



Matingo & another v Mutisya & 2 others (Environment and Land Case Civil Suit E096 of 2021) [2025] KEELC 6059 (KLR) (18 September 2025) (Judgment)

Neutral citation: [2025] KEELC 6059 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND CASE CIVIL SUIT E096 OF 2021
CA OCHIENG, J
SEPTEMBER 18, 2025**

BETWEEN

JOHN MUTHIANI MATINGO 1ST PLAINTIFF

PETER MUMO MUTWIWA 2ND PLAINTIFF

AND

JACKSON MUNYAO MUTISYA 1ST DEFENDANT

MUOKA MATHEKA 2ND DEFENDANT

KIOKO MATHEKA 3RD DEFENDANT

JUDGMENT

1. The Plaintiffs commenced this suit vide a plaint dated 9th November 2021. They are legal representatives of the estate of one Mbai Maingi (deceased), who was a step-brother to Daniel Matheka Maingi (deceased), whose estate is represented by the 1st Defendant while the 2nd and 3rd Defendants are sons of Daniel Matheka Maingi. The said step-brothers (hereinafter referred to as Daniel and Mbai Maingi - both deceased) were sons of Maingi Ndawa (deceased).
2. The Plaintiffs contend that Mbai Maingi(deceased) acquired the parcel of land known as Mitaboni/ Mitaboni /2555, hereinafter referred to as the 'suit land', but it was registered in the name of his late brother Daniel to hold in trust for him, thus it forms part of his estate and the Defendants have no right over it.
3. They seek judgement against the Defendants for:
 - a. An order declaring that the land known as Mitaboni/Mitaboni/2555 was registered to the late Daniel Matheka in trust for the late Mbai Maingi and therefore it is now part of the estate of the late Mbai Maingi.



- b. An order dissolving the trust in the registration of the aforesaid land and revocation and cancellation of the said title by the Land Registrar Machakos to pave way for distribution of the said land to the heirs of the late Mbai Maingi in the respective succession proceedings.
 - c. An order of eviction against the 2nd and 3rd Defendants, their agents, servants or anyone claiming in their name or that of the late Daniel Matheka to vacate the land known as Mitaboni/Mitaboni/2555 or be forcefully removed.
 - d. Costs of this suit and any other relief that this court deems just and fit to grant.
4. The 1st Defendant filed a Statement of Defence dated 20th January 2022. He admitted the Plaintiffs' claim and contended that the Plaintiffs' case should be allowed only to the extent of dissolving the trust in contention, giving the Plaintiffs 50% of the suit land and dividing the remainder in equal shares between the beneficiaries of the estate of Daniel (deceased) and his father, Benjamin Mutisya (deceased) since they assisted the late Mbai Maingi to reclaim the suit land, when it was claimed by Muindi Mbingu (deceased).
 5. The suit is also opposed by the 2nd and 3rd Defendants who filed a joint Statement of Defence dated 10th February 2022. They denied the averments contained in the plaint and contended that the 1st Defendant is an imposter to the estate of Daniel (deceased) as he is neither a Defendant nor a beneficiary of the said estate. They contended that their father the late Daniel is the bonafide legal owner of the suit land and that the Plaintiffs and 1st Defendant's relationship with Daniel (deceased) is so remote to make their claim for trust idle.
 6. The Plaintiffs filed a reply to the 2nd and 3rd Defendants' Statement of Defence. They contended that the 1st Defendant was issued with a Limited Grant under Section 54 Rule 14 of the 5th Schedule of the Law of Succession Act, thus he has locus.

