Kithinji v M'Mwirichia (Environment and Land Appeal E021 of 2023)
[2025] KEELC 6535 (KLR) (16 September 2025) (Judgment)

Neutral citation: [2025] KEELC 6535 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ENVIRONMENT AND LAND APPEAL E021 OF 2023

JO MBOYA, J

SEPTEMBER 16, 2025

BETWEEN

MARTHA MWARI KITHINJI ..... APPELLANT

AND

BERNARD RIUNGU M'MWIRICHIA ..... RESPONDENT

JUDGMENT

1. The Respondent [who was the Plaintiff in the subordinate court] filed Originating Summons dated 17th August 2013; and wherein same sought various reliefs. The reliefs sought at the foot of the Originating Summons are as hereunder;

    a. The court be pleased to grant orders of eviction of the defendant from the plaintiff's land, namely Nyaki/Mulathankari/1252.

    b. The land registrar does remove the caution registered by the defendant upon the title of the suit property on the 2nd of September 1999.

    c. Damages for maintenance of wrongful caution as envisaged under the provisions of section 75 of the *Land Registration Act*.

    d. Cost of the suit and interest.

2. The Appellant herein [who was the Defendant in the subordinate court] duly entered appearance and thereafter filed a Replying Affidavit sworn on 1st August 2014; and wherein the Appellant contended inter alia that the suit property was registered in the name of the Respondent to hold same on trust for himself [Respondent] and the Appellant's husband [now deceased].

3. Moreover, it was contended that the Appellant and her husband [now deceased] had been occupying a portion of the suit property and have equally developed same. In addition, it was averred that the Appellant's husband [now deceased] was equally buried on the suit land.

4. The Originating Summons [suit in the subordinate court] was subsequently heard and disposed of vide judgement delivered on 1st August 2023 and whereupon the Learned Trial Magistrate held that the Respondent had duly proved his case. To this end, the Learned Chief Magistrate proceeded to and granted the reliefs sought at the foot of the Originating Summons [save for damages]. Furthermore, the Learned Chief Magistrate awarded costs and interests to the Plaintiff.

5. It is the said judgement which has aggrieved the Appellant culminating into the filing of the Memorandum of Appeal dated 31st August 2023. The Appellant has highlighted various grounds.

6. For coherence, the grounds highlighted by the Appellant are reproduced as hereunder:

   i. The Learned Trial Magistrate erred in law and in fact in failing to hold that the suit land L.R No. Nyaki/mulathankari/1252 is ancestral land and it belonged to M'mwirichia Wa Kaongo who was the grandfather to the respondent and the appellant's husband James Kithinji Mwirabua.

   ii. The Learned Trial Magistrate erred in law and fact by failing to find the appellant's late husband and his family having lived on the suit land for a considerable long period of time s customary law trust arose as a result of the concept of intergenerational equity and therefore the respondent could not evict the appellant and her family from the suit land.

   iii. The Learned Trial Magistrate erred in law and fact in that she found that the respondent was not holding a share of the suit land for his brother the late husband of the appellant.

   iv. The Learned Trial Magistrate erred in law and fact in that she failed to find that the registration of the respondent as the owner of the land did not extinguish the appellant's late husband's rights since the very elements of customary law trust existed in respect of the suit land.

   v. The Learned Trial Magistrate erred in law and fact in that she failed to find that the appellant and her family were occupying the land as the same was ancestral land and her occupation did not amount to trespass to land.

   vi. The Learned Trial Magistrate erred in law and in fact that she failed to find that the appellant's caution against the suit was justified having living and occupied part of the suit land for a considerable long period of time.

   vii. The whole judgement of the Learned Trial Magistrate is against the weight of evidence and the same is bad in law.

7. The subject appeal came up for directions on 7th April 2025; and on the 20th May 2025, respectively. When the appeal came up on 20th May 2025, the advocates for the parties confirmed that the Record of Appeal had been duly filed and served. Furthermore, the advocates covenanted to canvass and dispose of the appeal by way of written submissions.

8. Arising from the foregoing, the court proceeded to and issued directions to the effect that the appeal be heard and disposed of by way of written submissions. Additionally, the court ventured forward and circumscribed the timelines for the filing and exchange of the written submissions.

