



**M’Nyange v M’Nyange & another (Environment and Land Appeal E028 of 2024) [2025] KEELC 5000 (KLR) (2 July 2025) (Judgment)**

Neutral citation: [2025] KEELC 5000 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT AND LAND APPEAL E028 OF 2024**

**BM EBOSO, J**

**JULY 2, 2025**

**BETWEEN**

**KENNETH MWITI M’NYANGE ..... APPELLANT**

**AND**

**PETER KITHINJI M’NYANGE ..... 1<sup>ST</sup> RESPONDENT**

**PATRICK MUTUMA M’NYANGE ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal against the Judgment of the Chief Magistrate at Meru [Hon J M Njoroge] delivered on 27/3/2024 in Meru Chief Magistrate Court Environment and Land Case Number 94 of 2018)*

**JUDGMENT**

**Introduction**

1. This appeal challenges the Judgment of the Chief Magistrate Court at Meru [Hon. J.M Njoroge CM] rendered on 27/3/2024 in Meru CMC E&L Case No. 94 of 2018. One of the key issues that arose for determination in the suit was whether land parcel number Ntima/Igoki/1089, measuring approximately 0.2 hectares and registered in the name of Kenneth Mwiti M’Nyange [the appellant], was ancestral and family land held in trust for members of the family of the late Nyange Baruga, also known as M’Nyange Baruga. The trial court returned a finding in the affirmative. Invariably, the above issue is one of the two key questions to be determined in this first appeal. Before I analyse and dispose the issues that fall for determination, I will outline a brief background to the appeal and summarize the parties’ respective submissions in the appeal.

**Background**

2. The appellant and the two respondents are siblings. They are children of the late Nyange Baruga also known as M’Nyange Baruga [hereinafter referred to as “the late Baruga’]. Through a plaint



dated 24/6/2016, the two respondents initiated Meru Environment & Land Court Case No. 84 of 2016 against their father [the late Nyange Baruga] [hereinafter referred to as “the late Baruga”] and their sibling [Kenneth Mwiti M’Nyange] [the appellant]. They challenged the registration of the appellant as proprietor of land parcel Number Ntima/Igoki/1089 [the suit land] on 30/8/2013. Prior to 30/8/2013, the land was held in the name of the family patriarch, the late Baruga.

3. The late Baruga died on 21/3/2018 during the pendency of the suit. On 9/5/2018, the ELC [Justice Lucy Mbugua] transferred the case to the Chief Magistrate Court at Meru where it was registered as Meru CMC E&L Case No. 94 of 2018. Subsequently, the plaint was amended on 16/6/2021. Through the amendments, the late Baruga was removed from the suit, leaving the appellant as the only defendant. The amendments itemized various particulars of:
  - (i) trust
  - (ii) breach of trust; and
  - (iii) fraud, deceit and misrepresentation
4. Through the amended plaint, the respondents sought the following reliefs against the appellant:
  - (i) a declaration that the suit land was family land and trust land;
  - (ii) a declaration that the transfer of the suit land from the late Baruga to the appellant was fraudulent;
  - (iii) an order decreeing cancellation of the said transfer and reinstatement of the land into the name of the late Baruga;
  - (iv) an order decreeing rectification of the relevant land register to reflect the deceased as the registered proprietor of the suit land;
  - (v) an order of permanent injunction restraining the appellant against evicting the respondents from the suit land; and
  - (vi) an order awarding the respondents costs of the suit.
5. The case of the respondents was that, the suit land was ancestral and family land and that, although the late Baruga was registered as proprietor of the land in 1970 following land adjudication, he held it as a trustee for himself and for his family. They contended that their father [the late Baruga] was a trustee under customary trust and held the land on his own behalf and on behalf his seven children.
6. The respondents averred that the suit land was gathered by their grandfather who caused it to be registered in the name of their father [the late Baruga], adding that their father was given the land to hold it in trust for himself and on behalf of the parties to the suit. They averred that they were born and raised on the suit land and had built permanent residential houses on their respective portions in which they lived, adding that they did not have “any other place to call home”. They further averred that they co-existed peacefully on the suit land until 2013 when the appellant procured registration of the suit land into his name deceitfully and fraudulently. They contended that the transfer of the suit land into the name of the appellant was done in breach of the trust.
7. The respondents itemized:
  - (i) particulars of the alleged trust;
  - (ii) particulars of breach of trust; and