Evidence of the Plaintiff

7. The 1st Plaintiff testified as PW1. He adopted his witness statement and his further witness statements as his evidence in chief and produced the Plaintiffs' list and bundle of documents dated 9th November 2021 as Exhibit 1-23 and a further list and bundle of documents dated 21st March 2022 as Exhibit 24-31 respectively.
8. He stated that he is the son of Matingo Mbai who was son of Mbai Maingi with his first wife Ndanu Maingi (all deceased). Further, that they lived in Mutondoni since he was born and the late Daniel used to visit Mbai Maingi on the suit land. It was his testimony that at some point, the late Daniel moved his livestock into the suit land and employed a worker known as Kikandu to take care of the said animals. Further, that he also moved his wife to the suit land and Mbai Maingi gave them his hut and constructed another one.
9. He explained that the 2nd and 3rd Defendants, who are sons of the late Daniel attended Mutondoni primary school with him. He insisted that the 2nd Defendant was not brought up on the suit land and only commenced residing thereon, when he became a teacher at Mwang'a Primary School, which is close to the suit land. He insisted that the 2nd Defendant later on constructed a permanent house when Mbai Maingi and Daniel passed on and when the family of Daniel sought to know why he constructed the said house, he claimed ownership of the suit land by virtue of registration of the same in their late father's name.
10. During cross-examination, PW1 asserted that growing up, he knew that the suit land belonged to his grandfather (Mbai Maingi), as he would go there on Fridays after school and he'd meet up with his



cousins. He did not know when land adjudication was undertaken in Mitaboni area but confirmed that the late Daniel was the Chairman of the Land Adjudication Committee. He denied knowledge of an alleged dispute between his grandfather Mbai Maingi and one Muindi Mbingu. He however claimed that following the said dispute, it was agreed that the suit land was to be registered in the name of Daniel in trust for his brother Mbai Maingi.

11. He further confirmed that his grandfather (Mbai Maingi) passed on and was buried in his home in Lita. It was his further testimony that his grandfather had two homes but his first wife stayed in Lita. He clarified that from 1969 upto 1982, no one from the Mbai Maingi's family set foot on the suit land because Daniel was in charge of it, since Mbai Maingi had allowed him to graze thereon. He did not know when the 2nd Defendant put up a house on the suit land but confirmed that the said suit land is registered in the name of Daniel.
12. PW2 Daniel Mailu Maingi adopted his witness statement as his evidence in chief. He explained that Maingi Ndawa was his father from his seventh wife Ndunge Maingi while Mbai Maingi was his brother, born of the first wife Ndanu Maingi. He testified that Mbai Maingi acquired the suit land even before Daniel became an adult and he was grazing his cattle thereon. Further, that Mbai Maingi's second wife later joined him on the suit land and they constructed a structure where they lived.
13. During cross-examination, PW2 reiterated that the suit land belongs to Mbai Maingi and that Daniel only had grazing rights.
14. PW3 Julius Kitavi Ndolo adopted his witness statement as his evidence in chief. He confirmed that he was born in 1941 and at the time, he knew that the suit land belonged to Mbai Maingi. He explained that their home was a walking distance to Mbai Maingi's home and he knew his children very well. Further, that the entire village knew that the suit land belonged to Mbai Maingi.
15. During cross-examination he was categorical that he saw Mbai Maingi on the suit land in 1951 and insisted that Muindi Mbingu's land borders the suit land. He did not know where Mbai Maingi was buried as he was in school when he died. He knew Daniel but he had not stepped foot on the suit land since 1969 and he did not know who is currently in possession.
16. PW4 who was the 2nd Plaintiff adopted his witness statement as his evidence. He confirmed that he was born in 1972 and is the son of Josiah Mutwiwa Mbai, son of Mbai Maingi. He claimed that on 12th December 2013, Joseph Mulu Mbai, the eldest son of Mbai Maingi called the family members of the house of Rebecca Mutania, the 2nd wife of Mbai Maingi and told them that he wanted them to subdivide the suit land amongst themselves. Further, since the 2nd Defendant had a house on the suit land, they consulted him but he claimed that the suit land belonged to his father Daniel. It was his testimony that that his father (Josiah Mutwiwa Mbai) had written the history of the suit land in a note book.
17. In cross-examination, PW4 stated that his grandfather (Mbai Maingi) died in 1969, so he never met him. Further, that his grandfather had three wives and the two plaintiffs were from the household of Rebecca. He explained that prior to 2013, no one claimed the suit land as they knew it belonged to Mbai Maingi. He confirmed that the family of Daniel declined to attend clan meetings called to resolve the dispute surrounding the suit land.
18. PW5 Peter Munyao Muli, who was a Chief, adopted his witness statement as evidence in chief. He confirmed that on 11th November 2014, he was in a meeting in the D. O's Office to discuss the dispute surrounding the family of Daniel and Mbai Maingi. Further, that the meeting had been convened at the request of Joseph Mulu Mbai, a son of the late Mbai Maingi who complained that the children of Daniel were illegally claiming ownership of the suit land at Uungani. He stated that following