9. The Appellant filed written submissions dated 11th June 2025; and wherein same has highlighted and canvassed two [2] key issues, namely; that the Appellant herein duly established that her late husband and herself entered into and commenced occupation of L.R Nyaki/mulathankari/502 [hereinafter referred to as the original property] around 1980 s; and that the occupation of a portion of the original parcel of land and which now falls on the suit property was with the knowledge of the Respondent

herein. Furthermore, the Appellant has also contended that by the time the Respondent was being registered as the owner of the suit property the Appellant's husband [now deceased] and the Appellant were already in occupation of the suit property.

10. Regarding the first issue, learned counsel for the Appellant has submitted that the original parcel of land belonged to and was registered in the name of Mwirichia Kaungu [now deceased]. Furthermore, it has been submitted that the said registered owner allowed both the Respondent and the Appellant's husband [now deceased] to occupy portions of the original parcel of land. Besides it was submitted that the Appellant's husband [now deceased] and the Appellant herein have remained in occupation of a designated portion of the suit property to date.

11. It was the further submission by the learned counsel for the Appellant that the entry upon and occupation of a portion of the original parcel of land was predicated on the fact that the property was registered in the name of the maternal grandfather of the Respondent and the Appellant's husband [now deceased]. In this regard, it has been submitted that the Appellant herein cannot be said to have trespassed onto the suit property either in the manner contended by the Respondent or at all.

12. As pertains to the second issue, learned counsel for the Appellant has submitted that the Respondent herein procured the transfer and registration of what is now the suit property based on misrepresentation. In particular, it has been submitted that the Respondent misrepresented that same is the sole owner of the suit property, even though the Respondent knew that same held the suit property on trust for himself and the Appellant's husband [now deceased]. To this end, learned counsel for the Appellant has posited that the suit property is indeed held on trust for the Respondent and the Appellant herein.

13. To buttress the contention that the suit property is held by the Respondent on trust for himself and the Appellant's husband [now deceased], the Appellant has cited and referenced inter alia the decision in the case of Kiebia v M'Lintari & another (Petition 10 of 2015) [2018] KESC 22 (KLR) (5 October 2018) (Judgment) [supreme court] and Felister Muthoni Nyaga vs Peter Kayo Mugo (2016) eKLR respectively.

14. Flowing from the foregoing, learned counsel for the Appellant has implored the court to find and hold that the Appellant herein tendered and placed before the court credible evidence to demonstrate the existence of customary trust. To this end, the court has been invited to find and hold that the appeal beforehand is meritorious and thus same ought to be allowed.

15. The Respondent filed written submissions dated 21st July 2025; and wherein same has raised and highlighted four [4] key issues, namely; that the suit property lawfully belongs to the Respondent and thus the Respondent is entitled to exclusive possession, occupation, and use; that the occupation of a portion of the suit property by the Appellant and the Appellant's husband [now deceased] constituted trespass; that the Appellant herein has no affinity and or consanguinity with the Respondent and thus same is devoid of locus standi to propagate a claim of customary trust; and that the appeal beforehand is devoid of merits.

16. Regarding the first issue, learned counsel for the Respondent has submitted that the Respondent herein inherited the suit property from his [Respondent's] grandfather. Moreover, it has been submitted that following the inheritance, the suit property was registered in the Respondent's name on 25th June 1987. In this regard, it has been posited that the Respondent is the lawful and legitimate owner of the suit property and thus entitled to exclusive occupation, possession, and use.

17. Secondly, it has been submitted that the Appellant herein and the Appellant's husband [now deceased] illegally and unlawfully entered upon and have remained in occupation of a portion of the suit

property. For good measure, the Respondent has contended that the actions and or activities by the Appellant and her husband [now deceased] constituted trespass.

18. Furthermore, it has been submitted that even though the Appellant's husband [now deceased] had filed a suit namely, Meru HCC No. 172 of 1994 seeking a declaration of trust, the said suit was dismissed in 2009 on account of abatement. Nevertheless, it has been posited that the Appellant herein and by extension her late husband do not have any lawful right to the suit property.

19. Learned counsel for the Respondent has further submitted that the Appellant herein has no affinity and or consanguinity with the Respondent and in this regard, the Respondent contends that the Appellant lacks the requisite locus standi to maintain a claim of customary trust. In particular, the Respondent has submitted that in the absence of locus standi, the Appellant's suit in the subordinate court was unmaintainable.

