



**Kinyanjui & another v Mbiyu (Environment and Land Case
E009 of 2023) [2025] KEELC 5231 (KLR) (14 July 2025) (Judgment)**

Neutral citation: [2025] KEELC 5231 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT AND LAND CASE E009 OF 2023**

MN GICHERU, J

JULY 14, 2025

BETWEEN

PETERSON MIRING’U KINYANJUI 1ST PLAINTIFF

ELIUD GACHANJA KINYANJUI 2ND PLAINTIFF

AND

EDMUND MWANGI MBIYU DEFENDANT

JUDGMENT

1. The Plaintiffs’ seeks the following reliefs against the Defendant.
 - a. A declaration that one James Mbiyu alias John Mbiyu (deceased) held in trust LR Loc. 5/ Githunguri/22 in trust for Hezron Kinyanjui (deceased).
 - b. An order of cancellation of land parcel Loc.5/Githunguri/22 in the Defendant’s name and the same reverts to the name of James Mbiyu alias John Mbiyu (deceased).
 - c. That the trust be determined and 2 acres of the land parcel No. Loc. 5/ Githunguri/22 be registered in the name of the Plaintiffs herein.
 - d. Costs of the suit.
 - e. Any other orders that this Court may deem fit.
2. The Plaintiffs’ case is as follows. One, the suit land Loc.5/Githunguri/22 belonged to both James Mbiyu alias John Mbiyu and Hezron Kinyanjui jointly. The two were brothers. John Mbiyu was older than Hezron Kinyanjui. John Mbiyu is the father to the Defendant while Hezron Kinyanjui is the father to the Plaintiffs. Two, the Defendant’s father John Mbiyu was registered as proprietor of the suit land which is four (4) acres and he held two acres out of the four (4) in trust for his brother Hezron Kinyanjui. Three, the Plaintiffs occupy half of the suit land just like their parents did and currently



the half belonging to the Defendant's family is not occupied by the Defendant or any of his family members. Four, the Defendant's father was to transfer half of the suit land to the Plaintiffs' father but he died before he could do so even though he admitted before the Chief of the area where the land is situated that he would transfer the land to the Plaintiffs' father. Five, in the year 1981, the Plaintiffs' father cautioned the suit land. Six, the Defendant filed *Thika Succession Cause No. 484 of 2015* where the Plaintiffs filed a protest but the succession court in its judgment dated 10-7-2019 ruled that their claim ought to be filed in the Environment and Land Court. For the above and other reasons, the Plaintiffs decided to file this suit because the Defendant has refused to willfully transfer half of the suit land to them.

3. In support of their case, the Plaintiffs filed the following evidence.
 - i. Witness statements by Peterson Miring'u Kinyanjui, Nelson Njoroge and Eliud Gachanja Kinyanjui.
 - ii. Copy of judgment in *Thika Succession Cause No. 484 of 2015*.
 - iii. Copy of register of the suit land showing entries between 3-12-1962 and 16-6-2022.
4. The Defendant in a written statement of defence and counterclaim dated 31-7-2023 avers as follows. Firstly, the Plaintiffs' claim is denied in its entirety generally. Secondly, the Plaintiffs' father had leased part of the suit land from the Defendant's father for the purposes of cultivation. Thirdly, the Plaintiffs' father was allocated land by his own father who is the grandfather of the parties herein. This land measures 3 acres and it is at Kagumoini and the Plaintiffs cultivate it to date. Fourthly, the Defendant's father originally owned only 2 acres but he bought parcels from his neighbours such that LR No. Loc. 5/Githunguri/122 measures 4.6 acres. Fifthly, it is only in the year 2015 after the death of the Defendant's father that the Plaintiffs started building structures on the suit land. Sixthly, in *Thika Succession Cause No. 484 of 2015*, the Plaintiff's protest was dismissed and an order for their eviction from the suit land was issued by the Court. Finally, there is no trust created by the grandfather of the parties over the suit land and such a claim is completely unfounded and unsupported by any documents and the Plaintiffs' suit ought to be dismissed with costs.
5. In the counterclaim, the Defendant seeks the following orders against the Plaintiffs.
 - i. A permanent injunction be issued against the Plaintiffs, whether by themselves, their servants, agents, employees and or representatives or anyone else claiming through them from any further trespassing or in any way interfering with the Defendant's occupation, possession or utilization of land parcel No. Loc. 5/Githunguri/122.
 - ii. An order to the Plaintiffs to vacate from the Defendant's property and remove all the illegal structures erected on the Defendant's property.
 - iii. Costs of this suit.
 - iv. Interest at Court rates.
6. In support of his defence and counterclaim, the Defendant filed the following evidence.
 - i. Witness statements by himself, James Muiruri Gachanja, Julia Njeri Ng'ang'a and Erastus Muiruri Kaibere.
 - ii. Copies of record for renting/leasing of the suit land and copies of the receipts for land rent from the year 2009.



