



REPUBLIC OF KENYA



**KENYA LAW**  
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**Ndonga v Kanyi (Environment and Land Appeal 44 of 2021)  
[2025] KEELC 6075 (KLR) (19 September 2025) (Judgment)**

Neutral citation: [2025] KEELC 6075 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYERI  
ENVIRONMENT AND LAND APPEAL 44 OF 2021  
JO OLOLA, J  
SEPTEMBER 19, 2025**

**BETWEEN**

**ISAAC MACHARIA NDONGA ..... APPELLANT**

**AND**

**EUSEBIA WAGITIE KANYI ..... RESPONDENT**

**JUDGMENT**

1. This is an Appeal arising from the judgment of the Hon. M.N. Munyendo, PM delivered on 15<sup>th</sup> October 2021 in Othaya PMELC Case No. 4 of 2019.
2. By a Plaint dated 31<sup>st</sup> January 2019, Eusebia Wagitie Kanyi [the Respondent herein] had sought the following:
  - i. A declaration that Land Parcel No. Othaya/Itemeini/413 was held by Ndonga S/o Charambu in trust for Gachogu Charambu to the extent of ½ share thereof;
  - ii. That the said interest be set aside for the estate of Gachogu S/o Charambu and the same be registered to the name of Eusebia Wagitie Kanyi, the administrator to the estate of Gachogu S/o Charambu; and
  - iii. Costs to the Plaintiff.
3. Upon hearing the dispute, and in her judgment delivered on 15<sup>th</sup> October 2021, the Learned Trial Magistrate allowed the Respondent's claim with no order as to costs.
4. Aggrieved by the said determination, Isaac Macharia Ndonga [the Appellant] moved to this court vide a Memorandum of Appeal dated 11<sup>th</sup> November, 2021 urging this court to set aside the said judgment on some six [6] grounds listed as follows:



1. The Learned Trial Magistrate erred in law and fact in holding that the land parcel number Othaya/Itemeini/413 was held by Ndonga S/o Charambu in trust for Gachogu Charambu;
  2. The Learned Magistrate erred in law and fact in finding that the Plaintiff has a right to be registered as beneficiary;
  3. The Learned Magistrate erred in law and fact in concluding that Charambu was buried in the suit property as it is a family land;
  4. The Learned Magistrate erred in law and in fact [in] failing to appreciate that Gachogu Charambu had moved and settled in Meru before land consolidation was done;
  5. The Learned Magistrate erred in law and in fact in failing to find [that] the Plaintiff's evidence was hearsay as she was born and raised in Meru [and] not in Witima Location; and
  6. The Learned Magistrate erred in law and in fact in not considering the evidence of the Defendant.
5. As it were, the duty of the first appellate court is to re-evaluate the evidence which was adduced in the trial court and to arrive at its own independent conclusion bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand [See *Selle & Another v Associated Motor Boat Co. Ltd and Others* [1986] EA 123].
  6. I have accordingly carefully perused and considered the Record of Appeal as well as the judgment that is under Appeal. I have similarly perused and considered the submissions and authorities placed before the court by the Learned Advocates representing the parties herein.
  7. By her suit as instituted in the Lower Court, the Respondent had sought for a declaration that the parcel of land known as Othaya/Itemeini/413 was held by Ndonga S/o Charambu in trust for her father, one Gachogu Charambu to the extent of half a share thereof. She urged the court to settle the trust and to have the half share of the land registered in her name as the Administrator of the Estate of the said Gachogu Charambu.
  8. It was the Respondent's case that during the period of land consolidation, demarcation and registration, the Appellant's father – Ndonga S/o Charambu was registered as proprietor of the suit property to hold the same in trust for the family of Charambu Ndonga.
  9. While conceding that his father and the father to the Respondent were brothers being the sons of the said Charambu, the Appellant denied that the suit property was registered in the name of his father to hold in trust for the Respondent's family. He told the court that his father was a businessman and that the father had bought the land before it was registered in his name as the absolute proprietor thereof.
  10. Considering the question of customary trust in *Isack Kieba M'Inanga v Isaaya Theuri M'Lintari & Another* [2018] eKLR, the Supreme Court held as follows:
 

“ 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; and
  5. The claim is directed against the registered proprietor who is a member of the family, clan or group.”
11. From a perusal of the judgment, it was apparent that the trial court was cognizant of the above decision. Having cited the same, the Learned Trial Magistrate found as follows at paragraph 18 to 21 of the judgment:
- “ 18. From the above, I drew one conclusion that the suit property was family land this was compounded by the fact that the patriarch Charambu was buried in Witima same location as where the suit property sits. I was thus persuaded that Charambu he was buried on the suit property;
  19. The second aspect is not in dispute that Gachogu Charambu and Ndonga Charambu were biological brothers. They were closely related. This dispenses with the third consideration demonstrated that the parties herein are first cousins they each represent the interests of their deceased fathers. Thus the claim is justified in the circumstances;
  20. The Court is also required to assess whether the claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances. The Plaintiff is the daughter to Gachogu Charambu and represents his interest in the suit property. Since I have found that the suit property was family land, as one of the sons to Charambu he would have a right to be registered as a beneficiary. It is not strange that Ndonga Charambu was registered as the proprietor during land consolidation in 1958 noting that he was the eldest son to Charambu; and
  21. Lastly, the defendant has been sued as the legal representative to the estate of Ndonga Charambu, I find that the claim is properly lodged against him.”
12. I did however find great difficulty in reaching the same conclusion as that of the trial court. As the Court of Appeal stated in *Muthuita v Muthuita* [1982-88] 1 KLR 42, customary law trust is proved by leading evidence on the history or root of the suit property and the relevant customary law on which the relevant customary law on which the trust is founded and to which the claimants subscribe. A trust can never be implied by the court unless the intention to create a trust in the first place is clear.
13. In the matter before me, there was indeed no dispute that Ndonga Charambu and Gachogu Charambu were brothers. From the Respondent’s own witness testimonies, it was clear that when Gachogu Charambu came of age, he moved away from Witima in Othaya and went and settled in Meru. The Respondent and her witnesses were clear that the movement happened before the period of land consolidation and demarcation. Thus in 1958 when Ndonga became registered as the proprietor of the suit property, his brother was already settled in Meru.



14. While the Learned Trial Magistrate held that the Suitland was family property as the patriarch Charambu was buried on the land, I was unable to find the basis of such a conclusion. While the Respondent stated that the family patriarch was buried in the suit property, no evidence was adduced in support of such a position. In his testimony before the court, the Appellant told the court that he was born in the year 1944 and that he never met his grandfather Charambu and he did not know where he was buried. The Respondent who told the Court she was born in 1967 did not disclose the source of her claim that the patriarch was buried on the Suitland.
15. In the absence of any concrete evidence to show that the property was once family land, it was difficult to come to the conclusion that there was any trust created for the benefit of the Respondent. While the court blamed the Appellant for not providing any evidence of an agreement for sale of the suit property, I did not think there was any requirement for an agreement entered into in the year 1958 to be in writing.
16. It follows that I am persuaded that the Learned Trial Magistrate fell in error in coming to the conclusion that the Respondent had proved the existence of a customary trust.
17. Accordingly, I find merit in the Appeal, set aside the judgment delivered on 15<sup>th</sup> October 2021 and substitute the same with a judgment dismissing the Respondent's claim in the Lower Court.
18. The Appellant shall have the costs of the suit in the Lower Court as well as for this Appeal.

**JUDGMENT 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. Mrs. Maina Advocate for the Appellant
- c. No Appearance for the Respondents