20. In support of the foregoing submissions, namely; that the Appellant is devoid of the requisite locus standi, learned counsel for the Respondent has cited and referenced the decision in the case of Zachariah Mugatsia vs Agneta Mmbone Okwemba (2019) eKLR where it is stated that the court held that a sister-in-law to the plaintiff cannot without any known legal and justifiable reason deal on land registered in the plaintiff's name. To this end, the Respondent has invited the court to adopt and apply [sic] the holding in the said decision.

21. Finally, learned counsel for the Respondent has submitted that the Appellant herein failed to tender and place before the court any plausible evidence to demonstrate her claim to the suit property. In this regard, the court has been invited to find and hold that Appellant's claim was rightly dismissed.

22. Premised on the foregoing, learned counsel for the Respondent has invited the court to find and hold that the appeal beforehand is devoid of merit[s]. To this end, the court has been implored to dismiss the appeal.

23. Having reviewed the record of appeal; having taken into account the pleadings filed by the parties; the evidence tendered [both oral and documentary] and upon consideration of the written submissions filed on behalf of the parties, I come to the conclusion that the determination of the subject appeal turns on three [3] key issues, namely; whether the acquisition and registration of the suit property in the name of the respondent was lawful, legal, and devoid of encumbrances or otherwise; whether the respondent's title is subject to overriding interests and in particular customary trust; and whether the caution which was registered by the appellant was well founded or otherwise.

24. Before venturing to address the thematic issues, [which have been identified and highlighted in the preceding paragraph], it is imperative to underscore that what is before me is a first appeal. In this regard, it suffices to highlight that this court is vested with the jurisdiction to undertake exhaustive scrutiny, appraisal, review, and evaluation of the entire evidence that was tendered before the trial court and thereafter to determine whether the factual findings and conclusions by the trial court accord with the evidence or otherwise.

25. In addition, it is instructive to observe that this court is at liberty to form and arrive at an independent conclusion. Moreover, the court is also at liberty to depart from the findings and conclusions of the trial court. Nevertheless, it is paramount to highlight that even though this court is at liberty to arrive at an independent conclusion, the liberty is however, circumscribed by certain factors. Simply put, the liberty is not at large and can only be deployed where it is shown that the trial court acted on no evidence; the findings are perverse to the evidence on record; the findings are premised on misapprehension of the evidence on record; or where it is demonstrably shown that there is an error of principle which vitiates the conclusions arrived at by the court.

26. The jurisdictional remit of the first appellate court has been considered in various decisions. Most recently, the parameters underpinning the scope of the first appellate court's jurisdiction were expounded in the case of Kenya Urban Roads Authority & another v Belgo Holdings Limited (Civil Appeal E011 of 2021) [2025] KECA 764 (KLR) (9 May 2025) (Judgment) where the court held as hereunder;

> " 37. We have considered the appeal and this being a first appeal, we are under a duty to subject the entire evidence and the judgment to a fresh and exhaustive examination with a view to reaching our own conclusions in the matter. In carrying out this duty, we have to remember that we had no opportunity of seeing and hearing the witnesses who testified during the trial and to make an allowance for the same. We have also to remember that it is a big thing to overturn the findings of a trial court which has had the singular opportunity of reaching its conclusions based on a combination of the evidence adduced and observation by the court of the demeanour of witnesses. In a nutshell, a first appellate court must of necessity proceed with caution in deciding whether or not to interfere with the findings of a trial court, but of course where such findings are not supported by the evidence on record or where they are founded on a misapprehension of the law, the axe must fall on the impugned judgement.
>
> This position is anchored in section 78 of the *Civil Procedure Act*, which requires a first appellate court to re-evaluate, reassess and reanalyse the extracts of the record and draw its own conclusions. These provisions have been underscored in numerous decisions of the Superior Courts among them Peters v Sunday Post Limited [1958] EA 424, where the predecessor to this Court expressed itself as follows:" Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law an appellate court has jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this really is a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial Judge as to where credibility lies is entitled to great weight. This is not to say that the Judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstances that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to the courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given... Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial Judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial Judge's conclusion. The appellate court may take the view that, without having seen or heard the witnesses it is not in a position to come to any satisfactory conclusion on the printed evidence. The appellate court, either because the reasons given by the trial Judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question...