- iii. Copies of the petition, grant and certificate of confirmation of grant in *Succession Cause No. 484 of 2015* at Thika.
 - iv. Copy of order dismissing *Kiambu Civil Appeal No. 169 of 2020* dated 7-4-2022.
 - v. Copy of order removing caution over the suit land and dated 9-6-2022.
 - vi. Copy of application to be registered as proprietor by transmission.
 - vii. Copy of certificate of official search for the suit land dated 25-7-2022.
 - viii. Copy of eviction order dated 27-2-2023.
7. The Plaintiffs filed a reply to defence and defence to counterclaim dated 8-8-2023 in which they aver as follows. Firstly, they deny that the Defendant's father ever purchased any land to merge with the suit land and that the suit land solely belonged to their grandfather. Secondly, the Plaintiffs have been residing on the suit land since they were born and the structures thereon have been there since their father put them up. Thirdly, their protest was dismissed because the court dealing with the matter had no jurisdiction to deal with land cases. Fourthly, Kiambu Misc. 169 of 2020 which sought leave to appeal out of time was dismissed for non attendance by their advocate who died when the case was to be heard. Finally, they occupied the suit land because it belonged to their grandfather and the Defendant's father was a mere trustee. For the above and other reasons, they pray for the dismissal of the counterclaim with costs.
8. At the trial on 11/2/2025, the 1st Plaintiff testified together with Nelson Njoroge. His evidence was generally as per his pleadings. He denied having ever paid any rent for the suit where he has lived for 65 years. He said that his parents and his sister who died in the year 1978 are all buried on the suit land and the burials took place in broad daylight and no one ever sought to evict him during his father's life time. The Defendant's evidence at the trial as a restatement of his case in the pleadings. His evidence and that of his witnesses is that the Plaintiffs' father had land at Gitura measuring 3.6 acres. He sold 2.5 acres first and later 1.1 acres. He was buried on the suit land. He reiterated that the Plaintiffs are not entitled to any share of the suit land.
9. Counsel for the parties filed written submissions dated 30-5-2025 and 13-5-2025 respectively. Counsel for the Defendant identified two issues for determination.
- i. Whether the Plaintiffs have proved the existence of a trust.
 - ii. Whether the Plaintiffs have a legal claim on the suit land.
- The Plaintiffs' counsel on the other hand identified five issues for determination.
- i. Whether there was a customary trust over the suit land in favour of the Plaintiffs' father.
 - ii. Whether the Defendant has disproved the Plaintiffs' claim of trust over the suit land.
 - iii. Whether the Plaintiffs' father inherited land within Gitura scheme.
 - iv. Whether the Plaintiffs had leased or rented the suit land.
 - v. Whether the Plaintiffs have trespassed over the suit land.
10. I have carefully considered all the evidence adduced in this case by both sides including the witness statements, documents and testimony at the trial. I have also considered the written submissions by



learned counsel for the parties including the issues for determination and the law cited. I find that the issues as identified by both sides will determine the dispute. I find as follows on the seven issues identified by the counsel for the parties.

11. I am in agreement with the Defendant's Counsel's definition of a trust as a relationship where one person holds property for the benefit of another person. That is a simple definition. A more elaborate definition is again as per the submissions by the Defendant's counsel where he defines it as "a relation or association between one person (or persons) on the one hand and another person (or persons) on the other based on confidence, by which property is vested or held by one person, on behalf of or for the benefit of another."

