



**Kariuki v Mwihaki & another (Environment and Land Appeal
E005 of 2023) [2025] KEELC 5151 (KLR) (10 July 2025) (Judgment)**

Neutral citation: [2025] KEELC 5151 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT AND LAND APPEAL E005 OF 2023**

**JO OLOLA, J
JULY 10, 2025**

BETWEEN

GATHONGO KARIUKI APPELLANT

AND

HOLINDA MWIHAKI 1ST RESPONDENT

SWALEH MWANGI 2ND RESPONDENT

*(Appeal arising from the Judgment of the Hon. D.K. Matutu, SPM delivered
on 28th February, 2023 in Mukurweini PMELC Case No. E016 of 2021.)*

JUDGMENT

Background

1. This is an Appeal arising from the Judgment of the Hon. D.K. Matutu, SPM delivered on 28th February, 2023 in Mukurweini PMELC Case No. E016 of 2021.
2. By a Complaint dated 14th December, 2021, Holinda Mwihaki and Swaleh Mwangi (the Respondents herein) had sought Judgment against Gathongo Kariuki (the Appellant herein) for:
 1. An order that Muhito/Thiha 233 was registered in trust in the name of Kariuki Gathongo for himself and that of his younger brother 's family Kabanya Wachira Charagu;
 2. That the land parcel no Muhito/Thiha 233 measuring 7 Acres be sub-divided between the Estate of Kariuki Gathongo and that of Kabanya Wachira Charagu and each to get 3.5 Acres;
 3. That the 3.5 Acre of land to be sub-divided from Muhito/Thiha 233 and that the portion belonging to the estate of Kabanya Wachira Charagu to be registered in the name of Swaleh Mwangi;
 4. General Damages; and



5. Costs of this suit and interest at Court rates.
3. The basis for those prayers was the Respondent's contention that the 2nd Respondent and the Appellant are cousins whereas the Appellant is the 1st Respondent's nephew. The Respondent's averred that L.R. No. Muhito/Thiha 233 (the suit property) was registered in the name of Kariuki Gathongo, an elder brother of Kabanya Wachira who were both the sons of Gathongo Kariuki.
4. The Respondents averred that the two sons jointly lived on the land measuring 7 acres each occupying 3.5 acres of the land. It was the Respondents' case that the 1st Respondent's father and the Appellant's grandfather lived in harmony on the land which had boundaries in place and that the 1st Respondent's father and a brother are all buried on the suit property.
5. Further, it was the Respondent's case that the 2nd Respondent had been cultivating on 3.5 acres that belonged to his grandfather until September, 2020 when he was chased away by the Appellant. It was the Respondent's case that the Appellant had instituted Mukurweini P.M. Succession Cause No. 62 of 2019 in a effort to disinherit the Respondents.
6. Gathongo Kariuki (the Appellant) had opposed the suit vide his Statement of Defence dated 21st December, 2021. He denied any close family relationship ties with the Respondents and/or that his father had held the suit property in trust as stated by the Respondents. In addition, the Appellant denied that the 1st Respondent's parents and a brother had lived on a portion of the suit property and were buried therein. The Appellant had further denied that the 2nd Respondent had been utilizing a portion of the land measuring 3.5 acres.
7. Having heard the parties and in his Judgment delivered on 28th February, 2023 aforesaid, the Learned Trial Magistrate found in favour of the Respondents and granted orders as sought in the Plaint.
8. Aggrieved by the said determination, the Appellant who was the Defendant in Lower Court proceedings moved to this court and lodged his Memorandum of Appeal dated 23rd March, 2023 urging this court to set aside the judgment on some six (6) grounds listed as follows:
 1. That the Learned Magistrate erred in law and fact in not appreciating that land parcel Muhito/Thiha/233 was solely owned by one Kariuki Gathongo (dcd);
 2. That the Learned Magistrate erred in law and fact in not appreciating that no element of trust was ever proved by the Respondents as against the deceased Kariuki Gathongo;
 3. That the Learned Magistrate erred in law and fact in failing to appreciate that the Respondents did not prove their occupation of any parcel on land parcel No. Muhito/Thiha/233;
 4. That the Learned Trial Magistrate erred in law and fact in ignoring the fact that the Respondents did not prove the existence of Kabanya Wachira or his relationship with Kariuki Gathongo;
 5. That the Learned Trial Magistrate erred in law and fact by relying on mere allegations of any relationship between Kariuki Gathongo and the alleged Kabanya Wachira; and
 6. That the Learned Trial Magistrate erred in law and fact in ignoring the Appellant's evidence in its totality.