- (iii) particulars of fraud, deceit and misrepresentation.
8. In answer to the suit, the appellant initially filed a defence dated 13/9/2021. Upon amendment of the plaint, the appellant filed a defence dated 11/8/2021 in answer to the amended plaint. The appellant's case was that the suit land was not ancestral land. He contended that the late Baruga's ancestral land was in Katheri Location of Meru Central Sub-county, adding that the late Baruga purchased the suit land in the late 1960s from the late M'Ringer.
9. The appellant further contended that the late Baruga lawfully and procedurally transferred the suit land to him, adding that the allegations of fraud and misrepresentations were "not applicable". He added that their sisters were married and had no claim against him over the suit land. He further contended that the late Baruga did not reside on the suit land, adding that, he [late Baruga] resided at Ciontirai in Giaki Location. He urged the court to reject the claim and dismiss the suit.
10. Upon receiving evidence and submissions, the trial court reached a finding to the effect that the respondents had proved their case on a balance of probabilities and entered judgment against the appellant as prayed but with no orders as to costs.

### **Appeal**

11. Aggrieved by the findings and decree of the trial court, the appellant brought this appeal, advancing the following eight (8) grounds of appeal:
1. That the Learned Trial Magistrate erred in law and fact by finding that the parcel of land LR No. Ntima/Igoki/1089 was family land when there was ample evidence that the parties' father's ancestral land was situated at Katheri Location and not Ntima Location where the suit land is situated.
  2. That the Learned Trial Magistrate erred in law and fact by holding that the suit land, L.R No. Ntima/Igoki/1089, was ancestral and when the parties' father bought the land in the late 1960s and thereafter the land was registered in his name.
  3. That the Learned Trial Magistrate erred in law and in fact in that he failed to find that the appellant's father voluntarily, freely and absolutely transferred the suit land to the appellant as a gift and that the disposition of the land to the appellant was absolute and therefore there was no evidence to challenge the same by the respondents.
  4. That the Learned Trial Magistrate erred in law and in fact in that he failed to find that the respondents were given by their father other land elsewhere hence they were not entitled to claim the suit land.
  5. That the Learned Trial Magistrate erred in law by disregarding the evidence which was tendered by the appellant in support of his case.
  6. That the Learned Trial Magistrate erred in law in that he failed to find that there was no evidence by the respondents to prove fraud on the part of the deceased, M'nyange Baruga, and the appellant.
  7. That the Learned Trial Magistrate erred in law and fact by awarding the respondents the suit land when there was no sufficient evidence to impeach the appellant's title.
  8. The judgment of the Learned Trial Magistrate is bad in law and the same is against the weight of evidence.



12. The appellant urged this court to:
  - (i) allow the appeal;
  - (ii) set aside the judgment and the decree of the lower court; and
  - (iii) award him costs of the suit and interest on the costs.

### **Appellant's Submissions**

13. The appellant filed written submissions dated 6/2/2025 through M/s Kiogora Arithi & Associates. On the question as to whether the suit land was ancestral land, counsel cited the Supreme Court of Kenya pronouncement in *Kieba Vs M'Lintari & Another* [2018] KESC 22 (KLR) and submitted that the appellant and the respondents were brothers, adding that the appellant lawfully obtained the suit land from their father [the late Baruga]. Counsel argued that the trial court overlooked the fact that the late Baruga's ancestral land was situated in Katheri Location and not in Ntima Location where the suit land is located. Counsel further faulted the trial court for overlooking the fact that the suit land was bought by the late Baruga in the late 1960s and could not therefore have been ancestral land. Counsel argued that the respondents failed to discharge the burden of proving that the suit land was ancestral land.
14. Counsel for the appellant argued that the respondents did not object to their father giving the appellant the suit land during a family meeting, adding that there was no objection during the lifetime of the late Baruga.
15. Counsel submitted that the appellants failed to adduce evidence to prove that the appellant obtained the suit land through fraud. Citing Sections 107 and 109 of the *Evidence Act*, counsel submitted that the respondents bore the burden of proving fraud in the registration of the appellant as proprietor of the suit land. Citing various decisions, counsel for the appellant submitted that an allegation of fraud must be specifically pleaded and proved to a standard that is above the balance of probabilities. Counsel contended that the respondents failed to prove fraud. Counsel urged the court to allow the appeal.

