



Kilonzo (Suing as the Administrator and Legal Representative of the Estate of Kilonzo Nthiwa) v Mutiku & another (Environment and Land Case 16 of 2020) [2025] KEELC 6699 (KLR) (30 September 2025) (Judgment)

Neutral citation: [2025] KEELC 6699 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT AND LAND CASE 16 OF 2020
TW MURIGI, J
SEPTEMBER 30, 2025**

BETWEEN

**MUNYILA KILONZO PLAINTIFF
SUING AS THE ADMINISTRATOR AND LEGAL REPRESENTATIVE OF THE
ESTATE OF KILONZO NTHIWA**

AND

**WAMBUA MUTIKU 1ST DEFENDANT
KYALO WAMBUA 2ND DEFENDANT**

JUDGMENT

1. The Plaintiff instituted this suit by a Plaint dated 17th January 2020, seeking the following orders: -
 - a. A declaration that the Plaintiff is the legal representative of the estate of Kilonzo Nthiwa, the owner of the property known as Nzai/Kikumini/609, measuring approximately 5.2HA.
 - b. A permanent injunction restraining the Defendants by themselves, their agents and or servants from entering into and/or trespassing, erecting/constructing houses, remaining on and/or cutting trees, digging terraces, cultivating on or any one claiming through them and/or any other manner whatsoever, interfering with the land parcel number Nzai/Kikumini/609.
 - c. Order of eviction from the said property being Nzai/Kikumini/609.
 - d. Cost of the suit and interest.
 - e. Any other relief this Honourable Court deems fit to grant.



2. The Defendants filed a Statement of Defence dated 10th March 2021, denying the Plaintiff's claim. They contended that the suit property is family land and should be shared amongst the families of Kilonzo Nthiwa and Kithia Nthiwa, deceased.

The Plaintiffs' Case

3. The Plaintiff, Munyila Kilonzo, testified as PW1 and called one witness in support of her case. She adopted her witness statement dated 17th January 2020 as her evidence in chief. It was her testimony that her late husband is the registered owner of the suit property. She further testified that, sometime in mid-2019, the Defendants began trespassing on the suit property by constructing houses, cultivating, and cutting down trees. Despite repeated demands, the Defendants have failed to cease their actions. Concluding her evidence, she urged the court to grant the orders sought in the plaint.
4. On cross-examination by Mr Muthiani, she testified that her late husband's brothers were Mangáu Nthiwa, Kingai Nthiwa, Keli Nthiwa, and Kionzo Nthiwa, while his sisters were Kalinde, Mbula, Kithia, and Kamene. She further testified that after Kithia Nthiwa left her matrimonial home in 2009, she moved in with their mother, Mbane Nthiwa, but was not allocated any land.
5. She further testified that Wambua Mutuku is a grandson of Kithia Nthiwa and that she was buried on the suit property. She told the court that she disagreed with the chief's decision that Kithia's family should continue residing on the portion they currently occupy on the suit property.
6. It was her testimony that she gave the Defendants one acre on which they built their home. She acknowledged that the suit property is ancestral land and confirmed that Kithia Nthiwa ought to have been allocated a portion of the suit land.
7. She confirmed that the 1st Defendant's mother is buried on the suit property.
8. In re-examination, she testified that she had objected to the burial of Kithia Nthiwa and the 1st Defendant's mother on the suit property. She reiterated that she had allocated the Defendants one acre, but they still sought additional land. According to her, the deceased brothers should also contribute one acre to the Defendants.
9. PW2 Peter Mwaniki Mulwa adopted his witness statement dated 18th August 2022 as his evidence in chief. He acknowledged that the 1st Defendant's grandmother was a sister to Kilonzo Nthiwa, deceased.
10. On cross-examination, he testified that after Kithia Nthiwa left her matrimonial home, she was shown where to build her home within the suit property and confirmed that she was buried on the suit property. He also confirmed that the 1st Defendant was born on the suit property and that Kithia's family has constructed their home on the suit property. According to him, the Defendants are trespassers because the suit land is registered in the name of Kilonzo Nthiwa.
11. In re-examination, he testified that the land initially belonged to Mbane Nthiwa, who subdivided it amongst her children. He further testified that Kithia Nthiwa was not present when the land was subdivided or when the titles were issued. He confirmed that the suit property belongs to Kilonzo Nthiwa. He also confirmed that the 1st Defendant is a grandson of Kithia Nthiwa and a nephew of Kilonzo Nthiwa.
12. He stated that after Kithia Nthiwa left her matrimonial home, she was shown where to build her house. He further stated that she is buried on the suit property.



