



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MERU**

**ELC APPEAL NO. E002 OF 2024**

**M'MPARATA M'IKIRIMA .....**  
**APPELLANT**

**=VERSUS=**

**JULIUS NTIKA..... 1ST**  
**RESPONDENT**

**STANLEY KIREMA..... 2ND**  
**RESPONDENT**

***(An appeal against the Judgment of the Principal Magistrate Court at Maua [Hon. A.G. Munene] rendered on 16/11/2022 in Maua Chief Magistrate Court Environment and Land Case Number 205A of 2015)***

**JUDGMENT**

**Introduction**

- 1.** The three parties to this appeal are siblings. The appeal challenges the judgment rendered on **16/11/2022** by the **Principal Magistrate Court at Maua [Hon. A.G. Munene - PM]** in **Maua CMC Civil Case No. 205A of 2015**. The appellant was the defendant in the said case. The two respondents were the plaintiffs. The key issue that fell for

determination by the trial court was whether land parcel number **Njia/Kiegoi/48**, measuring approximately 3.44 hectares [*hereinafter referred to as “the suit land”*] was trust property held under customary trust by the appellant, in trust for the respondents and for himself. The trial court made a finding in the affirmative. Invariably, this is the key issue that falls for determination in this first appeal. Before I analyze and dispose the issue, I will outline a brief background to the appeal and the grounds of appeal. I will also summarize the parties’ respective submissions in the appeal.

### **Background**

- 2.** Through a plaint dated 9/9/2015, the respondents instituted **Maua CMC Civil Case No. 205A of 2015** against the appellant, seeking: (i) an order directing the appellant to transfer 2 acres to each of the respondents out of the suit land; (ii) an order of permanent injunction restraining the appellant and his servants/agents against entering into or interfering with the suit land; and (iii) costs of the suit and interest thereon.
- 3.** The case of the respondents was that, the suit land was ancestral and family land that was allocated to their late father, **M’Mparata M’Ikirima**, by their clan in the early 1960s and their late father agreed to have the land registered in the name of the appellant who was his first born son, to hold it in trust for his [their late father’s] five sons. They stated that they had lived on the suit land continuously since the 1960s and they had developed their respective portions of the suit land.

- 4.** The respondents contended that the appellant had refused/failed/neglected to transfer to them their respective portions of the suit land and had at one point blatantly disregarded the trust by using the title to the suit land as security for a loan he took. The respondents added that at one point, they initiated proceedings against the appellant in the Land Disputes Tribunal and they were awarded an order requiring the appellant to transfer to them their respective portions. They stated that on appeal, the Provincial Appeals Committee ordered that the dispute be heard afresh by the District Land Disputes Tribunal because the signature of one of the Tribunal Members was missing. The Tribunals were abolished before hearing the dispute afresh.
- 5.** The appellant filed two statements of defence dated 2/10/2015 and 9/3/2022, respectively, in which he contested the respondents' claim. He contested the respondents' allegation that the suit land was ancestral and family land that he held in trust for himself and for his siblings. It was his case that he gathered the suit land during land adjudication and consolidation process after which he was registered as the absolute proprietor of the suit land. He urged the trial court to dismiss the respondents' claim.
- 6.** Upon concluding trial and upon receiving submissions from the parties, the trial court rendered the impugned judgement in which it reached a finding that the suit land was trust property registered in the name of the appellant to hold it on behalf of members of his late father's family. The trial court added that the trust which existed was a customary trust which did not

require noting in the land register. The trial court awarded each of the respondents the 2 acres they had each sought.

## **Appeal**

7. Aggrieved by the judgment and decree of the trial court, the appellant lodged an appeal in the High Court at Meru, to wit, **Meru High Court Civil Appeal No. 167 of 2022**. When the appeal came up for judgment before the High Court [Gitari J], the High Court rendered a ruling dated 19/7/2024 in which it held that it lacked jurisdiction to hear and determine the appeal. Vide the said ruling, the High Court transferred the appeal to the Environment and Land Court for disposal. None of the parties in the appeal challenged the ruling of the High Court transferring the appeal to this court.

