



**Muchiri & another v Kariuki (Environment and Land Appeal  
E023 of 2024) [2025] KEELC 4444 (KLR) (12 June 2025) (Judgment)**

Neutral citation: [2025] KEELC 4444 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA  
ENVIRONMENT AND LAND APPEAL E023 OF 2024**

**JM MUTUNGI, J**

**JUNE 12, 2025**

**BETWEEN**

**MONICA WANGUI MUCHIRI ..... 1<sup>ST</sup> APPELLANT**

**KIRACHI KARIUKI ..... 2<sup>ND</sup> APPELLANT**

**AND**

**FRANCIS NJERU KARIUKI ..... RESPONDENT**

*(Being an Appeal from the Judgment of Hon. L.W Kabaria, Principal Magistrate  
in Gichugu ELC Case No. 43 of 2021 delivered and dated 22nd December 2023)*

**JUDGMENT**

1. This Appeal is against the Judgment delivered by Hon. L.W. Kabaria (P.M.) on 22<sup>nd</sup> December 2023, in Gichugu ELC Case No. 43 of 2021. In the suit, the Learned Magistrate delivered the Judgment in favour of the Respondent who was the Plaintiff in the Lower Court and ordered the Appellants (Defendants in the Lower Court) to vacate land parcel Kabare/Ngiroche/1115 (suit land) within sixty (60) days from the date of Judgment failing which forceful eviction would issue. The Learned Magistrate further issued a permanent injunction against the Appellants and awarded the costs of the suit to the Respondent.
2. The Appellants, dissatisfied and aggrieved by the Judgment have appealed to this Court against the Judgment and have set out 9 grounds of Appeal in their Memorandum of Appeal dated 3<sup>rd</sup> May 2024, as hereunder:
  1. That the Learned Magistrate erred in Law and fact by failing to appreciate that there was no valid reason to evict the Appellants herein from the suit property Kabare/Ngiroche/1115. A miscarriage of Justice was thereby occasioned.



2. That the Learned Magistrate erred in Law and fact entering a Judgment for the Respondent against the weight of evidence. A miscarriage of justice was thereby occasioned.
  3. That the Learned Magistrate erred in Law and fact by failing to appreciate that the burden of proof lay squarely on the Respondent. A miscarriage of justice was thereby occasioned.
  4. That the Learned Magistrate erred in Law and fact by disregarding the testimony and the defence of the 2<sup>nd</sup> Appellant and didn't even comment on. A miscarriage of justice was thereby occasioned.
  5. That the Learned Magistrate erred in Law and fact in failing to consider that land parcel Kabare/Ngiroche/1115 was a result of subdivision of the land parcel Kabare/Ngiroche/104 which belonged to Paul Kariuki Kaburi who is deceased and was a father of the Respondent, the 2<sup>nd</sup> Appellant and father in law to the 1<sup>st</sup> Appellant who are entitled to share in the estate of the deceased. A miscarriage of Justice was thereby occasioned.
  6. That the Learned Magistrate erred in Law and fact by awarding an eviction order against the Appellant yet as per the testimony and evidence they presented it was clear that the ownership of land parcel Kabare/Ngiroche/1115 was still in dispute despite the same being registered in the names of the Respondent. A miscarriage of Justice was thereby occasioned.
  7. That the Learned Magistrate erred in Law and fact by failing to appreciate and consider the Appellants rights over the property under Section 40 of *the Constitution*. A miscarriage of Justice was thereby occasioned.
  8. That the Learned Magistrate erred in Law and fact by granting the eviction order against the Appellants herein without consideration of the inherent rights of the Appellant. A miscarriage of Justice was thereby occasioned.
  9. That the Learned Magistrate erred in Law and fact by failing to properly evaluate the evidence presented before her by the Appellants. A miscarriage of Justice was thereby occasioned.
3. The Appellants pray that the Appeal be allowed and the Judgment and the subsequent decree issued on 22<sup>nd</sup> December 2023 be set aside with costs.
  4. The background to this matter is that the Respondent filed a suit in the Lower Court by way of a Plaint dated 9<sup>th</sup> November 2021 where he prayed for the following orders:-
    - a. Vacant possession of the Plaintiff's L.R Kabare/Ngiroche/1115 and in default, forcible eviction be carried out by the Court Bailiffs and the O.C.S – Kianyaga Police Station be authorised to provide with the security during the eviction process.
    - b. An order of permanent injunction do issue restraining the Defendants by themselves, servants, agents or anyone claiming under them from interfering with the Plaintiff's quiet possession and enjoyment of his proprietary rights over the L.R Kabare/Ngiroche/1115 measuring 0.767 Hectares.
    - c. Costs of the suit and Interest thereon at Court rates.
  5. The Respondent's case was that he was the lawful registered owner of the suit land, which the Appellants had trespassed upon unlawfully and had refused to vacate from despite demands to do so. The Respondent averred that he acquired the land through inheritance vide Kerugoya P.M Succession Cause No. 137 of 1997 and that the suit land was a resultant subdivision of Land Parcel Kabare/Ngiroche/104.



