2000- it was stated that :-

“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” .(emphasis is mine).
43. The legal burden to prove the existence of the trust rests with the one who is asserting a right under customary trust. To discharge this burden, the person must proof that the suit properties were ancestral clan land; that during adjudication and consolidation, one member of the family was designated to hold on behalf of the family; that the registered persons were the designated family members who were registered to hold the parcels of land on behalf of the family.
44. Section 116 of the *Evidence Act* stipulates that where the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner.
45. In conclusion, in the case of Mbui vs Mukangu vs Gerald Mutwiri Mbui C.A No. 281 of 2000 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 succeeding generations. If land was passed down from the family member to another, the presumption of trust subject to evidence is high.
46. Guided by the above pronouncements of the Court, I will now analyze the evidence led by the parties in answer to the issues framed for determination in the preceding paras.
47. It was the Plaintiffs case that the land belonged to her father namely Gerald. It is commonly agreed that Gerald died in a year none of the parties disclosed but in any event before the land demarcation in 1959. The Plaintiff stated that her father died while she was 6 years old. That at the time of his death, her mother was expectant with Henry their last born.
48. In *George Roine Titus & Another - v- John P. Ngurai, Civil Appeal No. 107 of 1999*, Kwach, J.A., stated that in adjudication matters, in order to succeed on a claim to land based on trust, it must be shown that at the conclusion of the adjudication process but before the suit land was registered in the name of a proprietor, the adjudication committee had ascertained the interest of the claimant and confirmed that the suit land belonged to them. And further, that the reason why the claimant was not registered was because of some legal impediment which precluded the claimant from taking title immediately thereby making it necessary for the suit land to be registered as the proprietor in trust.
49. It was therefore her case that come the demarcation of the land the land was registered in the name of Henry as per the customs and traditions of the Kikuyu which required that the eldest son in a family would assume the responsibility to should the role of land registration on behalf of the family.



50. He who asserts must prove. The Supreme Court of Kenya has given detailed guidelines in the case of *Kiebia v M' Lintari & Another* (2018) eKLR when it stated as follows;

“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.”

51. PW2 led evidence that he was only 14 years during the land consolidation and demarcation. The Court finds that a 14-year-old is too young to understand the process of demarcation and land consolidation. Indeed, the witness exonerated himself when he stated that he was neither a committee member nor attended the meetings of the committee nor even held any minutes in his possession as to the details of the process and to answer the all time important question as to whether Henry was allocated the land in his own right or in trust for his father and family. He even did not know the name of the adjudication section. In cross examination he stated that;

“I got these information from my parents”

52. The import of the above evidence is that it is nothing but hearsay and of no evidential value to the Plaintiff. It is rejected.

53. The Plaintiff failed to call witnesses who were present during the consolidation and demarcation of the land. Equally the Plaintiff failed to adduce evidence in terms of the consolidation and demarcation records (which are public records) before the Court in support that the land was registered in the name of Henry to hold in trust for his family.

54. PW2 attempted to lead evidence on Kikuyu traditions and customs to the effect that once a daughter whose dowry had not been paid returns home she is entitled to land. However in cross he stated that he is not an expert in Kikuyu traditions and customs. A large part of his evidence therefore centered on his appointment as a village elder in 2005 meaning that he was not in a position to adduce evidence to the events of 1958 in respect to consolidation and demarcation of the suit land.

55. PW3 adduced evidence that he was born and bred on the suit land in 1970 hence was unaware of the demarcation processes in 1958. His evidence therefore was found weak and to a large extent of little relevance to the issue in controversy.

56. It is not in dispute that the Plaintiff has been in possession of the land until when she moved out to her own land leaving PW3 behind. The Court notes that in determining the question of customary trust possession alone is not a basis to found customary trust because customary trust can be founded even in the absence of possession.

57. The Plaintiff's claim is that she was entitled to a portion of the land under customary trust . That Henry held his fathers land in trust for his siblings , the plaintiff included. If that was the case why did the



Plaintiff live at what she termed a ramshackle house at Nyathuna centre if indeed she was entitled to the land under customary trust. She led evidence that out of the good will and generosity of her brother Henry, she was allocated a place to construct a house. There is also the evidence led by the Defendant that the Plaintiff owns two other properties one of which she currently resides. The conduct of the Plaintiff in these two instances leads the Court to conclude that the Plaintiff was aware that the land was not held under customary trust otherwise she would have demanded her share then when she needed it most. Secondly the Court can infer that she acquired her own properties as she was acutely aware that she lived on the land on invitation of her brother.

58. Further even if customary trust was founded (which has not been) the summons as filed by the plaintiff does not disclose the size and the location of the land she is claiming.
59. Arising from the above issues the Court cannot in the circumstances of this case infer customary trust. The Court finds that there was no evidence led as to establish the intention of the parties to so create customary trust. The irresistible conclusion is that the Plaintiff has failed to proof customary trust.
60. On the 2nd issue, having failed to proof that the suit land is encumbered with customary trust, this issue is moot and is answered in the negative.

The Preliminary Objection

61. On the Preliminary objection the Court notes that the Defendant appears to have abandoned the PO and in the circumstances the Court finds no necessity to determine the same. It is struck out.

Costs of the suit

62. Although costs of an action or proceeding are at the discretion of the court, the general principle is that costs shall follow the event in accordance with the proviso to Section 27 of the [Civil Procedure Act](#) (Cap.21). As such, the successful litigant should ordinarily be awarded costs unless, for good reason, the Court directs otherwise. The Court has noted that the Plaintiffs case was not controverted. In the circumstances, the Court is of the view that the Defendant deserves costs of the suit.
63. Final orders for disposal
 - a. In the end I find that the Plaintiffs case devoid of merit.
 - b. It is dismissed with costs to the Defendant
64. Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 27TH DAY OF JANUARY 2025 VIA MICROSOFT TEAMS.

J. G. KEMEI

JUDGE

Delivered Online in the presence of:

Githinji for Plaintiff

Kamau holding brief for Kingangi for Defendant

Judith Adhiambo – Court Assistant