## **Grounds of Appeal and Reliefs**

8. The appellant raised the following 9 verbatim grounds of appeal
  - 1) ***The Learned Magistrate erred in law and in fact in failing to find that the appellant is the rightful and legal owner of land parcel No. Njia/Kiegoi/48 measuring approximately 9.75 acres.***
  - 2) ***The Learned Magistrate erred in law and fact in directing that the appellant do transfer 2 acres of land parcel Njia/Kiegoi/48 to each of the respondents and the same to be registered in their names.***
  - 3) ***The Learned Magistrate erred in law and in fact by finding that land parcel no. Njia/Kiegoi/48 is ancestral land being held under customary trust by the appellant for the respondents herein.***

**4) The Learned Magistrate erred in law and in fact by finding that the appellant has any legal claim over the suit land herein.**

**5) The Learned Magistrate erred in law and fact by proceeding on the wrong principles when he found out that the respondents herein had any cause of action against the appellant herein.**

**6) The Learned Magistrate erred in law and fact by directing that the court administrator to execute all the relevant documents to cause subdivisions and transfer of the sad (sic) 2 acres to each of the appellants.**

**7) The Learned Magistrate erred in law and fact by finding that the appellant hasn't suffered any damage and loss arising from the respondents' illegal occupation of the appellant's land.**

**8) The Learned Magistrate erred in law and in fact in that he failed to consider the appellant's submissions on both points of law and fact.**

**9) The Learned magistrate erred in law and fact in arriving at his said decision.**

- 9.** The appellant urged this court to allow the appeal and set aside the impugned judgment in its entirety and decree the respondents to bear the costs of the appeal.

### **Appellant's Submissions**

- 10.** The appeal was canvassed through written submissions dated 22/1/2024, filed by **M/s Mutembei & Kimathi Advocates.**

Counsel for the appellant submitted that the appellant was the registered proprietor of the suit land, observing that he was issued with a title on 29/8/1983. Counsel stated that during trial, the appellant explained how he acquired the suit land, adding that the appellant gathered the suit land in 1963, hence it was not family land and did not belong to the appellant's father. Counsel argued that the appellant explained how the respondents entered the suit land, stating that, since the respondents were his family members, he gave them a portion of the suit land to live on because they were destitutes after they relocated from Ntingirai with their late father.

- 11.** Counsel added that the respondents' contention that the suit land belonged to their late father was untrue because their late father had never lived on the suit land and never laid a claim over the suit land during his lifetime. Citing Sections 26 and 27 of the repeated **Registered Land Act**, counsel submitted that the appellant was the absolute proprietor of the suit land. Counsel argued that the respondents failed to explain why they did not pursue their claim between 1983 [**when the title was issued to the appellant**] and 2005 [**when they lodged a claim in the Tribunal**]
- 12.** Counsel faulted the respondents for failing to lead corroborative evidence by other family members, adding that their evidence was biased. Counsel submitted that the 2nd respondent confirmed in his evidence that, initially they did not reside on the suit land, a fact which the trial court ignored. Counsel argued that the respondents failed to demonstrate how their

late father acquired the suit land yet he did not reside close to it.

- 13.** Citing the pronouncement of the **Supreme Court of Kenya** in ***Isack M'Inanga Kiebia v. Isaaya Theuri M'Lintari & another [2018] eKLR***, counsel submitted that the trial court erred in holding that the respondents had a claim over the suit land. Counsel submitted that it emerged from the trial court proceedings that the appellant's father was offered the suit land by their Clan Land Committee but he refused to take the land, adding that the suit land was not family land prior to adjudication. Counsel argued that because the appellant had his own family, he was eligible to acquire land. Counsel added that transfer of part of the suit land to the respondents would amount to a violation of the appellant's rights under **Article 40** of the Constitution. Lastly, counsel submitted that the appellant stood to suffer loss and damages if part of the suit land was transferred to the respondents, adding that the appellant had invested immensely on the suit land.

### **Respondents' Submissions**

- 14.** The respondents filed written submissions dated 28/11/2023 through ***M/s Maitai Rimita & Co. Advocates***. Counsel for the respondents summarized the oral and the documentary evidence which the respondents tendered before the trial court, including the verbatim proceedings in the **Land Disputes Tribunal Case**. Citing the pronouncement of the **Supreme Court of Kenya** in ***Isack M'Inanga Kiebia v Isaya Theuri M'Lithari & another [supra]*** and the pronouncement of the Environment and Land Court in ***Charity Machaki Kaugi &***

***Another v. Dickson Nyaga Kaugi [2019] eKLR***, counsel submitted that the registration of the appellant as proprietor of the suit land did not make him the sole and exclusive owner of the suit land.