13. He went on to state that he did not attend the clan meeting where the decision was made that the suit property belongs to Mbane Nthiwa. He maintained that the Defendants are trespassers because the land is registered in Kilonzo Nthiwa's name.

The Defence Case

14. The 1st Defendant, Omari Wambua Mutiku, adopted his witness statement dated 4th March 2022 as his evidence in chief. He also produced the documents in his list as DEX1-4. He told the court that Munyila Kilonzo (the Plaintiff herein) is his grandmother. It was his testimony that the suit property is family land and should be divided between the families of Kilonzo Nthiwa and Kithia Nthiwa, both of whom are deceased.
15. He went on to state that during the land adjudication process, the suit land was registered in the name of Kilonzo Nthiwa because he was the eldest son of Mbane Nthiwa, who owned the land. He further stated that he was born and raised on the suit property and that Kithia Nthiwa inherited the land from her mother, Mbane Nthiwa. He stated that the families of Kilonzo and Kithia reside on the property. He further testified that his mother, wife and elder brother are also buried on the suit property. He insisted that the land was initially given to them by Kithia Nthiwa.
16. On cross-examination by Mr Hassan, he testified that he was not present when Mbane Nthiwa allocated Kithia Nthiwa land. He also confirmed that they have constructed their homes on the suit property.
17. In re-examination, he confirmed that Munyila Kilonzo was present at the family meeting.
18. The 2nd Defendant, Kyalo Wambua, testified as DW2. He adopted his witness statement, dated 4th March 2022, as his evidence in chief.
19. He informed the court that the 1st Defendant is his father and that he resides on the suit property, where he has built his home. He confirmed that his mother is buried on the suit property. He further testified that his great-grandmother, Kithia Nthiwa, was allocated land by her mother, Mbane Nthiwa. He further stated that the families of Kithia and Kilonzo Nthiwa currently reside on the suit property.
20. After the close of the hearing, parties agreed to file and serve their written submissions

The Plaintiff's Submissions.

21. The Plaintiff filed her submission dated 31st January 2025.
On behalf of the Plaintiff, Counsel submitted that the Defendants unlawfully trespassed onto her late husband's land since she did not permit the Defendants to access her property. Counsel urged the court to declare the Defendants trespassers. To bolster this argument, Counsel relied on Section 3(1) of the *Trespass Act*. Counsel contended that the Defendant's allegations are an attempt to deprive the Plaintiff of her land.
22. In conclusion, Counsel submitted that the Plaintiff has proved her case on a balance of probabilities. To support his submissions, reliance was placed on the case of Joseph Kipchirchir Koech v Philip Cheruiyot Sang (2018) eKLR.

The Defendants' Submissions

23. The Defendants filed their submissions dated 20th January 2025.
On behalf of the Defendants, Counsel outlined the following issues for the court's determination:-



- a) Whether the Plaintiff is the legal owner of the suit land?
 - b) Whether the Defendants have any rights over the suit land?
 - c) Whether the Plaintiff is entitled to orders of a permanent injunction?
 - d) Who should bear the costs of the suit?
24. On the first issue, counsel submitted that the suit property is family land. Counsel contended that the Plaintiff's husband was registered as the owner of the suit property to hold in trust for himself, his family, and the Defendant's family.
 25. Counsel further submitted that the Defendants have had possession of the suit land for over 40 years, and that their family members are buried there. To support this argument regarding the existence of a trust, Counsel relied on the case of *Alice Wairimu Macharia v Kirigo Philip Macharia* (2019) eKLR, *Isack Kieba Minanga v Isaaya Theuri M'Lintari & another* (SCOK NO 10 of 2015), and on the case of *Juletabi African Adventure Limited & another v Christphet Michael Lockley* (2017) eKLR.
 26. It was further submitted that the suit land belonged to Mbane Nthiwa, since there were no previous records indicating that the suit land had been registered in the name of Kilonzo Nthiwa. Counsel contended that the Defendants have satisfied the criteria for establishing a trust as they had demonstrated that the land was owned by Mbane Nthiwa, the Defendants' grandmother, and that members of their family are buried on the suit property.
 27. Regarding the second issue, Counsel submitted that the Plaintiff did not challenge the evidence showing that the land was held in trust. Counsel argued that the burden of proof shifted to the Plaintiff to prove that the acquisition of the title was legal and free from encumbrances.
 28. It was submitted that the Defendants are not trespassers as they have occupied the land for over 25 years and that their family lineage has resided there.
 29. On the final issue, Counsel submitted that the Plaintiff is not entitled to the land because they have constructed their houses there.