- discussions, it was determined that the property belonged to Mbai Maingi. The meeting was also attended by the family of Mbai Maingi and the D.O Kathiani, while Daniel's family failed to attend despite being invited.
19. He pointed out that on 11th February 2021, a Clan meeting was convened by Joseph Mulu and he attended as a representative of the provincial administration but the family of Daniel failed to attend the said meeting. He explained that it was decided that though the land belonged to Mbai Maingi, the family of Daniel deserved a 50% share as a token of appreciation since they assisted Mbai Maingi in resolving the dispute over the said land with one Muindi Mbingu.
 20. In cross-examination, PW5 stated that he was born in 1961, he did not know Mbai Maingi and does not know when he died. He confirmed that the minutes of the meeting of 2014 were recorded by the secretary to the District Officer. He did not have a copy of summons inviting Daniel's family to the said meeting but he insisted that he did invite them and recorded the findings of the said meeting in a report in his capacity as Chief.
 21. PW6 Nyali Musyoki adopted his witness statement as his evidence. He stated that his late father (Musyoki Maingi), was brother to Mbai Maingi and had been Mbai Maingi's neighbour since 1940's and as a family, they have always known Mbai Maingi as the owner of the suit land. It was his testimony that they joined their late father at Kinyau, Mitaboni in 1946 to assist him to herd cattle. Further, that his uncle Mbai Maingi was also rearing livestock in the subject land and they lived peacefully with their family during his lifetime though he had another house in Lita, Kathiani.
 22. It was his testimony that sometimes before independence, Mbai Maingi invited his brother Daniel to graze his cattle and goats on the suit land. Further, that Mbai Maingi later passed on before land adjudication and issuance of titles. He claimed Daniel would later become the Chairperson of the Land Adjudication Committee and he used his powers to grab land from the residents of Mitaboni location and registered the suit land in his name and had agreed to do so in trust for the family of Mbai Maingi but after he passed on, his sons have refused to distribute the land.
 23. During cross-examination, PW6 stated that after Mbai Maingi passed on, one of his daughters stayed on the suit land but later left for Lita. He reiterated his evidence in Chief that Mbai Maingi owned the suit land.

Evidence for the Defendants

24. The 2nd Defendant testified as DW1. He adopted his witness statement as his evidence in chief and produced the 2nd and 3rd Defendant's list of documents dated 10th February 2022 as Exhibit 1-16. He confirmed that Daniel Matheka was his father who died intestate and had one wife with nine (9) children. He insisted that the 1st Defendant is neither a dependant nor a beneficiary of his father's estate but he fraudulently petitioned for Letters of Administration Ad Litem vide Machakos Succession Cause No. E049 of 2021.
25. It was his testimony that he was born in 1952, raised by his father on the suit land and in 1967, he built his permanent home where he resides with his family while Mbai Maingi lived in Lita and did not have a home on the said suit land. He further insisted that the suit land was solely owned by his late father Daniel through acquisition in the year 1936 or thereabouts and during the lifetime of his father, Mbai Maingi never laid any proprietary claim on the said suit land, never occupied it and his dependants including his own children did not lay claim on it until 2014 when the Plaintiffs started laying ownership claims after fraudulently collecting the original title deed from the Machakos District Land registry without the 2nd and 3rd Defendants consent or knowledge.