### **Respondents' Submissions**

16. The respondents filed written submissions dated 13/3/2025 through M/s Mwirigi Kaburu & Co Advocates. Citing the Supreme Court of Kenya pronouncement in *Kieba V M'Lintari & another* [supra], counsel for the appellants submitted that the respondents were able to prove that the suit land was family land. Counsel added that all the three siblings who were parties to the suit in the lower court were born and raised on the suit land. Referring to the record of appeal, counsel submitted that the appellant testified during cross-examination that the suit land was not bought but was "gathered" and that they were "brought up at Mwiteria on Ntima/Igoki/1089 [the suit land]."
17. Counsel for the respondents submitted that whereas the appellant alleged that the family's ancestral land was in Katheri Location, he failed to produce any green card relating to any family land held in the said Location in the name of their deceased father. Counsel made reference to page 66 of the record of appeal and submitted that DW2 testified that they were all brought up at Mwiteria and that although the suit land belonged to all of them [the 7 siblings], their father "decided otherwise". Counsel argued that the trial court was correct in holding that the suit land was ancestral and therefore trust land.
18. Observing that all the three siblings were born and raised on the suit land, counsel added that during the construction of the bypass tarmac road, the 2nd respondent was compensated by the Government when his house which stood on the suit land was demolished. Counsel added that during the lifetime



of the late Baruga, neither of the respondents was sued nor evicted from the suit land, adding that both parents of the three siblings were buried on the suit land.

19. Citing the testimony of DW1 in which he stated that he did not have evidence of any consent or minutes of any family meeting relating to the impugned transfer, counsel for the respondent submitted that the transfer of the suit land to the appellant was secretive. Counsel argued that the intention of the two parties who were privy to the transfer was to deprive the respondents of their right to family land. Counsel argued that the actions of the duo fits within the Black's Law Dictionary definition of fraud. Counsel added that the appellant conceded in his testimony that other family members were not aware and were not consulted before the suit land was secretly transferred to the appellant. Citing the Court of Appeal pronouncement in *Peter V Kamacho & Another KECA 1003 (KLR)*, counsel urged the court to find that transfer of the suit land to the appellant was fraudulent. Counsel urged the court to dismiss the appeal.

### **Analysis and Determination**

20. I have read and considered the original record of the trial court; the primary record of appeal and the supplementary records of appeal; the grounds of appeal; and the parties' respective submissions. I have also considered the relevant legal frameworks and the jurisprudence relevant to the key issues in the appeal. The two key issues that fall for determination in the appeal are:
- (i) Whether land parcel number Ntima/Igoki/1089 is ancestral and family land that was held in trust for the family of the late Nyange Baruga, also known as M'Nyange Baruga; and
  - (ii) Whether the transfer of the said land to the appellant was procured fraudulently. I will analyse and dispose the two issues sequentially in the above order. Before I do that, I will briefly outline the principle that guides this court when exercising jurisdiction as a first appellate court.
21. The task of a first appellate court was summarized by the Court of Appeal in the case of *Susan Munyi v Keshar Shiani (2013) eKLR* as follows:
- “As a first appellate court our duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. We are to analyze, evaluate, assess, weigh, interrogate and scrutinize all of the evidence and arrive at our own independent conclusion.
22. The principle was similarly outlined in *Abok James Odera t/a A J. Odera & association v John Patrick Machira t/a Machira & Co Advocates [2013] eKLR* as follows:-
- “This being a first appeal, we are reminded of our primary role as a first appellate court, namely to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons either way.”
23. The appellant and the two respondents are siblings. They are sons of the late Nyange Baruga also known as M'Nyange Baruga. The respondents filed the suit which culminated in this appeal because they were aggrieved by the transfer of the suit land from the name of their father [the late Baruga] to the name of the appellant. They contended that the suit land was ancestral and family land that was held by their late father under customary trust for the benefit of his seven children and for his own benefit. They further contended that the suit land is where they had their homes. The defence of the appellant was that the suit land was not ancestral and family land. He contended that their father purchased the



suit land from the late M'Ringera and owned it absolutely. It was his case that the transfer of the suit land to him was lawful.

24. Customary trusts are some of the overriding interests that do not require mandatory noting in the land register. They are provided for under Section 28 of the *Land Registration Act* in the following terms:

“28. 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. rights of way, rights of water and profits subsisting at the time of first registration under this Act;
- d. natural rights of light, air, water and support;
- e. rights of compulsory acquisition, resumption, entry, search and user conferred by any other written law;
- f. leases or agreements for leases for a term not exceeding two years, periodic tenancies and indeterminate tenancies;
- g. charges for unpaid rates and other funds which, without reference to registration under this Act, are expressly declared by any written law to be a charge upon land;
- h. rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription;
- i. electric supply lines, telephone and telegraph lines or poles, pipelines, aqueducts, canals, weirs and dams erected, constructed or laid in pursuance or by virtue of any power conferred by any written law; and
- j. any other rights provided under any written law.”

