



REPUBLIC OF KENYA



**Gatihi v Gichuki & 2 others (Environment and Land Appeal 008 of 2022)  
[2025] KEELC 6074 (KLR) (19 September 2025) (Judgment)**

Neutral citation: [2025] KEELC 6074 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYERI  
ENVIRONMENT AND LAND APPEAL 008 OF 2022  
JO OLOLA, J  
SEPTEMBER 19, 2025**

**BETWEEN**

**MARGARET WANJUGU GATIHI ..... APPELLANT**

**AND**

**MATHEW MAINA GICHUKI ..... 1<sup>ST</sup> RESPONDENT**

**JOSEPH NDEGWA GICHUKI ..... 2<sup>ND</sup> RESPONDENT**

**MARTIN GICHUKI NDEGWA ..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. This is an Appeal arising from the judgment of Hon. M.N. Munyendo, PM as delivered on 18<sup>th</sup> February 2022 in Othaya MCL&E case No. E001 of 2021.
2. By a Plaint dated 16<sup>th</sup> February 2021, Margaret Wanjugu Gatihi (the Appellant herein) had sought judgment against the Respondents for:
  - a. A permanent injunction restraining the Defendants, their agents, servants, family or any other person claiming under them from trespassing, tilling, wasting, occupying, alienating and or claiming land parcel No. Othaya/Kiandemi/193;
  - b. General damages for trespass and use of the suit property;
  - c. Costs of the suit and interest thereon at court rates; and
  - d. Such other or further relief as the Honorable Court may deem fit to grant.
3. The basis for those prayers was the Appellant's contention that the said Othaya/Kiandemi/193 was registered in the name of her husband one Daniel Gatihi Gichuki (now deceased) during his lifetime on 6<sup>th</sup> September 1971. Following Daniel's demise on 1<sup>st</sup> May 2016, the Appellant was registered as the proprietor by way of transmission on 27<sup>th</sup> July 2020 and was issued with a title on 10<sup>th</sup> August 2020. It



was the Appellant's case that prior to the death of the deceased, the three (3) Respondents trespassed onto the suit property and started planting Napier grass thereon.

4. But in their Statement of Defence and Counterclaim dated 20<sup>th</sup> April, 2021, Mathew Maina Gichuki, Joseph Ndegwa Gichuki and Martin Gichuki Ndegwa (the Respondents) averred that the Appellant was registered as proprietor of the Suitland subject to their unregistered interests thereon.
5. By way of their Counterclaim, the Respondents sought for:
  - a. A declaration that the Plaintiff holds the Suitland in trust for herself and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants in equal shares and determination of the said trust by an order for the subdivision and transfer of the Suitland accordingly; and
  - b. Costs and Interests.
6. Having heard the dispute and in her judgment rendered on 18<sup>th</sup> February 2022, the Learned Trial Magistrate found in favour of the Respondents and allowed the Counterclaim as prayed with no order as to costs.
7. Aggrieved by the said determination, the Appellant moved to this court and lodged the Memorandum of Appeal dated 4<sup>th</sup> March 2022 urging this court to set aside the judgment on some five (5) grounds listed as follows:
  1. That the Learned Trial Magistrate failed to address her mind to the pleadings on record and evidence by the Appellant particularly towards the purchase and first registration of the Suitland. A miscarriage of justice was occasioned;
  2. That the Learned Trial Magistrate erred in law and fact by failing to consider and evaluate the entire evidence as well as supporting documents presented by the Appellants, a miscarriage of justice was occasioned;
  3. That the Learned Trial Magistrate erred in law and fact by taking the position of the litigants, giving evidence and determining the suit on the said evidence, occasioning a gross miscarriage of justice;
  4. That the Learned Magistrate erred in law and fact in dismissing the Appellant's case whereas the Appellant had tendered sufficient evidence to warrant the orders sought; and
  5. That the Learned Trial Magistrate erred in law and fact in granting the prayers sought in the Respondents Counterclaim whereas there was no sufficient evidence to warrant the said orders.
8. The primary duty of a first appellate court such as this is to re-evaluate the entire evidence and arguments presented before the trial court, analyze them independently and arrive at its own conclusions while still giving due consideration to the trial court's original findings [see *Selle & Another –vs- Associated Motor Boat Co. Ltd and Others* (1968) EA 123].
9. I have accordingly carefully perused and considered the Record of Appeal as well as the judgment rendered in the Lower Court. I have similarly perused the submissions placed before the court by the Learned Advocate acting for the Appellant. I was unable to find any submissions on the part of the Respondents.
10. In her suit in the Lower Court, the Appellant had sought for orders of a permanent injunction restraining the three Respondents, their servants and/or agents from trespassing, tilling, wasting,



occupying, alienating and/or claiming the parcel of land known as Othaya/Kiandemi/193. In addition, the Appellant had sought general damages for trespass against the Respondents.