Analysis and Determination

9. It is now settled law that the duty of a first appellate court is to re-evaluate the evidence which was adduced in the trial court both on the facts and the law and to arrive at its own conclusion bearing in



mind that it did not have the opportunity of seeing and hearing the witnesses first hand [See *Selle & Another –vs- Associated Motor Boat Co. Ltd and Others* (1968) EA 123].

10. I have accordingly carefully perused the Record of Appeal as well as the Judgment rendered by the Court. I have similarly perused and considered the submissions and authorities placed before me by the Learned Advocates representing the parties herein.
11. The two Respondents herein are a mother and son. By their suit as filed in the Lower Court, the duo contended that the parcel of land known as Muhito/Thiha/233 measuring 7 acres was registered in the name of one Kariuki Gathogo in trust for the Appellants and the Respondents. It was the Respondents' case that the Appellant was a nephew to the 1st Respondent and a Cousin to the 2nd Respondent and that the suit property was registered in the name of the Appellant's grandfather Kariuki Gathogo in trust for himself and his younger brother Kabanya Wachira Charagu who was the father of the 1st Respondent.
12. On his part, the Appellant denied that he was related in any way to the Respondents. He further denied that the suit property was registered in the name of his grandfather in trust for the Respondents or anyone else. The Appellant further denied that the Appellants had been occupying and/or utilising any portion of the suit property.
13. Upon hearing the parties and in the judgment delivered on 28th February, 2023, the Learned Trial Magistrate concluded as follows at Paragraphs 10 and 11 of the Judgment.

“ 10. I have considered the testimonies and documentation produced. There is every evidence that this was the only known ancestral home to the parties herein. There is a Succession Cause in court over the same suit land. I agree with the Plaintiffs submissions that the Defendant only wants to feign

ignorance.

11. I have carefully considered the Pleadings, the testimonies of Plaintiff, the Defendant and their witnesses, the submissions filed. I do find that the Plaintiffs have proved their case on balance of probabilities. They have proved the Kariuki Gathongo was registered on the suit and as elder son to hold in trust for the entire family which includes that of the Plaintiffs. It is therefore safe to conclude he was holding it in trust for the Plaintiffs and their families.”

14. As was held in the case of *Jutelabi African Adventures Limited & Another –vs- Christopher Michael Lockley* (2017) eKLR.

“

“ 25. It is settled that the onus lies on a party relying on the existence of a trust to prove it through evidence. That is because:

“The law never implies, the Court never presumes, a trust, but in case of absolute necessity. The Courts will not imply a trust save in order to give effect to the intentions of the parties. The intention of the parties to create a trust must be clearly determined before a trust will be implied.”



See Gichuki –vs- Gichuki (1982) KLR 285 and Mbothu & 8 Others -vs- Wairimu & 11 Others (1986) KLR 171.

15. Addressing the question of Customary Law trust in Isaack Kiaba M’Inanga –vs- Isaaya Theuri M’Lintari & Another (2018) eKLR, the Supreme Court of Kenya observed 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 -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:

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; and
5. The claim is directed against the registered proprietor who is a member of the family, clan or group.”