Analysis And Determination

30. Having considered the pleadings, the evidence on record and the submissions by the parties, the following issues arise for determination:-
 - a) Whether there exists a trust in respect of the suit property?
 - b) Whether the Plaintiff is entitled to the orders sought in the Plaint.
31. It is not in dispute that the Plaintiff is seeking a declaration that she is the legal representative of the estate of Kilonzo Nthiwa (deceased), the owner of the suit property. It is also not in dispute that the suit property is registered in the name of Kilonzo Nthiwa. The Plaintiff produced a title showing that the suit property is registered in the name of Kilonzo Nthiwa.
32. It is not in dispute that the parties herein are related and reside within the suit property. The Plaintiff contends that the suit property belongs to her late husband and, as such, the Defendants should vacate.
33. On their part, the Defendants contended that the suit property was registered in the name of Kilonzo Nthiwa to hold in trust for the family.



34. The Black's Law Dictionary, 9th Edition, defines a trust as follows:-

“The right enforceable solely in equity, the beneficial enjoyment to which another holds a legal title, a property interest held by one person (trustee) at the request of another (settler) for the benefit of a third party (beneficiary).”

35. A customary trust is a valid claim to land and falls under the ambit of the proviso to Section 28(b) of the [Land Registration Act](#), which provides as follows:-

Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register— (b) trusts, including customary trusts.

36. It is clear from the above provisions that the registration of a person as a proprietor of land does not automatically exclude any other obligations to which such proprietor may be subject as a trustee. These are non-registrable rights which run with the land.

37. Customary trust is a matter of evidence and not inference. It is an issue both of fact and law which requires serious demonstration through credible evidence. This was the holding by the Court of Appeal in the case of *Mbothu & Others Vs Waitimu & 11 Others*, (1980), KLR 171 cited in the Estate of the late Jonathan Kinyua Waititu (deceased) eKLR Succession Cause No. 488 of 2010, where it was held that:-

“The law never implies, the Court never presumes a trust but in case of absolute necessity. The Courts will not imply a trust save in order to give effect to the intention of the parties. The intention of the parties to create a trust must be clearly determined before a trust will be implied.

Since the plaintiff's claim was based on trust, the law places the onus on her to prove the existence of such trust..... It is however clear from the evidence herein that the plaintiff has neither pleaded nor proved any of the particulars as to how the trust subject matter of this claim arose with respect to the suit land. There is really no evidence upon which this Court can make a finding that the defendant holds the suit land in trust for him.”

38. Similarly, in the case of *Salesio M'itonga v M'ithara & 3 others* (2015) eKLR, the Court of Appeal held that:-

“It is trite law that trust is a question of fact and has to be proved by evidence.”

39. The issue for determination is whether the Defendants have demonstrated that the suit property is trust land. In the case of *Isaack M'inanga Kiebia Vs Isaaya Theuri M'lintari & another* [2018] eKLR, the Supreme Court articulated the elements which a person must prove to demonstrate the existence of a trust 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.

The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances.

i) The claim is directed against the registered proprietor who is a member of the family, clan or group.”

40. The legal burden of proof in demonstrating that the suit property is trust land lies with the Defendants who wish the Court to make a finding as to the existence of such trust.
41. The Defendants contend that Kilonzo Nthiwa was registered on the title of the suit property to hold in trust for the two families. It is not in dispute that their mother and grandmother are buried on the suit property. It is also not in dispute that the 1st Defendant’s wife and elder brother are buried on the suit property. Similarly, it is not in dispute that the Defendants have established their homes on the suit property. In this regard, the Defendants produced photographs showing their homes. The Defendants produced a decision by the elders who held that Kithia Nthiwa was entitled to a share of the suit property. The Plaintiff told this court that she disagreed with the elder’s findings. No evidence was presented to suggest that Kilonzo Nthiwa had attempted to evict the Defendants from the suit property. The Plaintiff did not dispute the evidence of the 1st Defendant that he was born and raised on the suit property.
42. From the foregoing, I find that the Defendants have demonstrated that Kilonzo Nthiwa was holding the suit property in trust for the two families.
43. Having found that the Defendants have established that there exists a trust over the suit property, I find that the Plaintiff is not entitled to the orders sought in the Plaintiff.
44. In the end, I find that the Plaintiff has not proved her case on a balance of probabilities as required by the law.
45. The upshot of the foregoing is that the Plaintiff’s suit is hereby dismissed. As parties are closely related, I order that each party bear its own costs.

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HON. T. MURIGI



JUDGE

JUDGEMENT SIGNED, DATED AND DELIVERED VIA MICROSOFT TEAMS THIS 30TH DAY OF SEPTEMBER, 2025.

IN THE PRESENCE OF:

Munyasya for the Plaintiff

Muthiani for the Defendant

Ahmed – Court Assistant