> It not infrequently happens that a decision either way may seem equally open and when this is so, then the decision of the trial Judge who has enjoyed the advantages not available to the appellate court, becomes of paramount importance and ought not be disturbed. This is not an abrogation of the powers of a Court of Appeal on questions of fact. The judgement of the trial Judge on the facts may be demonstrated on the printed evidence to be affected by material inconsistencies and inaccuracies, or he may be shown to have failed to appreciate the weight or bearing of circumstances admitted or proved or otherwise to have gone plainly wrong."

27. With the foregoing in mind, I am now well disposed to revert to the issues and to interrogate same. I shall commence with the first issue, namely; whether the acquisition and registration of the suit property in the name of the Respondent was lawful, legal, and devoid of encumbrance.

28. The Respondent herein contended that the suit property [which arose from the subdivision of L.R Nyaki/mulathankari/502] previously belonged to his maternal grandfather. Furthermore, the Respondent contended that the suit property was transferred and registered in his [Respondent's] name based on inheritance.

29. In particular, learned counsel for the Respondent has contended that the suit property was inherited by the Respondent from his maternal grandfather and same was registered in the name of the Respondent on 25th June 1987.

30. Additionally, the Respondent posited that the suit property was gifted unto him by his maternal grandfather. To this end, the Respondent tendered and produced before the trial court a copy of the 'Will' dated 23rd July 1980.

31. Despite the fact that the Respondent has posited that the suit property was lawfully gifted unto him, the Respondent however failed to tender and produce before the court evidence of the gift inter vivos. Furthermore, the Respondent also failed to tender and produce a copy of the transfer instrument [if any] that was executed by the giftor.

32. Be that as it may, it is not lost on me that by the time the Respondent was transferring and causing the suit property to be registered in his name, the Respondent was knowledgeable of the fact that the Appellant and the Appellant's husband [now deceased] were already in occupation of a portion of the suit property. Furthermore, the Respondent was privy to the fact that the Appellant's husband now deceased and himself [respondent] were brothers born by the same mother.

33. Regarding the fact that the Appellant's late husband was already residing on a portion of the suit property as at the year 1980, it is imperative to take cognizance of the evidence of DW1.

34. Same stated thus;

> " I was married in 1980 by James. I live on the shamba 1252/Nyaki/Mulathankari. Previously, the land was 502. When I got married, I found M'Mwirichia, and Bernard Riungu and my husband. The farm was initially registered in the name of M'Mwirichia Kaungu. He was given by the clan. I have never been kicked out of the farm. M'Mwirichia did not kick me out of the shamba."

35. Suffice it to posit that the testimony by DW1 [in terms of the excerpt reproduced above] was never controverted. In this regard, it is apparent that by the time the suit property was being transferred to and registered in the name of the Respondent the Appellant and the Appellant's husband [now deceased] were already in occupation thereof.

36. Nevertheless, even though the Respondent proceeded to and caused the suit property to be registered in his name, it is common ground that the registration of the suit property in his name was and remains subject to the rights of the Appellant and the Appellant's husband on account of being in occupation thereof. If anything, it behooved the Respondent to have persuaded his maternal grandfather to remove the Appellant and her husband from the property before transferring same unto him.

37. Furthermore, the evidence tendered by the parties and in particular DW2 and DW3 demonstrate that the Appellant and her husband [now deceased] were entitled to a portion of the suit property measuring one acre.

38. Flowing from the foregoing observations and considering the totality of evidence on record, it is my finding and holding that the acquisition and registration of the suit property in favor of the Respondent was subject to the existing encumbrances; and in particular, the occupation of a portion thereof by the Appellant and the Appellant's husband [now deceased].

39. Additionally, it is worth recalling and reiterating that the issuance of a certificate of title by and of itself does not extinguish the overriding interests, which were existing and attaching to the land at the time of registration. To this end, the provisions of section 25 of the *Land Registration Act*, 2012; are instructive.

40. The provisions of section 25 of the *Land Registration Act*, 2012; stipulate as hereunder;

> " 25. Rights of a proprietor
>
> 1. The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject;
>
> a. to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
>
> b. to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.
>
> 2. Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee."

