



**Gichovi v Kiura (Environment & Land Case 16 of 2019)  
[2022] KEELC 15677 (KLR) (10 June 2022) (Judgment)**

Neutral citation: [2022] KEELC 15677 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA  
ENVIRONMENT & LAND CASE 16 OF 2019**

**EC CHERONO, J  
JUNE 10, 2022**

**BETWEEN**

**LYDIA WAMBUI GICHOVI ..... PLAINTIFF**

**AND**

**FRANCIS NDEGE KIURA ..... DEFENDANT**

**JUDGMENT**

1. The plaintiff, vide a Plaint dated March 20, 2019 seeks the following orders-;
  - i. A declaration that the defendant holds a portion measuring 6 acres out of original parcel land No. Ngariama/Ngiriambu/556 now subdivided into L.R No. Ngariama/Ngiriambu/4401 to Ngariama/Ngiriambu/4412 in trust for the beneficiaries of the Estate of the late Edward Gichobi Kiura (deceased)
  - ii. An order that the trust held by the defendant in respect of the 6 acre portion out of original parcel of land No. Ngariama/Ngiriambu/556 now subdivided into L.R. No. Ngiriama/Ngiriambu/4401 to Ngiriama/Ngiriambu/4412 all inclusive be determined and that the said portion measuring 6 Acres be transferred and registered in the name of the plaintiff Lydia Wambui Gichobi.
  - iii. Costs of the suit plus interest
2. The plaint is accompanied by an affidavit verifying the correctness of the averments in the plaint and his witness statement dated the same date. The plaintiff also filed a list of documents containing 10 items.
3. By way of a statement defence dated June 14, 2021, the defendant denies the plaintiff's claim and prays that the suit be dismissed with costs. The defendant also filed a list of documents, a list of witnesses and witness statements. Upon the close of pleadings and after compliance with Order 11 of the [Civil Procedure Rules](#), the matter was fixed for pre-trial direction where it was certified as ripe for hearing.



## Plaintiff's Summary of Facts

4. The plaintiff took the witness stand on 17/11/2021 and after taking oath, she was referred to her witness statement dated 20/3/2020 which she adopted in her evidence. She was also referred to her list of documents containing 10 items dated 26/7/2021 which she also produced as P-Exhibits No. 1, 2, 3, 4, 5, 6, 7, 8, 9, and 10 respectively. The plaintiff was further referred to an order issued in HCCC NO. 20 OF 2009 (EMBU) which she also produced as P- Exhibit No. 11. According to the plaintiff, she got married to one Edward Gichobi Kiura (deceased) in 1978 and thereafter settled and started utilizing approximately 7 Acres of land parcel No. Ngariama/Ngiriambu/556 while her mother-in-law was utilizing 2 Acres. She said that the original land Parcel NO. Ngiriama/Ngiriambu/556 was in the name of her Father-in-law one by the name Kiura Ngaimwe (deceased) and after he passed on, the suit land was registered in the name of Francis Ndege Kiura (1<sup>st</sup> defendant) in trust for himself, his mother and the siblings including her husband Edward Gichovi Kiura (deceased). She said that they developed their portion with coffee, trees, maize, beans and other food crops such as arrow Roots.
5. The plaintiff also testified that before her husband passed on, he used to ask the defendant for his portion of the suit land. She said that their right over the suit land had even escalated to the clan elders (Ugaciiku mbari ya njeru) who on 29/12/1984 directed the 1<sup>st</sup> defendant to transfer to her husband a portion of 6 acres.
6. Despite the verdict by the clan elders, the 1<sup>st</sup> defendant declined to transfer the 6 acres to her husband. Her husband then sought an advice from the clan elders who told him to file a case in court. After her husband passed on, she requested the 1<sup>st</sup> defendant to give her the 6 acres of the family/clan land but 1<sup>st</sup> defendant declined saying that he would only give her 2 acres. Since the offer was not acceptable to her, she decided to file a complaint before Gichugu Land Disputes Tribunal and after the hearing, she was awarded 6 acres on behalf of the estate of her late husband.
7. The plaintiff stated that shortly thereafter, she heard that there was another case pending in Embu High Court being HCCC NO. 20 of 2009 whereby the 1<sup>st</sup> defendant's wife Esther Wanjira Ndege, his sister Mary Wambura Kiura and one Peter Wangai had sued the 1<sup>st</sup> defendant seeking to be given shares out of land parcel NO. Ngariama/Ngiriambu/556. She stated that the parties then compromised the case by a consent settlement whereby they shared out the suit land amongst themselves and 5 sons of the 1<sup>st</sup> defendant. She ended up being awarded 2 acres in the said consent. Thereafter, she made an application where the said consent was set aside by the Court but a one acre portion out of the said land that had been sold to one Peter Wangai was not affected.
8. She stated that while the case was proceeding, the 1<sup>st</sup> defendant, without her knowledge caused the original parcel of land No. Ngiriama/Ngiriambu/556 to be subdivided into 12 portions being L.R No. Ngariama/ngiriambu/4401 to 4412. Thereafter, the 1<sup>st</sup> defendant transferred parcel NO. Ngiriama/Ngiriambu/4411 Measuring Approx. 0.37H. to the 2<sup>nd</sup> defendant. She said that that portion transferred to the 2<sup>nd</sup> defendant is the one she has planted coffee, trees which were destroyed, 10 grated mango trees, mature gravelia and eucalyptus which were also cut down. She stated that her husband's grave is also on that portion.
9. The plaintiff called one Richard Mati Njoka as her witness(PW2). The said Richard Mati stated that Lydia Wambui Gichobi (plaintiff) is the wife of Edward Gichovi Kiura (deceased) and Richard Ndege Kiura is her brother-in-law and the elder brother to her late husband. He said that on 4/2/2019, Lydia Wambui informed him that the court had advised her and her brother-in-law to explore an out of court settlement in this dispute and requested him to mediate. He accepted and called for a meeting



