



**In re Estate of Samuel Mithanga Watene (Family Appeal E004 of 2024)  
[2025] KEHC 2119 (KLR) (Family) (6 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 2119 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYANDARUA  
FAMILY  
FAMILY APPEAL E004 OF 2024  
CM KARIUKI, J  
FEBRUARY 6, 2025  
IN THE MATTER OF THE ESTATE OF SAMUEL MITHANGA WATENE**

**BETWEEN**

**HANNAH MUTHONI MITHANGA ..... APPELLANT**

**AND**

**TIMOTHY MUGO WATENE ..... RESPONDENT**

**RULING**

1. Before you for determination is the Appellant's Appeal brought before this Honourable Court vide a Memorandum of Appeal dated 19th March 2023. The Memorandum is based on the following grounds:
  - i. That the Learned Magistrate erred in law by failing to find that the Respondent's claim sought declaration orders of the existence of trust for which his court being a probate court lacked jurisdiction to hear and determine.
  - ii. That the Learned Magistrate erred in law and fact by failing to find that issues arising from and related to trust in land fall under the ambit and jurisdiction of the Environment and Land Court and not the probate Court.
  - iii. That the learned Magistrate erred in law and fact by failing to find that the Respondent relying on a trust, ought to have filed separate proceedings to articulate his claim in the correct forum.
  - iv. That the Learned Magistrate erred and misdirected himself both in law and in fact by failing to appreciate that the Respondent is neither a dependant nor a beneficiary of the Estate of the deceased.



- v. That the learned Magistrate erred in law and fact by failing to appreciate that the protestors are neither beneficiaries nor dependants of the deceased needed to prove the existence of trust and thereafter seek revocation of grant.
- vi. That the Learned Magistrate erred in law and in fact by failing to find that succession proceedings were not appropriate for the resolution of a contested claim against the deceased's estate by third parties.
- vii. That the Learned Magistrate erred in law and in fact by ruling that the protestors are entitled to half of the estate of the deceased that is Land Reference Number Nyandarua/Wanjohi/547 whereas they are neither beneficiaries nor dependant of the estate of the deceased.

### **Appellant's Submissions**

2. Based on the grounds on the face of the Memorandum of Appeal, it was submitted that the following are the issues that arise and would require your determination:
  - i. Whether a probate Court has jurisdiction to hear and determine trust issues.
  - ii. Whether the Respondent is a dependant and or a beneficiary of the estate of the deceased.
  - iii. Whether the alleged trust has been proved to show that the deceased held the estate in trust for himself and the Respondent.
3. On the first issue reliance was placed on the case of *The Late Jonathan Kinyua Waititu (Deceased) 2017 eKLR, Re Estate Samuel Kathieri (Deceased) (2019) eKLR, Re Estate of Solomon Mwangi Waweru (Deceased) (2018) eKLR*.
4. The Appellant's argument is that the claim sought declaratory orders regarding the existence of trust in land which was held in the name of the deceased. It was averred that the issues raised solely lay under the ambit and jurisdiction of the Environment and Land Court and not the Probate court as was the case here, it is therefore submitted that a distinction ought to be made between a claim against the estate of a deceased and a claim on inheritance in respect of the estate of the deceased.
5. On the second issue, it was contended that the Respondent does not fall under the definition of dependant as provided in Section 29 of the Succession Act, and therefore he is not entitled to the estate of the deceased as a dependant. Reliance was placed on *Beatrice Ciamutua Rugamba v Fredrick Nkari Mutege & 5 others [2016] eKLR, Re Estate of Njuguna Igwima (2017) eKLR*.
6. It was contended that the Respondent, was not a dependant of the deceased because in the trial Magistrate's proceedings nowhere did he state that he was depending on the deceased prior to his death. In fact, the Respondent stated that he did not live on the deceased estate but only came to visit. They prayed that this Honourable Court finds that the Respondent is not a beneficiary and or a dependent on the deceased estate and therefore not entitled to benefit from it.
7. On the last issue, reliance was placed on the case of *Patrick Mbaso v Meshack Odhiambo Mbaso & another [2020] eKLR, Peter Ndungu Njenga vs. Sophia Watiri Ndungu [2000] eKLR*.
8. It was stated that the burden of proving that the deceased was registered as the proprietor of the suit land in trust lay squarely on the Respondent. However, the Respondent herein did not prove that there was trust created on LR No Nyandarua/Wanjohi/547 in the name of the deceased and or that the suit property was ancestral clan land. His only contention was that they lived on the property since they were born, which is not sufficient to prove the existence of trust.