25. The approach to take and the key factors to consider in determining whether a claim of a right to land qualifies as a customary trust were outlined by the Supreme Court of Kenya in *Kiebia v M'Lintari & Another* [2018] KESC 22 (KLR) as follows:

“Flowing from this analysis, we now declare that a customary trust, as long as the same can be proved to subsist, upon a first registration, is one of the trusts to which a registered proprietor, is subject under the proviso to Section 28 of the Registered *Land Act*. Under this legal regime, (now repealed), the content of such a trust can take several forms. For example, it may emerge through evidence, that part of the land, now registered, was always reserved for family or clan uses, such as burials, and other traditional rites. It could also be that other parts of the land, depending on the specific group or family setting, were reserved for various future uses, such as construction of houses and other amenities by youths graduating into manhood. The categories of a customary trust are therefore not closed. It is for the court to make a determination, on the basis of evidence, as to which category of such a trust subsists



as to bind the registered proprietor. 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 v. 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.
5. The claim

26. In the suit giving rise to this appeal, the 2nd respondent testified as PW1 and the duo closed their case at that point. The appellant testified as DW1 and led evidence by his sister, Charity Nkatha, who testified as DW2. The 2nd respondent identified the 7 children of the late Baruga and stated that they were all born and raised on the suit land. They lived on the suit land at the time of trial. He added that he had his home on the suit land.

27. On his part, the appellant gave the following verbatim evidence which was a sharp contradiction of his pleadings:

“I do not know the history of the land. I don’t know where my father got the land from. I can’t tell if my grandfather gathered the land. The land was not bought but gathered.”

28. Asked questions on past occupation of the suit land, the appellant confirmed that they were all brought up at Mwiteria on the suit land, and further confirmed that his brothers had settled on the suit land. He stated thus:

“My brothers have settled on 1089. They built their houses long ago when my parents were alive. My parents have been buried on the land”.

29. DW2 who was called by the appellant as his witness, similarly, sharply contradicted the appellant’s case by testifying as follows during cross-examination:

“We have been brought up on Mwiteria. The land belonged to all of us (7). This was family land but my father decided otherwise.”

30. Besides the above contradictions, whereas the appellants pleaded that their father bought the land, no evidence of the alleged purchase was tendered. Instead, the appellant corroborated the respondents’ case to the effect that the suit land was gathered and subsequently registered in the name of the late Baruga during land adjudication. DW2 supported the respondent’s case to the effect that prior to the impugned transfer, the suit land was family land.



31. The totality of the evidence on record is that, the respondents were able to demonstrate that the suit land was ancestral and family land that was occupied by the family of the late Baruga and was held by the late Baruga in trust for himself and for his immediate family members. That is the finding of the court on the first issue.
32. Was the transfer of the suit land to the appellant procured fraudulently? The court has made a finding to the effect that the suit land was ancestral and family land that was home to the late Baruga and to all his seven (7) children. It was not available for transfer to the appellant as the sole absolute proprietor. Both the appellant and the late Baruga knew that fact. The appellant nonetheless caused the suit land to be secretly conveyed to him as an absolute proprietor and did not acknowledge the customary trust when his siblings questioned the transfer. PW1 testified that the other family members who resided on the suit land were not aware of the secret transfer, adding that the respondents learnt about the impugned transfer when the appellant filed a suit seeking eviction orders against them.
33. The respondents contended that there was no consent of the land control board, adding that at the time of the impugned transfer, their father who was illiterate was a drunkard. The appellant did not bother to tender, as evidence, the documents that conveyed the suit land to controvert the specific allegations that had been made against the transfer through evidence. He did not bother to tender, as evidence, the minutes of the alleged family meeting in which the late Baruga decided to gift the suit land to the appellant. The evidence on record sufficiently proved a scheme to defraud the respondents who had their homes on the suit land which, as found, was trust property under customary trust.
34. In the end, for the above reasons, I do not find merit in this appeal. The appeal is rejected and dismissed.
35. On costs, the appellant and the two respondents are siblings. There is need to promote reconciliation and family harmony within the family of the late Baruga. For this reason, the court decrees that parties do bear their respective costs of the appeal.

**DATED, SIGNED AND DELIVERED AT MERU THIS 2ND DAY OF JULY, 2025**

**B M EBOSO**

**JUDGE**

In the presence of

Mr. Otieno holding brief for Mr. Mwirigi Kaburu for the Respondent

Ms Bett holding brief for Mr. Kiogora Arithi for the Appellant

Court Assistant – Tupet.