for 9/2/2019. However, Francis Ndege insisted that the only land available for the family of Edward Gichovi Kiura was 2 acres.

10. PW3 was Elisha Ndere Githinji who is a Cousin to Edward Gichovi Kiura (deceased) and Francis Ndege. He stated that the father to Edward (deceased) and Francis was known as Kiura Ngaimwe. He further stated that the said Kiura Ngaimwe was given land by the clan being L.R NO. Ngariama/Ngiriambu/556. When the said Kiura Ngai-imwe passed on, the suit land was transferred to Francis Ndege to hold in trust for himself, his mother and Edward Gichovi Kiura who was a minor at the time.
- 11 He said that when Edward became of age, he asked his elder brother for his share of the family land but Francis refused/declined. After his demise, Lydia Wambui Kiura, the plaintiff herein filed a complaint before the Land Disputes tribunal asking for a share of the suit land. The Tribunal heard the complaint and the plaintiff was awarded 6 acres on behalf of the estate of her Husband Edward Gichovi (deceased).

### **Defendant's Summary of Facts**

12. The defendant was referred his witness statement dated 14/6/2021 which he adopted in his evidence. He stated that he is the absolute owner of the suit property L.R NO. Ngariama/Ngariama/556 and that his brother Edward Gichobi Kiura (deceased) had his own parcel of land. He stated that the proceedings at the Gichugu Land Disputes Tribunal were a nullity since the Tribunal had no jurisdiction to handle the issue of title. He said that he transferred land parcel NO. Ngariama/ngiriambu/4411 to Jane Wangui Kariithi as the sole proprietor of the land and that the plaintiff has never occupied the said parcel of land.

### **Legal Analysis and Decision**

13. I have considered the pleadings, documentary viva- voce evidence as well as the rival submissions and the applicable law. The issues for determination in this case are as follows-;
  1. Whether the defendant held the title to the original land parcel No. Ngariama/Ngiriambu/556, now subdivided into L.R No. Ngariama/Ngiriambu/4401 to 4412 in trust for himself and the Estate of Edward Gichovi Kiura (deceased)?
  2. If the answer to paragraph 1) above is in the affirmative, whether an order that the trust held by the defendant in respect of the six (6) acres portion out of the original parcel of land L.R. No. Ngariama/Ngiriambu/556, now subdivided into L.R NO. Ngariama/Ngiriambu/4401 to 4412 all-inclusive be determined and that the said portion measuring six acres be transferred and registered in the name of the plaintiff, Lydia Wambui Gichovi?