## Respondent's Submissions

9. The Respondent submitted that the grounds of appeal raised by the petitioner raise two issues for determination thus: -
  - a. Whether the court lacked jurisdiction to hear and determine the issues raised by the Respondent touching on customary trust
  - b. Whether the Respondent herein is a dependant for purposes of succession
  - c. Are the protestors dependants of the estate?
10. It was stated that the petitioner had alleged that the court erred in its decision in holding that the Respondent and his family were dependants of the deceased estate thus they were entitled to inherit. Reliance was placed on Section 29 of the [Law of Succession Act](#). The Respondent asserted that he and his family lived on the subject land, tilled thereon and even buried their kin on the land. In evidence it arose that the mother to the deceased lived on the land till the time of her demise, her children lived thereon and even her grandchildren. They depended on the said land for their livelihood and even after the deceased demise in 1973 they continued to live on the land and they lived on lower side whereas the Appellant lived on the upper part.
11. It was asserted that in her testimony before the lower court, the Appellant stated she occupied the upper part of the land and she even made her nephew move from where had built as he was supposed to build on the lower part which was their part therefore it is clear that the Respondent and his family met the criteria stipulated in Section 29(2) of the Succession Act
12. On jurisdiction, it was averred that the Appellant has alleged that the lower court lacked jurisdiction to determine the issue raised in the protest as they touched on trust and that the same ought to have been dealt with in a different forum. Reliance was placed on Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd. (1989).
13. The Respondent contended that the lower court was well seized with jurisdiction in this matter. Further, the Respondent herein and his family are dependants of the estate of the deceased herein. It was asserted that Section 26 of the [Law of Succession Act](#) gives the court power to order that a reasonable provision be made for any dependant from the deceased net estate if it is of the opinion that the dependant is not adequately provided for. Section 27 provides that on making such a provision the court shall have complete discretion to order a specific share of the estate to be given to the dependant.
14. It was submitted in present matter evidence was tendered of how the land in question was acquired and it is clear that the land was family land held by the deceased herein for himself and the whole family. Evidence was tendered to show that the land was registered in the name of the deceased herein because at the time women did not hold National Identity Cards and it was known by all the family members of how the land was to be shared. The petitioner herein held the land for himself, and his siblings and they all co- existed on the land before and even after his demise. They depended on the land for their livelihood long after the deceased died and even developed the land collectively
15. It was stated that the objectors' claim is that they are inheritors of the estate, and they do not claim on behalf of the mother's estate. They are beneficiaries of the estate by dint of Section 29 of the [Law of Succession Act](#). It is submitted that; the objectors' claim can be distinguished from the claim In the Matter of the Estate of Peter Igamba Njoroge Succ. Cause No. 432 of 2009 whereby the objectors claimed on behalf of their late father's estate the court held that they lacked locus standi to claim on behalf of their father's estate.



16. It is thus the Respondent's submission that the lower court had power under Section 26 of the *Law of succession Act* to make the provision for the beneficiaries and thus the court urged to dismiss the appeal herein with costs.

### **Analysis and Determination**

17. Being a first Appeal, the court relies on a number of principles as set out in *Selle and Another vs Associated Motorboat Company Ltd & Others* [1968] 1EA 123:

“... this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. This court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take into account of particular circumstances or probabilities materially to estimate the evidence.”

18. Additionally, in *Gitobu Imanyara & 2 Others vs Attorney General* [2016] eKLR the Court of Appeal stated that: -

An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.

19. The Appellant asserted that the claim sought declaratory orders regarding the existence of trust in land which was held in the name of the deceased. It was averred that the issues raised solely lay under the ambit and jurisdiction of the Environment and Land Court and not the Probate court as was the case here, it is therefore contended that a distinction ought to be made between a claim against the estate of a deceased and a claim on inheritance in respect of the estate of the deceased.

20. In the case of *Re Estate of Mbai Wainaina (deceased)* Nairobi Succession Cause No 864 of 1996 (2015) eKLR where the Court stated that matters of trust and ownership of land are preserve of the ELC Court and not the Probate Court.

21. Consequently, whilst the high court may not have jurisdiction to handle matters regarding to trust land the question is whether the magistrate's court has such jurisdiction?

22. Section 7 of the Magistrates Act which provides the jurisdiction of the Court with respect to civil suits stated as follows: -

“A magistrate's Court shall have and exercise such jurisdiction and powers in proceedings of a civil nature in which the value of the subject matter does not exceed —

- a. twenty million shillings, where the Court is presided over by a Chief Magistrate.
- b. fifteen million shillings, where the Court is presided over by a Senior Principal Magistrate.
- c. € ten million shillings, where the Court is presided over by a principal magistrate;



- d. seven million shillings, where the Court is presided over by a Senior Resident Magistrate; or
- e. five million shillings, where the Court is presided over by a Resident Magistrate.