11. It was the Appellant's case that her husband the late Daniel Gatihi Gichuki had purchased the suit property around the year 1958 after which the same was registered in his name. The Appellant told the court that following the demise of her husband on 1<sup>st</sup> May 2016, she was registered as the proprietor of the said property by transmission on 27<sup>th</sup> July 2020. It was further her case that prior to the death of her husband, the Respondents had trespassed onto the suit property and had started planting napier grass thereon.
12. On their part, the Respondents rejected the claim that they had trespassed onto the suit property. They told the court that they were on the land as a matter of right as the same was their ancestral land. The Respondents asserted that the Appellant's husband had been registered as the proprietor of the suit property to hold the same in trust for herself and the Respondents in equal shares.
13. Having considered the issues raised before the court, the Learned Trial Magistrate came to the conclusion that a customary trust existed at the time of the registration of the suit property and therefore determined that the Respondents were equally entitled to their share of the property.
14. As was held by the Court of Appeal in *Muthuita –vs- Muthuita* (1982-88) 1 KLR 42, customary law trust is proven by leading evidence on the history of the suit property and the relevant customary law on which the trust is founded.
15. In the matter herein, it was not in dispute that the Appellant's deceased husband was a brother to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and an uncle to the 3<sup>rd</sup> Respondent. According to the Appellant, the Respondents had trespassed onto the suit property before her husband's death in the year 2016. While she did not tell exactly when the alleged trespass occurred, it was clear that the Respondents had been using a large portion of the suit property for a long period of time.
16. According to the Respondents, the suit property initially belonged to Gichuki Gatihi who was the father of the husband to the Appellant as well as the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. It was their case that at the point of land consolidation and demarcation in the year 1958, their father owned two parcels of land and since one could only be registered as the owner of one parcel their father opted to register his eldest son, the Appellant's husband as the owner of the suit property. It was however their case that the entire family continued using the suit property and that in the 1980s they started growing tea thereon.
17. It was indeed telling that in her Further Statement dated 16<sup>th</sup> July 2021 as filed in court on 4<sup>th</sup> August, 2021, the Appellant confirms that the Respondents were indeed growing tea on the Suitland in the 1980s. At Paragraph 6 to 9 of that statement (page 82 to 83 of the Record) the Appellant states as follows:

“We built our home in the Suitland in the year 1973, planted tea bushes, trees and fenced the property. But we relocated to Mombasa around the year 1977 and left the Suitland to my mother-in-law to keep harvesting the tea.

Sometime in 1980, I came back home from Mombasa when my late mother-in-law, Leah Wachinga told me that the 2<sup>nd</sup> Defendant wanted to plant tea leaves in the said farm but my late father-in-law Gichuki Gatihi stopped him indicating and confirming in my presence that the Suitland belonged to my husband.

But the house was later demolished by the Defendants and other unknown person and they planted more tea leaves. The Defendants have since harvested and sold off the trees as well as destroyed the fence.



We have over the years tried to have the defendants move out but they have refused. Whenever we called the family meetings to discuss the ownership and use of the subject property, the Defendants failed to attend and even the intervention of the Chief has borne no fruits leading to the filing of the instant case before this Honourable Court.”

18. Arising from the foregoing and even assuming that the Appellant was right that the Respondents only trespassed onto the land around 1980, it would mean that the Respondents had been using their portions of the suit property for some 36 years before the Appellant’s husband passed away in the year 2016. The Appellant does not explain why her husband who was the registered proprietor of the land all that time did not take any legal action against his brothers and why she now imagines herself to be the right person after transmission to stop them from utilizing the land.

19. Having considered the circumstances herein, one cannot but agree with the Learned Trial Magistrate’s conclusion at paragraph 21 of the judgment wherein she found as follows:

“21. That said, the two competing theories sharply differed on under what circumstances the title was registered in the names of the deceased. The Plaintiff claimed the land was bought from Gichuki Mambo. No witness was availed to support this claim. The closest was PW2 who only presented hearsay evidence that he heard from his father that the deceased had purchased a parcel of land. I am persuaded that the suit property was family land before registration. There is continued use of the property by the defendants who are brothers to the deceased and have used the land since the 1950s. If the land belonged to the deceased, he would have taken legal steps to stop his brothers from utilizing the land since the 1980s. He did not until he met his death in 2016. This in my view demonstrates that he knew it was family land and, in his wisdom, opted not to take steps to disturb the status quo during his lifetime. I find so.”

20. As it were, trusts including customary law trusts are overriding interests recognized under Section 28 of the Land Registration Act 2012 and which need not be noted in the register. As was stated by the court in the case of Kanyi –vs- Muthiora (1984) KLR 712:

“The registration of the land in the name of the Appellant under the Registered Land Act (Cap 300) did not extinguish the Respondents’ right under Kikuyu Customary Law and neither did it relieve the Appellant of her duties or obligations under Section 28 of the Act.”

21. In the premises, I was not persuaded that the Learned Trial Magistrate had erred either in law or in fact in her finding that the suit property was subject to an existing customary trust and that the Respondents were entitled to their shares thereof.

22. Accordingly, it is my finding that this Appeal is devoid of merit. I dismiss the same with costs to the Respondents.

**JUDGEMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT MOMBASA THIS 19<sup>TH</sup> DAY OF SEPTEMBER, 2025**

.....\*\*.

**J.O. OLOLA**  
**JUDGE**



In the presence of:

- a. Ms. Firdaus Court Assistant.
- b. Ms. Nanjala Advocate holding brief for Mr. Ombogi Advocate for the Appellant
- c. Ms. Matata Advocate holding brief for Mr. C.M. Kingori Advocate for the Respondents