26. He averred that in 1966, Mbai Maingi was authorized by his late father out of brotherly love to graze his flock of sheep on the suit land, which was occasioned by lack of pasture and drought at his residence in Lita. Further, that he grazed from 1966 to 1969 when he passed away and was buried in Lita. He contended that Mbai Maingi's son collected all the sheep and took them back to their home in Lita. He claimed that he then continued to graze undisturbed on the suit land from 1969 to 2014 and that the suit land is registered in his father's name absolutely as he acquired it solely.
27. He pointed out that the Plaintiffs' filed Citation Cause No. 333 of 2015 at Machakos, claiming that they had a common and joint interest in the estate of Daniel (deceased) and vide an order issued on 25th January 2016, together with one Mulu Mbai, they were granted leave to petition for Letters of Administration in respect of the said estate. They later commenced Succession Cause No. 469 of 2016 at the Chief Magistrate's Court at Machakos and were granted Letters of Administration on 15th December 2017 but following the 3rd Defendant and his protest to Confirmation of Grant to the Plaintiffs and Mulu Mbai, it was revoked vide a Consent Order recorded on 28th August 2019.
28. In cross –examination, DW1 stated that he started working as a teacher in 1974 after he finished form four in 1973. Further, that he attended Mutondoni Primary School which is in Lita, a distance of over twenty (20) kilometers from the suit land. He confirmed that he studied with the 1st plaintiff in the same school.
29. He averred that the District Officer through the letter dated 29th June 2016 directed the Defendants to release the title to the suit land to the 1st Plaintiff. He stated that he did not attend the clan meeting of 11th February 2021 and that all his deceased siblings including parents were buried in Lita, as the land there is almost thirty (30) acres while the suit land is about seventy (70) acres and no one has built thereon except him. He clarified that he did not build his home on the suit land in 1967 as he had claimed during the examination in chief. He also confirmed that the Certificate of Title for the suit land was issued in 2014. He denied receiving proceedings for Citation and denied ever refusing to take out Letters of Administration Intestate. It was his further testimony that when he was teaching at Mwang'a Primary School near the suit land, he stayed in some of the mud huts left by Mbai Maingi but demolished them and put up a permanent house.
30. The 1st Defendant testified as DW2 and adopted his witness statement and his further witness statement as his evidence in chief. He said that his father, Benjamin Mutisya Maingi was the son of Maingi Ndawa with his first wife Ndanu and a brother to Mbai Maingi. He explained that the land at Mutondoni was for families of the seven (7) wives of Maingi Ndawa but people started moving out in search for more land.
31. It was his testimony that his father (Benjamin) bought land at Mutondoni and moved there leaving the son of Daniel on his portion. Further, that since grazing land had become scarce, Mbai Maingi and his step brother Daniel left for the Uungani land where each acquired a parcel. He claimed that there was a dispute between Muindi Mbingu and Mbai Maingi over the suit land and since Mbai Maingi was illiterate, he called his father and Daniel to assist him in the case. Further, after the dispute, Daniel and his father requested Mbai Maingi to allow them bring their cattle to graze on the said land as well as live thereon with him and he agreed. It was his further testimony that later in the 1970's Daniel became the Chairman of the Land Adjudication Committee and registered the suit land in his name as trustee of Mbai Maingi. He claimed that Daniel's son became a teacher at Mwang'a, Primary, which is a school near the suit land and he moved into his father's small hut on the said suit land. He was categorical that the suit land belongs to Mbai Maingi. He concurred with the clan's decision that the suit land should be shared out by three parties being his father including the estates of Daniel Matheka and Mbai Maingi.



32. He was categorical that the 2nd Defendant was not born on the suit land but in Lita where his father was buried. He confirmed that the Plaintiffs applied to court to nominate him as administrator since the 2nd and 3rd Defendants refused to take out Letters of Administration Intestate.
33. In cross-examination, DW2 reiterated his evidence in chief and stated that he had not filed a counterclaim.

Submissions

Plaintiffs' Submissions

34. In their submissions, the Plaintiffs reiterated their evidence and submitted that they had established that the registration of the suit land in the name of Daniel (deceased) was subject to a customary trust under Section 28 of the [Land Registration Act](#). They contended that the suit land was acquired by Mbai Maingi (deceased) and that at the time of acquisition, the 2nd and 3rd Defendants' father, the late Daniel was very young. Further, that during adjudication, Mbai Maingi had already passed away thus his brother the late Daniel was registered in trust for him.
35. They further contended that they had established that their relationship to Daniel and Mbai Maingi (both deceased) was not remote. On the validity of the 1st Defendant's Grant, they submitted that it remains valid as it was issued by a Honourable Court and the Order issuing it has not been appealed against. To buttress their averments, they relied on the following decisions: *George Mbiti Kiebia & Another v Isaya Theuri M'lintari & Another* [2014] eKLR and *Samson Ndambo Ngugi v Anthony Muchina Kamau & Another* [2021] eKLR.