23. Section 7 (3) of the said Act states as follows: -

“A magistrate’s Court shall have jurisdiction in proceedings of a civil nature concerning any of the following matters under African customary law —

- a. land held under customary tenure.
- b. ....

24. Section 26 of the ELC Act provides as follows;

“Subject to Article 169(2) of *the Constitution*, the Magistrate appointed under sub-section (3) shall have jurisdiction and power to handle —

- a. disputes relating to offences defined in any Act of Parliament dealing with environment and land; and
- b. matters of civil nature involving occupation, title to land, provided that the value of the subject matter does not exceed the pecuniary jurisdiction as set out in the *Magistrates’ Courts Act*.

25. In *Lucy Njeri Gikonyo v Agnes Wanjiru Mwangi* [2021] eKLR, the court stated thus:-

My reading of the above provisions is that the Magistrate’s Court has power to determine issues of trust subject to pecuniary limitations set out in para 13 above and the Learned PM misdirected himself when he divested himself of jurisdiction. He fell in error in the regard.

26. Further, in the case of *Charles Liyokho v Martine Ngaira Liyokho & Another* [2019] eKLR the court held thus: -

“The court has carefully considered the submissions herein. In the case of *Law Society of Kenya Nairobi Branch v Malindi Law Society & 6 others* (2017) eKLR the court held that.

“By parity of reasoning, although under Article 162 (2) of *the Constitution* Parliament is mandated to establish courts with the status of the High Court to hear and determine disputes relating to employment and labour relations and environment and the use and occupation of, and title, to land, that in itself does not confer an exclusive jurisdiction to those specialized courts to hear and determine the specified types of cases. However, as already stated, Article 165 (5) is clear that the High Court has no jurisdiction in respect of matters falling within the jurisdiction of the specialized courts. Whereas Parliament is empowered to enact legislation to confer jurisdiction to the Magistrates courts to hear and determine disputes stipulated under Article 162 (2) of *the Constitution*, it cannot establish a Superior Court or confer upon a Superior Court jurisdiction to hear employment and labour relations cases and environment and land cases”.



After the enactment by Parliament, The Statute Law (Miscellaneous Amendments) Act, 2015, [Act No. 25 of 2015](#) received Presidential assent on 15<sup>th</sup> December 2015. Under Section 2 thereof, several laws were amended as indicated in the schedule thereto. Of relevance to this judgment were amendments made to The [Environment and Land Court Act, Act No. 19 of 2011](#) (the ELC Act) with a view to conferring on the Chief Justice the mandate to transfer Judges from the specialized courts to the High Court and vice versa, and clothing Magistrates courts with authority to hear and determine disputes relating to employment and labour relations and the environment and the use and occupation of, and title to, land.

- a. ....
- b. Amendments were made to Section 101 of the [Land Registration Act](#) which was amended by inserting the words “and subordinate courts” immediately after the expression “2011” and Section 150 of the [Land Act](#) that was amended by deleting the words “is vested with exclusive jurisdiction” and substituting therefore the words “and the subordinate courts as empowered by any written law shall have jurisdiction.” The Magistrates Courts Act, [Act No. 26 of 2015](#), an Act of Parliament to give effect to Articles 23(2) and 169(1)(a) and (2) of [the Constitution](#) was enacted to confer jurisdiction, functions and powers on the magistrates' courts; to provide for the procedure of the magistrates' courts, and for connected purposes. It received Presidential assent on 15<sup>th</sup> December 2015. It was to commence on 2<sup>nd</sup> January 2016.
- c. I find that the magistrate’s court has jurisdiction to entertain this matter subject to pecuniary jurisdiction. It is not disputed that the suit land is valued below twenty million Kenya shillings. I find that the magistrate court has jurisdiction in proceedings of a civil nature concerning matters under African Customary Law involving land held under customary tenure as provided under the Magistrate’s Act. The applicant has not demonstrated grounds warranting the transfer of this matter to this court. This application is not merited and I dismiss it with costs.”

27. Accordingly, it is my considered view that the magistrates court subject to pecuniary limitations has the jurisdiction to handle both ELC and Probate matters. The issue in the instant case was predominantly a probate matter but the court was called to determine whether a customary trust existed; an issue which it was seized with jurisdiction to determine. Therefore, I find that the trial magistrate had proper jurisdiction to hear and determine the instant matter in the trial court.