#### **1. Whether the Defendant Held the Title to the Original Land Parcel No. Ngiriama/ngiriambu/556, Now Subdivided Into L.r No. Ngiriama/Ngiriambu/4401 To 4412 In Trust For Himself and the Estate of Edward Gichovi Kiura (deceased)?**

14. From the evidence adduced by the parties and their witnesses, the following facts are not disputed-
  - a. Francis Ndege Kiura and Edward Gichovi Kiura (deceased) are blood brother.
  - b. Land parcel No. Ngariama/Ngiriambu/556 is a clan land
  - c. Francis Ndege Kiura, the defendant herein is the first born son of Kiura Ngaimwe and that he got registered as proprietor of the disputed land in 1968



- d. The late Kiura Ngaimwe lived and on the suit land together with his family, including the late Edward Gichovi Kiura and Edward Ndege Kiura, the defendant herein.
  - e. The late Edward Ndege Kiura was brought up on the suit property where he later got married and where his family, including the plaintiff lives to date.
15. It is trite law that Customary Trust is an overriding interest on land which need not be noted in the register. Section 28 of the [Land Registration Act](#) No. 3 of 2012 provides as follows-;

“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-

- a. Spousal rights over matrimonial property;
- b. Trusts including customary trusts;
- c. -----
- d. -----
- e. -----

The Superior Courts have made numerous decisions regarding the interpretation and application of the law on customary trust in Kenya. In the case of [Isack M’Inanga Kiebia v Isaaya Theuri M’Lintari & another](#), Petition No 10 of 2015 (2018), the Supreme Court of Kenya discussed the issue of trust and held as follows: \_

“Each case has to be determined on its own merits and quality of evidence. It is not every claim of right to land that will qualify as a customary trust. In this regard, we agree with the High court in [Kiarie vs 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;

- i. The land in question was before registration, family, clan, or group land;
- ii. The claimant belongs to such family, clan or group;
- iii. 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;
- iv. The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances;



- v. The claim is directed against the registered proprietor who is a member of the family, clan or group”.

16. The burden of proof as to the existence of trust lies with the person who wishes the court to make a finding of such existence in his/her favour. The plaintiff called two witnesses in support of her claim. Elisha Ndere Githinji (PW3) was one of the witnesses who comes from Umbui clan and stated that he knew the late Kiura Ngai-imwe who was father to Francis Ndege and the late Edward Gichovi Kiura. The witness further stated that during land demarcation and Adjudication in 1958, he was present when the late Kiura Ngai-imwe was given land by Ucaciku clan being land parcel NO. Ngiriana/Ngiriambu/556 to hold in trust for himself and rest of the Kiura family. He further stated that during land demarcation and Adjudication, only men were given land and not women as they were not issued with National Identity Cards.
17. The witness further stated that when Kiura Ngai-imwe died, the suit land was transferred and registered in the name of Francis Ndege Kiura by way of transmission since women by then could not be registered as owners of land.
18. The the evidence by the said Elisha Ndere Githinji (PW3) was not challenged on cross-examination. I find the same credible. I also find the evidence by the plaintiff and the other witnesses, to wit; Richard Mati Njoka (PW2) credible and consistent. The totality of my analysis and evaluation of the evidence by the parties and their witnesses is that the defendant holds land parcel No. Ngiriana/Ngiriambu/556, now subdivided into land parcel No. Ngiriana/Ngiriambu/4401 to 4412 in trust for himself and the Estate of Edward Gichovi Kiura (deceased).