I find that the Plaintiffs have proved the existence of a trust in favour of their father for the following reasons. Firstly, there is uncontroverted evidence that the Plaintiffs and even their parents have occupied the suit land all their lives and the Defendant's father, in his lifetime, never sought to evict them or their parents. Secondly, there is uncontroverted evidence that the Plaintiffs' parents and their sister are buried on the suit land. The sister is said to have been buried in the year 1978. These two reasons are sufficient to prove that the Defendant's father was a trustee for the Plaintiffs' father otherwise he would not have allowed the Plaintiffs' father to occupy the land, build thereon and bury his daughter on it. If there was no trust, the Plaintiffs' father would have been resisted at the point of entry into the suit land. The fact that the land belonged to the grandfather of the Defendant and Plaintiffs' makes this trust all the more probable. I am not satisfied that the Defendant's father bought more land because right from 3-12-1962 when the register for the suit land was opened, it was 1.86 Ha. That was still the size on 25-7-2022 as per the search of that date.

12. A customary trust is an overriding interest over registered land within the meaning of Section 28(b) of the [Land Registration Act](#). It provides as follows-

"Unless the contrary is experienced 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-

(b) trusts including customary trust".

The Supreme Court of Kenya had occasion to deal with this issue of a customary trust in the case of [Isack M' Inanga Kiebia v Isaya Theuri M'Lintari and Isack Ntongai M'Lintari](#) Petition No. 10 of 2015 where it stated as follows, *inter alia*.

53

"We also declare that, rights of a person in possession or actual occupation under Section 30(g) of the *Registered Land Act*, are customary rights. This statement of legal principle, therefore reverses the age old pronouncements to the contrary in *Obiero v Opiyo* and *Esiroyo v Esiroyo*. Once it is concluded that such rights subsist, a court need not fall back upon a customary trust to accord them legal sanctity, since they are already recognized by statute as overriding interests."

58... It is now clear that customary trusts, as well as other trusts are overriding interests. These trusts, being overriding interests, are not required to be noted in the register..."

My interpretation of the above judgment is that the Plaintiffs who occupied the suit land when the *Registered Land Act* (Cap 300) was in force were under Section 30(g) of the law entitled to the suit land



by way of customary trust. Secondly, even if they were not in occupation, they would still be entitled to the land. The Supreme Court, at paragraph 54 of the judgment stated as follows.

“In the foregoing premises, it follows that we agree with the Court of Appeal’s assertion that to prove a trust in land, one need to be actual physical possession and occupation of the land. A customary trust falls within the ambit of the proviso to Section 28 of the Registered Land Act while the rights of a person in possession or actual occupation are overriding interests and fall within the ambit of Section 30(g) of the *Registered Land Act*”.

This paragraph answers the second issue raised by the Defendant. The Plaintiffs have a legal claim over the suit land just as people in actual occupation and secondly as people who enjoy a trust as grandchildren of the owner Mutungu Wochiri who bequeathed the land to their father and the father of the Defendant.

This paragraph also answers the first and second issues raised by the Plaintiffs and it is that indeed there was a customary trust in favour of the Plaintiffs’ father and that the Defendant has not, disproved the Plaintiffs’ claim of trust over the suit land.

13. None of the witnesses called by the Defendant and the Defendant himself could prove that the Plaintiffs’ father inherited land within Gitura Scheme. There was no tangible evidence in form of a copy of the register or title deed or any other sort of evidence. This answers the Plaintiffs’ third issue.
14. The only evidence of the so called leasing of the suit land by the Plaintiffs are copies of handwritten receipts said to have been compiled by a person who was not even called as a witness. They do not even purport to be backed by an agreement executed by the Plaintiffs. I find that these photocopies of receipts have no probative value and the so called leasing of the suit land by the Plaintiffs is not proved.
15. Since I have already found that the Plaintiffs have proved to be entitled to half of the suit land through a customary trust, they cannot be trespassers on the land which belongs to their father.
16. For the above stated reasons, I find that the Plaintiffs are entitled to half of the suit land as they have been able to prove a customary trust. I order that the Defendant transfers half of the suit land on the portion that the Plaintiffs occupy to the Plaintiffs and in default the Deputy Registrar to execute all the necessary instruments to effect the subdivision and transfer of the said half of the suit land to the Plaintiff.

In the same vein, I dismiss the Defendant’s counterclaim. So that the acrimony between the parties does not escalate any further, each party to bear its own costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG’A THIS 14TH DAY OF JULY, 2025.

M.N. GICHERU JUDGE.

Delivered online in the presence of; -

Court Assistant – Mwangi Njonjo

Plaintiffs’ Counsel – Mr Mbugua

Defendant’s Counsel – Njeri Kiarie holding brief