Defendants' Submissions

36. The 1st Defendant did not file written submissions.
37. On their part, the 2nd and 3rd Defendants provided a background of the dispute herein and submitted that the Plaintiffs failed to discharge their duty to establish a trust under Section 107 of the [Evidence Act](#), since a trust is a question of fact, which must be established by evidence and the legal burden to establish it lies with the person asserting it. To this end, they submitted that the Plaintiffs did not meet the principles for establishment of trusts as stated in the case of *Isaack Kieba M'Inanga v Isaaya Theuri M'Lintari & Another* [2018] eKLR.
38. They submitted that on their part, they led evidence that the late Mbai Maingi only grazed on the suit land from 1966 to 1969, when he died while the 2nd Defendant has lived thereon since 1967 without objection. They pointed out that there is no evidence to show any of the dependants of Mbai Maingi settled or utilized the suit land since his passing in 1969, which in their view illustrates that the suit land is not family land but private land belonging to the estate of Daniel.
39. They also submitted that the Plaintiffs' relationship to the late Mbai Maingi is remote on the basis that he had ten (10) sons from his three (3) wives and apart from Joseph Mulu (PW2), none of them claimed ownership of the suit land.
40. On the validity of the Limited Grant issued to the 1st Defendant to be sued as a nominee under Section 54 of the [Law of Succession Act](#), they submitted that there is no evidence that surviving children of Daniel (deceased) were unable to petition for Letters of Administration of his estate thus nominating the 1st Defendant was done in secrecy and in cahoots with the Plaintiffs and its firm of advocates on record, who also acted for the 1st Defendant on the issue of obtaining the Limited Grant so as to validate and advance their non-existent claim of alleged customary trust.



Analysis and Determination

41. Upon consideration of the Plaint, Statements of Defence, testimonies of the witnesses, exhibits and rivalling submissions, the main issue for determination is whether the Plaintiffs have established the existence of a customary trust over the suit land, which is registered in the name of Daniel Matheka (deceased).
42. The Plaintiffs allege that the 2nd and 3rd Defendants' father, Daniel Matheka (deceased) is registered as a proprietor to the suit land in trust for the late Mbai Maingi who is their grandfather. While the 1st Defendant acknowledges the alleged trust, he claims that his father, Benjamin Mutisya (deceased) is also entitled to a ¼ share of the suit land on the basis that his father and Daniel Matheka assisted Mbai Maingi in a case where the suit land was claimed by one Muindi Mbingu. However, I note he did not file a counterclaim to that effect.
43. On their part, the 2nd and 3rd Defendants claim that their late father (Daniel Matheka) solely acquired the suit land, which is registered in his name. They contend that Mbai Maingi had a short grazing stint on the suit land between 1966 and 1969 but when he passed on in 1969, he was buried at Lita, where his larger family lived. They insist that the Plaintiffs have not established any relationship to create an element of customary trust.
44. The Plaintiffs' witnesses being PW1, PW2, PW3 and PW4 all claimed that the suit land belonged to Mbai Maingi who had invited Daniel to graze thereon. They confirmed that the Plaintiffs were grandchildren of Mbai Maingi. PW6 Nyali Musyoki stated that his late father (Musyoki Maingi), was brother to Mbai Maingi and had been Mbai Maingi's neighbour since 1940's and as a family, they have always known Mbai Maingi as the owner of the suit land. It was his testimony that they joined their late father at Kinyau, Mitaboni in 1946 to assist him to herd cattle and his uncle Mbai Maingi was also rearing livestock in the subject land. He testified that sometime before independence, Mbai Maingi invited his brother Daniel to graze his cattle and goats on the suit land. Further, that Mbai Maingi later passed on before adjudication process and issuance of titles. He claimed Daniel would later become the Chairperson of the Land Adjudication Committee and he used his powers to register the suit land in his name but agreed to do so in trust for the family of Mbai Maingi, yet after he passed on, his sons have refused to distribute the said land.
45. PW5 who was a local Chief in his testimony confirmed to have attended a meeting in the local D. O's Office to discuss the dispute surrounding the family of Daniel and Mbai Maingi. Further, that the meeting had been convened at the request of Joseph Mulu Mbai, a son of the late Mbai Maingi who complained that the children of Daniel were illegally claiming ownership of the suit land at Ungani. It was his testimony that after the meeting, it was resolved that the suit land belonged to Mbai Maingi. He explained that on 11th February 2021, a Clan meeting was convened by Joseph Mulu and he attended as a representative of the provincial administration but the family of Daniel failed to attend. He explained that, it was decided that though the land belonged to Mbai Maingi, the family of Daniel deserved a 50% share as a token of appreciation since they assisted Mbai Maingi in resolving the dispute over the said land with one Muindi Mbingu.
46. DW1 confirmed to be the son of Daniel but insisted that the 1st Defendant is neither a dependant nor a beneficiary of his father's estate but fraudulently petitioned for Letters of Administration Ad Litem vide Machakos Succession Cause No. E049 of 2021. It was his testimony that he was born in 1952, raised by his father on the suit land and in 1967, he built his permanent home where he resides with his family, while Mbai Maingi lived in Lita and did not have a home on the said suit land. He insisted that the suit land was solely owned by his late father Daniel through acquisition in the year 1936 or