28. Moreover, I have carefully analyzed the trial record and the witness testimonies. The Respondent relied on the doctrine of customary trust to lay basis for their entitlement to part of the deceased’s estate. The Respondent claimed that his mother had won the balloting process and acquired the land however it was registered in the deceased’s name because he was the eldest son and at the time women were not allowed to hold national identity cards. On the other hand, the Appellant asserted that the land was her late husband’s sole property and was not family land.



29. Customary trust is recognized under the *Land Registration Act*, 2012. The suit property was registered under the Registered *Land Act* Cap 300. Further, and as was stated by the trial magistrate the provisions of Section 27 & 28 of Registered *Land Act* state that the rights of a registered proprietor of registered land under the Act are absolute and indefeasible and only subject to rights and encumbrances noted on the register or overriding interests which are set out under Section 30 of the Act. The provisions of 27 & 28 are similar to the provisions set out in Section 24, 25, 26 & 28 of the *Land Registration Act*, 2012. Section 107 of the Land Registered Act (now repealed) provides for transitional clauses and is quoted for specifics as follows,

- (1) "Unless the contrary is specifically provided for in this Act any right, interest, title power, or obligation acquired, accrued, established, coming into force or exercisable before the commencement of this Act shall continue to be governed by the law applicable to it immediately prior to the commencement of this Act."
- (2) "Unless the contrary is specifically provided for in this Act or the circumstances are such that the contrary must be presumed to be the case, where any step has been taken to create, acquire, assign transfer, or otherwise execute a disposition, any such transaction shall be continued in accordance with the law applicable to it immediately prior to the commencement of this Act."

It is now accepted by the Courts in this country that Section 30(g) of Registered *Land Act* provided for customary trust. Section 28 (b) of the *Land Registration Act*, 2012 specifically provide for overriding interests as may subsist on the land and affect it without it being noted on the register such as customary trusts.

30. The trial magistrate correctly held that:-

"It is trite law that customary trust must be proved by way of evidence. Equally to prove customary trust one must prove that they are in actual possession and occupation of the land in question. After conducting my research on the history of the law on issuance of National ID cards, I take judicial Notice of the fact that in 1947, a new law, the Registration of Persons Ordinance, was passed to make it mandatory for all male persons of all races of 16 years and above to be registered. But under this new law, the identity cards issued distinguished between the protectorate and non-protectorate persons. Although the Ordinance sought to remove discrimination based on race, it made no attempt to remove gender-based discrimination. The trend continued even after independence until 1978 when an amendment was made to what has become the *Registration of Persons Act* (Cap 107, Laws of Kenya) to include the registration of women who had attained the age of 16 years and above. A further amendment to the Act was made in 1980 to raise the age of registration from 16 to 18 years. This fact was acknowledged by the petitioner who stated that she acquired her ID card in 1978 after she had been married."

31. According to the evidence, the deceased and his mother and siblings acquired the suit property before the deceased got married to the petitioner in 1964. It appears that the deceased, his mother and siblings were already living on the suit property. The Appellant admitted that she did not know how the land in question was acquired as she was yet to be married. DW3, a friend and neighbor to the deceased equally admitted that he was also allotted his land near the deceased's in 1963 and when he moved, he found the deceased already living there with his mother and siblings but he later married the petitioner in 1964.

32. I agree with the trial magistrate that the only direct evidence as to how the land in question was acquired was the evidence given by PW1 and PW3. They stated that there was customary trust as their mother lived on the parcel in question until her demise in 2008. It was also admitted by both parties that the



son to Mary Wanjiru who was PW4 was born and raised on the subject parcel of land and has even constructed on it where he currently lives with his family. Even though PW1 left for Kakamega long ago, during the post-election violence he went back to the land in question and constructed another house where he stayed for a while and the land still exists. That the deceased, his later mother who died after him and his sister Mary Wanjiru who also died after him were buried on the land in question. Until his demise in 1973 the deceased never sent away his mother and it is my considered opinion that there is sufficient proof that there exists customary trust.

33. Evidently, the Appellant and her children settled on the upper part of the land and the Respondent and his siblings together with his nephew having settled on the lower part of the land. The land in question is separated by a trench. It was stated that those were the wishes of the deceased and his deceased mother. I agree with the trial magistrate that this version to be believable and that the Respondent is entitled to inherit from the deceased by virtue of customary trust.
34. For the foregoing reasons I find that the appeal lacks merit and thus makes orders.
  - i. The appeal is hereby dismissed with no order as to costs.

**DATED, SIGNED, AND DELIVERED AT NAROK THROUGH TEAMS APPLICATION, THIS  
6<sup>TH</sup> DAY OF FEBRUARY, 2025**

.....

**CHARLES KARIUKI**  
**JUDGE**