41. Before concluding on this issue, it is also appropriate to cite and reference the decision of the Court of Appeal in the case of Munyu Maina v Hiram Gathiha Maina [2013] KECA 94 (KLR) where the court stated thus;

> " We state that when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register. It is our considered view that the respondent did not go this extra mile that is required of him and no evidence was led to rebut the appellant's testimony."

42. In my considered view, it was not enough for the Respondent to waive to certificate of title and thus seek to rely on same in procuring an order of the court declaring exclusive right to the suit property.

In this regard, it is my finding and holding that the acquisition and registration of the suit property in the name of the Respondent was undertaken on the face of existing encumbrances and thus same was neither lawful nor legal.

43. Regarding the second issue, namely; whether the Respondent's title is subject to overriding interests and in particular customary trust. To start with, it is important to recall and reiterate that the Respondent and the Appellant's husband [now deceased] were/are brothers. Instructively, the Respondent and the Appellant's late husband were born by the same mother.

44. Further and in addition, evidence abound that the Respondent and the Appellant's husband [now deceased] were both brought to reside on the parcel of land previously belonging to and registered in the name of M'Mwirichia Kaungu [now deceased].

45. On the other hand, it is worthy to recall that even though the Respondent contends that the suit property was gifted unto him, there is no gainsaying that at the point in time the property was being registered, the Appellant and her husband [now deceased] were in occupation thereof. Suffice it to posit that the Appellant and her late husband had been in occupation since 1980 s.

46. Moreover, the original parcel of land [which was subdivided culminating into the creation of inter alia the suit property] belonged to the maternal grandfather of both the Respondent and the Appellant's husband [now deceased]. In this regard, there is no gainsaying that both the original parcel of land and by extension the suit property constitute family/ancestral land.

47. Considering the blood relationship between the Respondent and the Appellant's husband [now deceased] and coupled with the fact that the Appellant and her late husband were in occupation of the suit property, I conclude that the registration of the Respondent as the owner of the suit property was subject to customary trust.

48. In the case of Justus Maina Muruku v Jane Waithira Mwangi [2018] KEELC 2366 (KLR) this court stated as hereunder;

> " 31. Customary trust is one of the overriding interest hinged on the land that is currently recognized in the *Land Registration Act*, 2012. The suit property was registered under Registered *Land Act* Cap 300. 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."

49. Moreover, the ingredients to be considered in an endeavor to demonstrate the existence of customary trust were succinctly highlighted and expounded by the Supreme Court of Kenya [the apex court] in the case of Kiebia v M'lintari & another (Petition 10 of 2015) [2018] KESC 22 (KLR) (5 October 2018) (Judgment), where the court held as hereunder;

> 52. 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.

53. 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."

50. The Learned Trial Magistrate stated and held that the Appellant herein and her husband entered the suit premises with an entitlement that same also had a right to a share. However, the trial magistrate ventured forward and contended that the suit property had been given to the Plaintiff [Respondent] as a gift inter vivos by his grandfather and thus the Respondent was entitled to exclusive and peaceful occupation.

51. In addition, the Learned Trial Magistrate is on record stating that the Appellant herein did not demonstrate that customary trust was created in the suit premises. To this end, the Learned Chief Magistrate held that no customary trust existed and thus the Respondent herein was not holding the suit property on trust for himself and the Appellant's husband [now deceased].

52. I am afraid that the findings and conclusions that were reached and or arrived at by the Learned Chief Magistrate are not based on the evidence on record. Moreover, it is apparent that the Learned Chief Magistrate misapprehended the totality of evidence on record including the fact that the Appellant and the Appellant's husband [now deceased] had been allowed to occupy the original property by the maternal grandfather and furthermore that same continued to and remained in occupation of the suit property.

53. Other than the foregoing, it is also evident that the Learned Trial Magistrate did not fully apprehend the import and tenor of the decision of the Supreme Court in the case of Isaac Kiebia [supra].

54. Flowing from the foregoing, I am minded to and do hereby depart from the factual findings and conclusions of the Learned Chief Magistrate. On the contrary, I find and hold that the rights of the Appellant herein who has been in occupation and continues to remain in occupation constitutes customary trust.

