



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mwangi v Gathura (Environment and Land Appeal E015 of 2024)  
[2025] KEELC 5117 (KLR) (7 July 2025) (Judgment)**

Neutral citation: [2025] KEELC 5117 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MURANGA  
ENVIRONMENT AND LAND APPEAL E015 OF 2024**

**MN GICHERU, J**

**JULY 7, 2025**

**BETWEEN**

**FRANCIS IRUNGU MWANGI ..... APPELLANT**

**AND**

**SAMUEL KAMAU GATHURA ..... RESPONDENT**

*(Being an Appeal against the Judgment delivered on 19th March 2024 in CM'S ELC CAE NO. E042 OF 2021 Murang'a By E.M. Nyagah Senior Principal Magistrate Murang'a)*

**JUDGMENT**

1. The Appellants seek the following orders in this appeal.
  - a. The appeal be allowed.
  - b. The judgment of the lower court be set aside.
  - c. Costs of the appeal.
2. The Appellant filed six grounds for seeking the three orders vide his memorandum of appeal dated 12-4-2024. The grounds are as follows. The learned trial magistrate erred in law and fact by-
  - i. failing to properly evaluate the evidence presented by the parties to the suit,
  - ii. disregarding the Appellant's evidence by erroneously finding that the Appellant did not adduce evidence on how the title deed to L.R. No. Loc.8/Gatuga/886 was registered in his name contrary to the evidence in the court record,
  - iii. failing to find that there was no evidence of fraud or misrepresentation adduced by the Respondent against the Appellant during the registration of the suit land in the Appellant's name,



- iv. failing to find that there was no privity of contract for the sale of the suit land between the Plaintiff and the Respondent, consequently, the Respondent had no cause of action against the Plaintiff as counterclaimed,
  - v. finding that the Respondent's counterclaim had merit despite no evidence having been adduced to prove the same, and
  - vi. failing to find that the Respondent's claim in the counterclaim was statute barred under Section 4(1) (a) of the *Limitation of Actions Act*.
3. In the lower Court suit Murang'a M.E.L.C E042/2021, the Appellant who was the Plaintiff had sought a permanent injunction against the Respondent who was the Defendant, to be barred from trespassing on the suit land. He also sought the costs of the suit. His case was that he was the registered owner of the suit land and the Respondent was trespassing thereon despite notice to vacate.
  4. On the other hand, the Respondent's case was as follows. One, he bought the suit land from Irungu Kihia who is now deceased. Irungu was a brother to the Appellant's father, John Mwangi Kihia. The Appellant's father had been ordered by the Court in PM Murang'a Civil Case No. 8 of 1996 to transfer 0.4 acres of L.R. No. Loc.8/Gatuya/1632 to the said Irungu. The Appellant's father subdivided the land but he refused to transfer 0.4 acres to Irungu Kihia as ordered by the Court. Two, the Respondent occupied the suit land immediately upon purchase and he has been in occupation since then. The reason why the land was not transferred to him by Irungu Kihia is that the Appellant's father refused to transfer the land to his brother Irungu Kihia.
  5. In addition to the defence, the Respondent filed a counterclaim seeking to be declared the lawful owner of the suit land on many grounds and an order that the suit land be transferred to him.
  6. In his Judgment dated 19-3-2024, the learned trial magistrate dismissed the Appellant's suit with costs to the Respondent. He allowed the Respondent's counterclaim with costs.
  7. Counsel for the parties filed written submissions dated 12-5-2025 and 28-4-2025 respectively. In the said submissions, the learned counsel for the parties raised the following issues.
    - i. Whether the judgment dated 19-3-2024 complies with Order 21 rule 4 of the Civil Procedure Rules.
    - ii. Whether fraud was proved to the required standard as against the Appellant.
    - iii. Whether the evidence adduced by the Respondent was at variance with his pleadings.
    - iv. Whether the title deed issued to the Appellant was absolute.
    - v. Whether the Respondent's counterclaim is time barred.
    - vi. Whether the trial court properly evaluated the evidence on record regarding the registration of the Appellant as the proprietor of the suit land.
    - vii. Whether the Respondent's claim for adverse possession is merited.
  8. I have carefully considered the appeal in its entirety including the grounds, the entire record, the written submissions, the issues raised therein and the law cited. I make the following findings on the issues identified.
  9. This being a first appeal, this court must reconsider the evidence of the trial court, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the



witnesses and should make due allowance in this respect. See *Selle vs. Motor Boat Co.Ltd and others* [1968] EA. 123.