- 15.** Counsel argued that the appellant and the respondents were siblings who had lived on the suit land since 1960s, adding that the suit land was given to the parties' late father by the parties' ***Muramba Clan*** in the 1960s. Counsel added that the parties' father authorized the suit land to be registered in the name of the appellant who was his first-born son, to hold it in trust for himself and for the respondents. Counsel argued that the appellant had not asked the respondents to vacate the suit land because he acknowledged that the land originated from their clan and he knew that he held the suit land in trust for himself and for the respondents. Counsel urged the court to reject the appeal.

### **Analysis and Determination**

- 16.** I have read and considered the original record of the trial court; the record filed in this appeal; the grounds of appeal; and the parties' respective submissions. I have also considered the relevant legal frameworks and the prevailing jurisprudence on the key questions in the appeal. As observed in the opening paragraph of this judgment, the key issue to be determined in this first appeal is whether the suit land is trust property held under customary trust by the appellant in trust for himself and for his siblings. Before I analyse and dispose the issue, I will outline the principle that guides this court when exercising appellant jurisdiction.

17. The task of a first appellate court was summarized by the Court of Appeal in the case of ***Susan Munyi v Kehsar 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 conclusions.”***

18. The principle was similarly outlined in ***Abok James Odera t/a A J Odera & Associates 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.”***

19. The equitable concept of customary trust in the African Communities in Kenya has been the subject of discourse in a number of judicial pronouncements, starting with ***Obiero v. Opiyo [1972] EA 227*** and immediately followed by ***Esiroyo v. Esiroyo [1973] EA 388***. The jurisprudence that prevailed up to early 1980s was that: (i) the registration of land under the now repealed **Registered Land Act (Cap 300)** extinguished customary rights to the land for all purposes; (ii) rights under customary law or such rights as existed prior to registration were not overriding interests under **Section 30** of the repealed **Registered Land Act**; and (iii) the trust envisaged under the

provision of Section 28 of the repealed **Registered Land Act** was the one recognized under English common law and doctrines of equity; and (iv) African customary law was incapable of creating a trust to which a registered proprietor would be subject after registration of land.

**20.** In early 1980s, the Court of Appeal altered the prevailing jurisprudential trajectory through its pronouncements in ***Kanyi v. Muthiora***[1984] **KLR 712**. **Chesoni JA** made the following pronouncement:

***“The registration of the suit land in the name of Kanyi under the Registered Land Act did not extinguish Nyokabi’s rights under the Kikuyu customary law. Kanyi was not relieved from her duty or obligation to which she was as a trustee to Muthiora’s land; see provisions to Section 28 of the Act”***

**21.** **Nyarangi Ag. JA** was more emphatic when he made the following pronouncement in the above:

***“I doubt like Madam JA did in *Kiama v. Mathuya*... if rights under customary law are excluded by Section 30 of this Act. Had the Legislature intended that customary law rights were to be excluded, nothing would have been easier for it to say so. I would say any valid rights are included in Section 30 of the Act just as a trustee referred to in Section 28 of the Act could not fairly be***

***interpreted and applied to exclude a trustee under customary law”***

**22.** In early 2000s, the **Court of Appeal** affirmed the new interpretation in ***Mbui Mukangu v. Gerald Mutwiri Mbui [2004] eKLR.***

**23.** The **Supreme Court of Kenya** made an in-depth analysis of the concept and interpreted the law with clarity in 2018 in ***Isack M’Inanga Kiebia v. Isaaya Theuri M’Lintari & another [2018] eKLR*** 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 is directed against the registered proprietor who is a member of the family, clan or group.**

**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 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 sanctity, since they are**

***already recognized by statute as overriding interests.***

***In the foregoing premises, it follows that we agree with the Court of Appeal's assertion that "to prove a trust in land; one need not be in actual physical possession and occupation of the land." A customary trust 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 Section 30(g) of the Registered Land Act.***

**24.** The registration that is the subject of this appeal happened in August 1983 under the **Registered Land Act**. It happened as a culmination of the land adjudication exercise. In his evidence, the 1st respondent [**PW1**] stated that the suit land was allocated to their late father by their clan around or between 1960-1962 and it was agreed that the land was to be registered in the name of the appellant to hold it in trust and share it to his five siblings. **PW1** stated that he entered the suit land in 1963 while in Class 5. It was his evidence that he had lived on the suit land since then, for decades. He had developed his 2-acre portion of the suit land. He produced the following four exhibits (i) letter from the Chief; (ii) letter from the DC; (iii) verbatim proceedings of the Land Disputes Tribunal relating to Meru North Land Disputes Tribunal Case No. 91 of 2005; and (iv) official search relating to the suit land.