55. Turning onto the third issue, namely; whether the lodgment/registration of the caution was well founded, it is important to highlight that the Appellant and the Appellant's husband [now deceased] had been in occupation of a portion of the original property. However, it was demonstrated that the Respondent herein proceeded to transfer the original property into his name and thereafter sub-divided same into two portions. In addition, evidence was tendered that the respondent thereafter proceeded to and disposed one of the resultant sub-divisions.

56. Furthermore, the Appellant and DW3 testified that the Respondent was on the verge of alienating the suit property or a portion thereof. In this regard, the Appellant felt obliged to register a caution to protect and preserve her rights thereto. For good measure, the caution was premised on the basis that the appellant had beneficial interest over the suit property.

57. While dealing with issue number two, I have found and held that the Appellant and her husband [now deceased] entered onto the original property at the instance of the original owner thereof. Besides, I have also found and held that the original owner [who was the grandfather of both the Respondent and the Appellant's husband] did not evict the Appellant and her husband.

58. Additionally, it is common ground that the Appellant and her late husband remained in occupation of the suit property. Moreover, it was conceded by the Respondent that the remains of the Appellant's husband were buried on the suit land.

59. From the totality of the evidence on record, there is no gainsaying that the Appellant herein had a lawful basis to lodge the caution in an endeavor to protect and preserve her beneficial rights. The lodgment and the subsequent registration of the caution was therefore well grounded. [See the decision in Hammed Ibrahim Sumeiman & Another vs Noor Khamisi Surur (2013) eKLR].

60. Consequently, and in the premises, I also conclude that the findings of the Learned Chief Magistrate as pertains to the registration of caution are equally misconceived.

Final Disposition.

61. Having analyzed the thematic issues that were highlighted in the body of the Judgement, it must have become crystal clear that the appeal beforehand is meritorious. In particular, the Appellant has ably demonstrated that the registration of the suit property in the name of the Respondent was subject to the existing overriding interests including customary trusts.

62. To the extent that the Appellant has demonstrated the existence of customary trust and considering the dictum of the Supreme Court in the case of Kiebia v M'lintari & another (Petition 10 of 2015) [2018] KESC 22 (KLR) (5 October 2018) (Judgment), I find and hold that the impugned Judgement merits being set aside.

63. In the circumstances, the final orders that commend themselves to me are as hereunder;

    i. The Appeal be and is hereby allowed.

    ii. The Judgement and the consequential decree of the Learned Chief Magistrate dated 1st August 2023 be and is hereby set aside in its entirety.

    iii. The Respondent's suit in the subordinate court be and is hereby dismissed.

iv. Cost of the Appeal be and are hereby awarded to the Appellant.

v. The Appellant shall also have costs of the suit in the subordinate court.

vi. For the avoidance of doubt and considering the provisions of Section 13(7) of the *Environment and Land Court Act*, I declare that the Respondent holds the suit property, namely; Nyaki/mulathankari/1252 on trust [customary trust] for himself and the Appellant.

vii. The portion of the suit portion held in trust for the Appellant measures one [1] acre and same comprises of the portion currently occupied, possessed, and being used by the Appellant and her children.

viii. The Respondent herein be and is hereby ordered to subdivide the suit property and thereafter to transfer the one-acre portion currently occupied by the appellant to and in favor of the Appellant.

ix. The subdivision and consequential transfer in terms of clause (viii) above shall be undertaken within 90 days from the date hereof.

x. In default by the Respondent to undertake the subdivision of the suit property and to facilitate the transfer of the 1-acre portion, the Deputy Registrar of the Court shall be at liberty to execute the requisite mutation form; and the conveyance instrument to facilitate the implementation of the judgement herein.

xi. The Appellant herein shall bear the costs of survey, subdivision, stamp duty, and registration fees [subject to advice by the designated authorities].

xii. Subject to the subdivision and transfer of the resultant portion to the Appellant, an order of permanent injunction be and is hereby issued to restrain and prohibit the respondent either by himself, agents, servants, employees, and or anyone claiming under him from trespassing onto, entering upon, and or otherwise interfering with the appellant's rights to and in respect of the resultant subdivision.

64. It is so Ordered.

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

OGUTTU MBOYA, FCIArb; CPM [MTI-EA].

JUDGE

In the presence of:

Hussein – Court Assistant

Ms. Mugo for the Appellant

Mr. Kaumbi for the Respondent