



REPUBLIC OF KENYA



KENYA LAW
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**Mwangi v Karii (Environment and Land Appeal E025 of 2024)
[2025] KEELC 5125 (KLR) (7 July 2025) (Judgment)**

Neutral citation: [2025] KEELC 5125 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT AND LAND APPEAL E025 OF 2024**

MN GICHERU, J

JULY 7, 2025

BETWEEN

STEPHEN MAINA MWANGI APPELLANT

AND

JOSEPH KIMANI KARIU RESPONDENT

*(Appeal from the Judgment and Decree on 12th June 2024 by Honourable C.
NDIMIA, Senior Resident Magistrate at Kangema ELC Case No. E010 of 2021)*

JUDGMENT

1. In the memorandum of appeal dated 26-6-2024, the Appellant seeks the following orders.
 - a. That this appeal be allowed with costs.
 - b. That the judgment of the lower court be set aside and judgment be entered for the Appellant as prayed for in the plaint in the lower court.
2. The memorandum of appeal contains six (6) grounds of appeal.
The learned trial magistrate erred in law and in fact in-
 - i. dismissing the Appellant's suit,
 - ii. not appreciating that the Appellant had proved ownership of LR No. Loc. 19/Rwathia/2120,
 - iii. making conclusions not supported by evidence,
 - iv. shifting the burden of proof of fraud to the Appellant,
 - v. holding that the Appellant had failed to prove that the deceased, Stephen Maina Karii was buried on the suit land,



- vi. not awarding costs of the suit to the Appellant.
3. The facts of the case according to the Appellant are as follows.

He is the registered owner of LR No. Loc. 19/Rwathia/2120. Secondly, Stephen Maina Karii died on 21-7-2021 and on 28-7-2021, the deceased was buried on the suit land. Thirdly, the deceased has never resided on the suit land but was residing on LR No. 19/Rwathia/2119. Fourthly, the acts of the Respondent have caused and continue to cause emotional distress to the Appellant. Fifthly, on 17-8-2011, Grace Wathima Kairi sworn an affidavit in which she swore that the Appellant is the owner of the suit land.
 4. The facts of the case according to the Respondent are as follows. One, LR No. Loc.19/Rwathia/2120 is an illegal subdivision of LR No. Loc.19/Rwathia/1149 which is owned jointly by James Mwangi Mukundi and John Karii Thanu who were brothers. James Mukundi is father to the Appellant while John Karii is father to the Respondent. The Appellant and the Respondent are cousins. Their fathers died before LR No. 1149 was subdivided. Two, the Appellant could not lawfully subdivide LR No. 1149 without filing a succession cause. Three, each of the two families of James Mwangi and John Karii occupy the land jointly and each family occupies a half hereof. The deceased was buried on the half of the suit land that belongs to his family and not on the side of the Appellant's family. His father John Karii Thanu is also buried on the same portion. Four, only the wives of the deceased brothers Leah Muthoni Mwangi and Grace Wathima Karii would be the immediate legal beneficiaries to the estate of the deceased owners of LR no. 1149. None of them has been appointed as administratrix as yet. Five, it is very suspicious that the Appellant could acquire registration of the family land without the knowledge of other beneficiaries. Six, the burial of the deceased was with the involvement of the bigger extended family and the Appellant never complained and had he done so, this would have raised eyebrows and the Appellant would have had to explain to the extended family how he acquired title to land that does not belong to him. Seven, the Respondent should not have been sued alone in this suit because he does not own the portion of the land that belongs to his family alone. The land is owned by the entire family of John Karii Thanu.
 5. The Respondent counterclaimed that LR. No. Loc.19/Rwathia/2120 be declared to have been fraudulently acquired and to be cancelled, nullification of any purported subdivision of LR. No. Loc.19/Rwathia/1149, an order of injunction restraining the Appellant, his family, kin agents, employees, servants or anyone claiming under them from interfering in any manner with the suit property and an order that the Plaintiff is not the registered owner of the suit property.
 6. In her judgment dated 12-6-2024, the learned trial magistrate dismissed both the Appellant's claim and the Respondent's claim. Each party was ordered to pay its own costs. The reason for the dismissal of the Appellants suit were as follows.
 - a. Failure of the Appellant to produce a title deed for LR. No. 2120.
 - b. Failure of the Appellant to explain how his father who died in 1995 transferred the land to him in the year 1997, almost two(2) years later.
 - c. Failure to explain how the caution registered by Josphat Karii Mwangi dated 26-5-1993 was removed.
 - d. Failure to prove exactly where the body of the deceased is buried.

The Defendant's counterclaim was dismissed for being time barred because there is evidence to show that on 18-4-2002, there were proceedings between the parties in Nyeri High Court Criminal Cases Nos. 102, 103 and 104 of 2001 in respect to LR No. Loc.19/Rwathia/2120 where the Respondent was



the 3rd Appellant. This according to the learned trial magistrate means that the fraud was discovered earlier than pleaded and time started running in 1997 and not recently.

7. In the written submission dated 4-4-2025, the Appellant's counsel identified the following areas for determination.
 - i. Ownership of the suit land.
 - ii. Burial of Stephen Maina Karii by the Respondent.
 - iii. Shifting the burden of proof to the Appellant.
 - iv. Failure to award the costs of the suit to the Appellant.

The Respondent did not file any written submissions..