16. In the instant matter, the Respondents asserted that the suit property was registered in the name of the Appellant’s grandfather in trust for themselves and the Appellant. The basis for that claim can be discerned from Paragraphs 8 to 14 of the Plaint wherein the Respondents plead as follows:

- “8. That Gathongo Wachira had two sons Kabanya Wachira and Gathongo Wachira who was the elder son;
9. That the 1st Plaintiff, her father Kabonyo Wachira, her mother Wanjira Mumuriithi all lived on the 3.5 acres of the land parcel;
10. That my father Kabanya Wachira Charagu and his father Kariuki Gathongo and his brother Kariuki Gathongo jointly lived on the land measuring 7 acres and each was occupying 3.5 acres;
11. That both the 1st Plaintiff’s father and the Defendant Grandfather lived in harmony on the land and that there were boundaries in place;
12. That in 1972 when the 1st Plaintiff father died (sic), who was the grandfather of the Plaintiff he was buried on the same land;
13. That the 1st Plaintiff’ (s) mother was buried on the same land in 1995 when she died, so was her late brother Simon Muriithi in 2008; and
14. That the 2nd Plaintiff has been cultivating on the 3.5 acres portion of land that belonged to his grandfather Kabanya Wachira Charagu until September, 2020 when the Defendant chased him and his mother from the land with a panga.”



17. In support of their case, the Respondents called three (3) witnesses with the 2nd Respondent testifying as PW1 while his mother testified as PW2. While the suit was brought by the Respondents in their capacity as the Administrators of the Estate of one Kabanya Wachira Charagu, I was unable to find a copy of the grant in the Record of Appeal.
18. Be that as it may, the Respondents told the court that the said Kabanya Wachira Charagu was the younger son of Gathogo Wachira and that the suit property belonged to Gathogo Wachira but was registered in the name of his elder son Kariuki Gathongo in trust for the family.
19. The said Kabanya Wachira Charagu passed away in the year 1972 and according to the Respondents, he was buried within their portion of the land forming part of the suit property. Similarly, when the 1st Respondent's mother passed away in 1995, she was buried on the land. Again according to the Respondents in 2008 when the 1st Respondent's brother Simon Muriithi passed away, he was buried on the land.
20. As it turned out, other than their verbal testimonies, the Respondents did not produce any evidence of the burials said to have been done on the suit property. They did not also tell the court what action they took when the Appellant is said to have chased the 2nd Respondent away from the land with a panga.
21. While I had no doubt in my mind that the Respondents were somehow related to the Appellant despite the Appellant's denials, it was difficult to find any basis upon which the court could conclude that the suit property was the parties' ancestral land and that the same had been registered in the name of the Appellant's grandfather in trust for the rest of the family. I say so because the Respondent's did not produce a copy of the Green Card or other document from which the history of the past holdings of the property could be discerned. That being the case, there was no proper demonstration on the part of the Respondents that this was family, clan or group land.
22. Secondly, even if the suit property could be said to be family land, I was not persuaded that the 2nd Respondent shared the same clan with the Appellant and the other fore bearers of the title as to warrant his registration as the owner under a customary trust. From the material placed before the Court, it was apparent that the 1st Respondent had gotten married some time in 1962 and that the 2nd Respondent was born, from his own testimony in court, in the year 1969. That was some three years before his grandfather would pass away in 1972.
23. From the testimony of the 1st Respondent, his father had a son by the name of Simon Muriithi who passed away in 2008. In the circumstances of this case, I was not persuaded that it was open for the 1st Respondent to return to her birth place with her son and to demand that the son be registered as part owner of the land under customary law.
24. In the premises herein it was clear to me that the Learned Trial Magistrate had erred and greatly misdirected himself in arriving at the conclusion that this was the only known ancestral home to the parties. The Plaintiffs had failed to prove that the property was ancestral land and that they were entitled to the same and the only option left to the court was to dismiss the suit.
25. Accordingly, I do find merit in this Appeal. I allow the same and do hereby substitute the Judgment dated February 28, 2023 with an order dismissing the Respondents suit in the Lower Court
26. I make no order as to costs.

JUDGEMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT MOMBASA THIS 10TH DAY OF JULY, 2025

.....



J.O. OLOLA

JUDGE

In the presence of:

- a. Ms. Firdaus Court Assistant.
- b. No appearance for the Appellant
- c. Mr. Muchangi Gichugu Advocate for the Respondents