**25.** The exhibited proceedings bear the verbatim evidence of **Isack M'Awanga**, a member of the **Land Adjudication Committee**

that allocated the suit land during the land adjudication exercise. His verbatim testimony at the Tribunal reads as follows:

***“The plaintiffs and the respondents are brothers. The disputed land is among land parcels that were allocated to people in the 1960. The party’s (sic) late father opted to have the disputed land registered to the respondent to hold the same on trust for himself and the plaintiffs. I was one of the Land Adjudication Committee which allocated land parcels during then (sic). That is why I know very well on what basis was the disputed land allocated to the respondent. That is all what I know and I came to testify.”***

- 26.** The court notes that only two out of the three elders signed the proceedings and award of the Tribunal. It was for this reason that the Provincial Appeals Committee directed a fresh hearing. The court takes this fact into account.
- 27.** The 2nd respondent’s [PW2’s] evidence was by and large similar to that of PW1 save that he stated that he entered the suit land in 1970 at age 12.
- 28.** The appellant’s evidence was that he gathered the suit land in the “year 1963 thereabouts” [see page 1 of his written witness statement]. He contended that at the time of gathering the suit land, their late father had relocated to Ntingiri with their mother and the respondents. He added that their late father and the respondents returned to the land in 1970s and he gave their late father a portion of the suit land ***“out of respect, to rebuild as his home as he was in his old age and wanted***

**to be near his relatives in his last years.”** The appellant added thus:

**“In the year 1982 thereabouts my father passed on and subsequently the plaintiffs [respondents] were left on the portion that I had allowed him to occupy and they have been in occupation of the same to date although I am the sole legal and registered owner”.**

**29.** In his oral evidence during re - examination, the appellant stated the following:

**“My father refused to have the land registered in his name. I then gathered the land for myself. I got in the land in 1962. My father used to live in Tingali with other children. I allowed him to come to the land when he got old”.**

**30.** It is clear from the above verbatim evidence of the appellant that, during land adjudication, their late father was the person entitled to be recorded and registered as proprietor of the suit land. Refusal to be registered as proprietor would not have arisen if the appellant's late father was not entitled to be so registered. Clearly the appellant was not truthful in contending that their late father never had any interest in the suit land and it was him (the appellant) who gathered the suit land. The appellant was not truthful when he contended that he gathered the suit land.

**31.** Secondly, the appellant gave the following testimony about occupation of the suit land by his late father and his family.

**“At the time of gathering my father had even relocated to Ntingirai with the plaintiffs**

***herein and our mother having disowned me and they all lived there until early 1970s when he moved back with the family and I gave him a portion of my land out of respect, to rebuild as his home as he was in his old age and wanted to be near his relatives in his last years”***

- 32.** Relocation to Ntingirai and moving back to the suit land by the appellant’s late father would not have arisen if the appellant’s late father did not reside on the land prior to his stint at Ntingirai. The logical inference from the appellant’s testimony is that his late father lived on the suit land prior to his short stint at Ntingirai and went back to the suit land after the short stint at Ntingirai.
- 33.** It does also emerge from the evidence on record that at the time the suit land was registered in the name of the appellant in August 1983, the respondents were in actual possession and in actual occupation of the suit land. By dint of their possession and occupation of the land as at 1983, their customary rights were protected under Sections 28 and 30 of the repealed Registered Land Act. They have remained in possession and occupation of the suit land since then. The appellant has never attempted to eject them through legal proceedings.
- 34.** Having reviewed the evidence on record and having evaluated the evidence against the law, this court, like the trial court, comes to the finding that the appellant holds the suit land in trust for himself and for his siblings. I find no basis for interfering with the findings of the trial court.

**35.** On costs, the appellant and the respondents are siblings. This appeal is before court because the parties' late father caused family land to be registered in the name of one of his sons. The dispute would not have been in this court if he had caused the land to be registered in his own name. For this reason, parties will bear their respective costs of the appeal.

**36.** For the above reasons, this appeal is rejected and dismissed for lack of merit. Parties will bear their respective costs of the appeal.

**DATED, SIGNED AND DELIVERED AT MERU THIS 16TH DAY  
OF SEPTEMBER, 2025**

**B M EBOSO [MR]**

**ELC JUDGE**