thereabouts and during the lifetime of his father, Mbai Maingi never laid any proprietary claim on the said suit land, never occupied it and his dependants including his own children did not lay claim on it, until 2014, when the Plaintiffs started laying ownership claims.

47. He insisted that in 1966, Mbai Maingi was authorized by his late father out of brotherly love to graze his flock of sheep on the suit land, which was occasioned by lack of pasture and drought at his residence in Lita. Further, that he grazed from 1966 to 1969 when he passed away and was buried in Lita. However, in cross examination he admitted that he studied with the 1st plaintiff in the same school, never attended the Clan meeting of 11th February 2021 and that all his deceased siblings including parents were buried in Lita. Further, that no one has built on the suit land save for him. He further clarified that he did not build his home on suit land in 1967 as earlier claimed but later on. He further confirmed that when he was teaching at Mwangi Primary School near the suit land, he stayed in some of the mud huts left by Mbai Maingi but demolished them and put up a permanent house.
48. DW2 explained that his father, Benjamin Mutisya Maingi was the son of Maingi Ndawa with his first wife Ndanu and a brother to Mbai Maingi. He claimed that there was a dispute between Muindi Mbingu and Mbai Maingi over the suit land and since Mbai Maingi was illiterate, he called his father and Daniel to assist him in the resolution of the said dispute. Further, after resolution of the dispute, Daniel and his father requested Mbai Maingi to allow them bring their cattle to graze on the said land as well as live thereon with him and he agreed. It was his further testimony that later in the 1970's Daniel became the Chairman of the Land Adjudication Committee and registered the suit land in his name as trustee of Mbai Maingi. He was categorical that the suit land belongs to Mbai Maingi. He was emphatic that the 2nd Defendant was not born on the suit land but in Lita.
49. On customary trust, the Court of Appeal in the case of Mbui Mukangu v Gerald Mutwiri Mbui [2004] eKLR stated that:
- “Customary trust is a concept of intergenerational equity where the land is held by one generation for the benefit of succeeding generations.”
50. While the Supreme Court laid down the prerequisites for the existence of a customary trust in Isack Kieba M’Inanga v Isaaya Theuri M’Lintari & another [2018] eKLR and stated thus:
- “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 is directed against the registered proprietor who is a member of the family, clan or group.”