8. I have carefully considered the appeal in its entirety including the record, the grounds, the judgment of the learned trial magistrate and the reasons therefore. I have also considered the written submissions and the case law cited therein. I find that the issues raised in the submissions are not similar to the grounds in the memorandum of appeal dated 26-6-2024. I will therefore treat the grounds of appeal as the issues. 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 the respect. See *Selle v Motor Boat Co. Ltd and Others* [1968] EA 123.
9. Starting with the first ground of appeal, I find no error on the part of the learned trial magistrate in dismissing the Appellant's suit. It was incumbent upon the Appellant to prove that he obtained title to the suit land lawfully. His suit raised many questions that were never answered. The questions included the following.
 - i. If the Appellant's father died in the year 1995, how come the suit land was transferred to him in 1997, two years after the death of the registered owner?
 - ii. where are the documents to support the transfer like the consent of the Land Control Board, the Application for the consent, the transfer instrument and other related instruments?
 - iii. When did the Respondent occupy the suit land and why was he allowed to occupy it.
 - iv. Did the Respondent bury the deceased on the suit land alone or was he with others.
 - v. Is it true that the Respondent is the Appellant's cousin and the land belonged to their grandfather.
 - vi. Has the Appellant disproved the alleged customary trust which existed in favour of the Respondent's father.

Without evidence to answer these questions, the learned trial magistrate had no option but to dismiss the Appellant's suit.

10. Under section 28 of the [*Land Registration Act*](#), all registered land is subject to overriding interests which include trusts as well as customary trusts. Since the family of the Respondent avers that they are in occupation of the suit land and that their father John Karii Thanu is also buried on the suit land, it was upon the Appellant to dispel this averment by calling evidence to the contrary. The mere registration of the Appellant as owner is not enough. A reasonable explanation as to the absence of a customary trust was necessary. This was all the more necessary because of the Respondent's family's occupation of the suit land and the apparent close family ties between the parties.



In the case of *Isack M'Inanga Kiebia v Isaaya Theuri M'Lintari and another* Petition No. 10 of 2015, the Supreme Court of Kenya held as follows, *inter alia*-

“We also declare that, rights of a person in possession or actual occupation ... 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 sanctify, since they are already recognized by statute as overriding interest.”

The Appellant's ownership was not proved without any explanation from him as to why the Respondent who was already in occupation did not enjoy overriding interest over the suit land in terms of Section 28(b) of the *Land Registration Act*. It is my finding that the family of John Karii Thanu is the lawful owner of the land that they occupy because the land did not belong to the Appellant's father but to the Respondent's father. In this regard, I find that the learned trial magistrate erred in finding that the counterclaim was time barred. The claim could not be time barred because the family of John Karii Thanu was not seeking to recover the land. They already had the land. To recover is to regain something one has lost. They have never lost the land. They always had it. It was actually the Appellant who was seeking to gain the land. The claim by the family of John Karii Thanu is not that they own the land by virtue of possession. Such a claim would be under Section 28(h) of the *Land Registration Act* which recognizes, “rights acquired or in the process of being acquired by virtue of any written law relating to the limitation of actions or by prescription,” as overriding interests. Their claim is based on Section 28 (b) of the Act which recognizes “trusts including customary trusts,” as another category of overriding interests.

11. As for the third ground of appeal, I find that all the four failures noted in paragraph [6] of this judgment are obvious. The Appellant did not produce a copy of the title deed as evidence. He did not explain how his father who died in 1995 was able to transfer land to him in the year 1997. He could not do so from the grave. He could not explain how the caution registered by the Respondent's father in 1993 was lifted without any notice to him or his dependants. With all these and other failures on the part of the Appellant, his case could not succeed.
12. There was no finding by the learned trial magistrate that the Appellant was guilty of fraud but there should have been. The foregoing paragraph [11] above has highlighted the irregularities in obtaining registration for the suit land by the Appellant. The Appellant did not file any reply to defence and defence to the counterclaim. He did not deny the averments in the counterclaim either by pleadings or by evidence. The trial magistrate ought to have inferred fraud arising from the failures noted paragraph [6] above and the Appellant obtaining registration of the land, those failures notwithstanding.
13. I did not see a single map or even a photograph on record to show exactly where the grave of Stephen Maina Karii is located. Such map and photographs would have assisted in proving burial and even the location of the grave. More fundamental to the case however, was the failure to prove absence of a customary trust. Since it is the Appellant who filed the suit in court, it is him who had the burden of proof and that burden included proving that there was no customary trust in favour of the Respondent and his family. This burden was never discharged.
14. The Appellant was only entitled to the costs of the suit if he had proved his case against the Respondent. Costs follow the event as per Section 27 of the *Civil Procedure Act*. Costs cannot be awarded to a losing party unless special circumstances are proved to warrant such departure from precedent and practice. I find no merit at all in the 6th ground of appeal.



15. In conclusion and for the reasons already given, I dismiss the Appellant's appeal with costs. Secondly, I enter judgment for the Respondent as per prayers (i), (ii), (iii), (iv), (v), (vi), (vii) and (viii) of the counterclaim dated 27-6-2022.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 7TH DAY OF JULY, 2025.

M.N. GICHERU

JUDGE.

Delivered online in the presence of; -

Court Assistant – Mwangi Njonjo

Appellant's Counsel – Mr. Kagwi

Respondent's Counsel – Miss Thuo holding brief