**2) If the answer to paragraph 1) above is in the affirmative, whether an order that the trust defendant in respect of the six (6) acres portion out of the original parcel of land L.R. No. Ngiriana/Ngiriambu/556, now subdivided into held by the L.R NO. Ngiriana/Ngiriambu/4401 TO 4412 all inclusive be determined and that the said portion measuring six acres be transferred and registered in the name of the plaintiff, Lydia Wambui Gichovi?**

19. The testimony by the plaintiff is that, when she got married to Edward Gichovi Kiura (deceased) in 1978, she found the family of Kiura Ngai-imwe living in the suit land including her late husband's two sisters namely, Mary Wambura Kiura and Jane Wakariko Kiura as well as the defendant herein. She said that all the four were born and brought up on the disputed land which is an ancestral land/ clan and/or family land. She further stated that together with her late Husband, they established their matrimonial home on the land. She said that when her husband died in the year 2003, the defendant started threatening and harassing her. She sought assistance from the local Administration offices who referred her to the Land Disputes Tribunal where she lodged a complaint. After the hearing of her complaint, the Tribunal awarded her six (6) acres of the suit property. She stated that the defendant was not satisfied and preferred an appeal at Nyeri Land Disputes Appeals Committee. The plaintiff also stated that the defendant colluded with his family members and a land broker and they filed Embu HCCC NO. 20 of 2009 where a consent order was allegedly recorded. She said that in the alleged consent order, she was to get 2 acres yet she was not a party or involved. She later applied for the setting aside of the said orders. Copies of those proceedings were produced in her evidence. These averments given on oath were not challenged or controverted on cross-examination.
20. From the testimony of the plaintiff, it is clear that after the demise of her Husband, every trick in the book was used by the defendant in collusion with his family to disinherit the estate of her late husband, Edward Gichovi Kiura from the suit land which is a family, clan and/or group land. Having found and held that the defendant holds the suit land L.R No. Ngiriana/Ngiriambu/556, now subdivided into



L. R No. Ngiriana/Ngiriambu/4401 TO 4412 in trust for himself and the Estate of Edward Gichovi Kiura (deceased), I now determine the said trust in favour of the plaintiff as prayed in the plaint since nothing shall be taken to relieve the defendant from his duty and obligation to which he is subject as a trustee.

21. Suffice to say that being a trustee in respect of the suit land parcel No. Ngiriana/Ngiriambu/556, now subdivided into land parcels No. Ngiriana/Ngiriambu/4401 to 4412, the defendant lacked capacity to transfer any of the portions to the 2<sup>nd</sup> defendant herein or any other person without the consent of the beneficiaries.

### 3) Who will bear the costs of the suit?

22. Section 27 of the *Civil Procedure Act* provides that costs provides that costs and other incidentals shall ordinarily be in the cause, unless the judge, for good reasons, decide otherwise. In this case, the plaintiff and the defendant are close family relations. For that reason, this court exercises its discretion and orders each party to bear their own costs.

### Final Orders and Decision

23. From my analysis and evaluation hereinabove, I find that the plaintiff has proved her claim to the required standard. I therefore enter judgment for the plaintiff against the defendant as follows;
  1. A declaration be and is hereby issued that the defendant holds a portion measuring 6 Acres out of the original parcel of land No. Ngiriana/Ngiriambu/556, now subdivided into L.R No. Ngiriana/Ngiriambu/4401 to 4412 in trust for the beneficiaries of the Estate of Edward Gichovi Kiura (deceased).
  2. An order that the trust held by the defendant in respect of the 6 Acres portion out of the original parcel of land No. Ngiriana/Ngiriambu/556, now subdivided into L.R No. Ngiriana/Ngiriambu/4401 to 4412 all-inclusive be and is hereby determined and the said portion measuring 6 Acres be and is hereby transferred and registered in the name of the plaintiff Lydia Wambui Gichovi.
  3. Each party to bear their own costs.

**JUDGMENT READ, DELIVERED AND SIGNED IN THE OPEN COURT AT KERUGOYA THIS 10<sup>TH</sup> JUNE, 2022.**

.....

**HON. E.C. CHERONO**

**ELC JUDGE**

**In the presence of-;**

- 1) M/S Kiragu H/B for Mrs Makworo for the Defendant
- 2) M/S Wambui H/B for Maina Kagio for the Plaintiff
- 3) Kabuta C/A-----present.