10. Looking at the first issue of whether the judgment complies with Order 21 rule 4 of the Civil Procedure Rules, I find that though it may not be perfect, it substantially complies with the law. It contains a concise statement of the case. The trial magistrate got the facts wrong by saying that it is the Appellant's father who sold the suit land to the Respondent. The correct position is that it is Irungu Kihia who sold the land to the Respondent. Irungu Kihia was the younger brother to John Mwangi Kihia. This John Mwangi Kihia is the father to the Appellant.

The judgment of the learned trial magistrate identifies three(3) issues for determination at page 3 thereof. This again complies with rule 4 of Order 21. Finally, though not boldly stated the court said,

“The Plaintiff did not adduce any evidence how the title deed for the suit property was registered in his name thereafter”.

The court did not give reasons why it allowed the Respondent's counterclaim.

11. It is my finding that overall, fraud was proved against the Appellant and his father. In Land Disputes Tribunal case No.8 of 1995 and Murang'a SPM's Case No. 8 of 1996, it was held that Irungu Kihia was entitled to 0.4 acres of L.R. No. Loc.8/Gatuya/632. This is the land that was subdivided into Loc.8/Gatuya/632. This is the land that was subdivided into Loc.8/Gatuya/886 and 887 respectively. Instead of John Mwangi Kihia transferring Loc.8/Gatuya/886 to his brother Irungu Kihia, he instead transferred the land to the Appellant. This was contrary to the Court order. This land did not belong to the Appellant's father. He had only been registered as a trustee for his younger brother. The Appellant did not have a lawful claim to the suit land because his father had defrauded Irungu Kihia who was the legitimate owner.
12. As for the third issue, I find that the evidence adduced by the Respondent is not at variance with his pleadings. It is the trial magistrate who mixed up the facts as to who sold the suit land to the Respondent. The Respondent was very clear in the evidence and in the pleadings. This mix up is well captured in paragraph [10] above.
13. Regarding the fourth issue, I find that title deed issued to the Appellant was not absolute. The Title was like all titles to registered land, subject to overriding interests as per Section 28 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 them being noted on the register-

(b) trusts including customary trusts,”

In the case of *Isack M'Inanga Kiebia Vs. Isaya Theuri M'Lintari and Isack Ntongai M'Lintari* Petition No 10 of 2015, the Supreme Court of Kenya held that the rights of a person in possession or actual occupation of land under Section 30(g) of the Registered [Land Act](#) (Cap 300) are customary rights. Section 30 of the Cap 300 is similar to Section 28 of the [Land Registration Act \(Act 3 of 2012\)](#).

At Paragraph 53 of the judgment the Supreme Court said as follows.

“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 age old pronouncements to the contrary in *Obiero vs. Opiyo and Esiroyo*



vs Esiroyo. Once it is concluded, that the such rights subsist, a court need not fall back upon a customary trust to accord them legal sanctify, since they are already recognized by statute as overriding interests.

In the foregoing premises, it follow that we agree with the Court of Appeal's assertion that

“to prove a trust in land, one need not to be in actual physical possession and occupation of the land. A customary trusts 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 the Registered [Land Act](#)...”

My understanding of this judgment is that the rights of Irungu Kihia did not emanate from his occupation of the suit land. His rights over the land arose from the fact that the land belonged to his father but not to his brother, the Appellant's father. Whether he had been in possession or not, he was entitled to the land. That interest is the one he sold to the Respondent. To make things even better for the Respondent, he is also in possession. The Respondent inherited that possession from the rightful owner, Irungu Kihia.

14. The Respondent's claim is not time barred. He is not seeking to recover the suit land. He is already in occupation of the suit land. What he is seeking is to be registered as the owner. It is in fact the Appellant who is seeking to occupy the land. He has never occupied it. It was first occupied by Irungu Kihia who sold it to the Respondent. The claim by the Respondent is based on customary trust and nothing more.
15. The trial magistrate may not have evaluated the evidence in great detail but in my view, he reached the right conclusion. The conclusion was correct though the reasoning was not elaborate.
16. The Respondent's claim is not through adverse possession. Such a claim would be under Section 28(h) of the [Land Registration Act](#) which provides as follows;

“rights acquired or in the process of being acquired by virtue of any written law relating to the limitation of actions or by prescription.”

His claim is based on Section 28 (b) of the [Land Registration Act](#) as per paragraph [13] of this judgment.

17. In conclusion and for the reasons already given, I find no merit in the Appellant's appeal which I dismiss with costs to the Respondent.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 7<sup>TH</sup> DAY OF JULY, 2025.**

**M.N. GICHERU**

**JUDGE.**

Delivered online in the presence of; -

Court Assistant – Mwangi Njonjo

Appellant's Counsel – Mr. Kariuki

Respondent's Counsel – Mr. Mwangi