51. The Supreme Court further stated as follows at paragraph 54 of the decision;
- “We’re entitled to enquire into the circumstances of registration, to establish whether a trust was envisaged.”
52. While applying the aforementioned decision in *Muraguri & 5 others v Macharia* [2023] KECA 384 (KLR), the Court of Appeal stated that:
- “In effect, possession, or occupation or usage of the land is no longer a requirement to establish a customary trust.”
53. Based on the facts as presented while associating myself with the decisions cited and applying them to the circumstances at hand, I find that the Plaintiffs as grandchildren of Mbai Maingi indeed had a relationship with Daniel Matheka, who was Mbai Maingi’s stepbrother and I hence disagree with the 2nd and 3rd Defendants averments that the Plaintiffs have not proved any relationship with Daniel Matheka. Further on the issue of customary trust, from the admission of the DW1 during cross examination that he had resided on some huts on the suit land which had been constructed by Mbai Maingi and only demolished them to put up a permanent structure, I find that Mbai Maingi had indeed established a home on suit land, prior to his demise in 1969. Further, that the suit land was under the land adjudication process process by the time Mbai Maingi died.
54. I further wish to reproduce an excerpt from the minutes of the Clan meeting held in Lita on 11th February, 2021, deliberated on the dispute herein, which was produced as an exhibit, they found thus:
- “The chairman held extensive consultations with the elders present in the meeting i.e Daniel Mailu Maingi, Kingoo (brother) and others. They highlighted how Mr. Mbai acquired the land and stayed in the land around 1920 until 1969 when he died in the same land. Before M. Mbai Maingi died in 1969 there was a boundary dispute between him and the late Muindi Mbingu an influential character in the colonial government. This prompted Mr. Mbai Maingi to call his brothers (Benjamin Mutisya Maingi and Daniel Matheka Maingi) to come and join and help him counter Mr. Muindi Mbingu legally at the colonial court. They managed to win the case and thereafter occupied the land.”
55. From the averments of DW1, he claimed his father purchased the suit land in 1936 and invited Mbai Maingi thereon in 1966. I note Daniel died in 1982 when he was sixty eight (68) years old, which means he acquired the suit land when he was only twenty two (22) years old and invited a much older brother to the said land to graze. To my mind, this does not seem feasible. From the evidence of DW2 who was a brother to both Mbai Maingi and Daniel Matheka, he confirmed that indeed Mbai Maingi had allowed Daniel Matheka and his father to graze on the suit land since they had assisted him with the dispute with Muindi Mbingu.
56. It is my considered view that the registration of the suit land in the name of Daniel Matheka in 2014, did not defeat the fact that the said land had initially belonged to Mbai Maingi, prior to registration. I opine that the Plaintiffs have indeed demonstrated the elements of customary trust, since they had established that prior to the registration of the suit land, it was used by Mbai Maingi who allowed Daniel Matheka to also graze thereon. I hence find that the registration of the suit land in the name of Daniel (deceased) was subject to a customary trust under Section 28 of the *Land Registration Act*.
57. To my mind, I find that the Plaintiffs’ connection to the Mbai Maingi and Daniel Matheka’s family is substantial and not remote as claimed by the 2nd and 3rd Defendants. Further, that it is immaterial



that they were not in possession of the suit land at the point of its registration since they were entitled to ownership or other beneficiary rights to the said land. I also find that the current claim is against the estate of Daniel Matheka, whose son registered the land in the deceased name and the registration was undertaken after his demise. I hence find that the existing Customary trust over the suit land indeed constituted an overriding interest, which bound the said land regardless of registration status in the name of Daniel Matheka (deceased).

58. In the foregoing, I find that the Plaintiffs have proved their claim on a balance of probability and will enter judgement in their favour as against the Defendants, in the following terms:

- a. An order be and is hereby issued declaring that the land known as Mitaboni/Mitaboni/2555 was registered to the late Daniel Matheka in trust for the late Mbai Maingi and therefore it is now part of the estate of the late Mbai Maingi.
- b. An order be and is hereby issued dissolving the trust in the registration of the aforesaid land and revocation and cancellation of the said title by the Land Registrar Machakos to pave way for distribution of the said land to the heirs of the late Mbai Maingi in the respective succession proceedings.
- c. An order be and is hereby issued that the estate of Mbai Maingi and Daniel Matheka to equally share the suit land Mitaboni/ Mitaboni/ 2555.
- d. An order of eviction is hereby issued against the 2nd and 3rd Defendants, their agents, servants or anyone claiming in their name or that of the late Daniel Matheka to vacate half portion of the land known as Mitaboni/Mitaboni/2555 or be forcefully removed.
- e. Each party to bear their own costs.

DATED SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 18TH DAY OF SEPTEMBER 2025

CHRISTINE OCHIENG

JUDGE

In the presence of:

King'oo for 2nd and 3rd Defendant

King'oo Wanjau for Plaintiff

Court Assistant: Joan