6. The Appellants filed a joint statement of defence on 2<sup>nd</sup> December 2021. The Defendants in their defence averred that the Respondent unlawfully acquired the suit land, and that he disregarded the rights of his late brother who had a home in the suit land where his wife was residing. The Appellants asserted that the Respondent had subdivided Land Parcel Kabare/Ngiroche/104 into two portions, and gave one of the portions to his two wives while he gave the other portion to the son of the late wife, Kariko Mwangi. The Appellants stated they had approached the Respondent to resolve the dispute amicably, but he refused to cooperate. The Appellants prayed for the dismissal of the suit with costs.
7. The Respondent's case was heard before the Lower Court on 30<sup>th</sup> May 2023. He adopted his witness statement and the documents he had tendered as in support of his case. He stated that he was the lawful owner of Land Parcel Kabare/Ngiroche/1115, which he inherited through a succession cause at Kerugoya. He testified that the suit land resulted from the subdivision of Land Parcel Kabare/Ngiroche/104, originally owned by his late father and measuring three decimal eight acres (3.8 acres). He explained that the original suit land was subdivided into two portions, which were shared between him and his stepmother, Margaret Kariuki, the mother of the 2<sup>nd</sup> Appellant. He affirmed that he held the title deed for Land Parcel Kabare/Ngiroche/1115 and asserted that he had brought the suit against the Appellants because they refused to vacate from the suit land. It was the Respondent's position that the 2<sup>nd</sup> Appellant should occupy his mother's portion of land while the 1<sup>st</sup> Appellant ought to relocate to the four (4) acres she was given in Mwea.
8. During cross-examination, the Respondent stated that his late father had bequeathed the suit land to him before his death. He explained that his late father had provided for all three of his children and stated that the 1<sup>st</sup> Appellant was given four acres in Mwea. He denied that he had given any part of his land to the 1<sup>st</sup> Appellant.
9. The Respondent called two witnesses who both reiterated that the Appellants had indeed trespassed on the suit land and affirmed they had alternative land where they could relocate to.
10. The 1<sup>st</sup> Appellant testified on 15<sup>th</sup> August 2023. She affirmed that the suit land belonged to her late father in law and that her husband and the Respondent and the 2<sup>nd</sup> Appellant were brothers. The 1<sup>st</sup> Appellant affirmed that following succession, the suit land was shared equally between the Respondent and the 2<sup>nd</sup> Appellant's mother. The 1<sup>st</sup> Appellant testified she had resided on the suit land since getting married to the Respondent's brother. She further confirmed the succession proceedings were carried out during the lifetime of her husband and that he had not objected to the grant and/or sought to have the same revoked. She however stated her late husband had informed her the Respondent's portion of land was to be shared with her. She confirmed that she was presently in occupation of about a quarter acre but desired the Court to award her half acre out of the Respondent's portion. She claimed she had no place to relocate to if she was ordered to vacate.
11. The Appellants witness DW2, Titus Kinyua the brother of the Respondent, testified that the 1<sup>st</sup> Appellant resided on the suit land. He affirmed that following succession, the suit land was shared equally between the Respondent and the 2<sup>nd</sup> Appellant's mother and each got 1.9 Acres. He affirmed he had been aware of the succession case involving the suit land.
12. The 2<sup>nd</sup> Appellant testified on 21<sup>st</sup> November 2023. He confirmed that he and the 1<sup>st</sup> Appellant have been living on the suit land. He stated that the land originally belonged to his father and that after his father's death, a succession case was conducted in Kerugoya and affirmed that all his brothers, including the late husband of the 1<sup>st</sup> Appellant, were present in Court when the grant was confirmed.
13. He further testified that the grant specified his mother would receive 1.9 acres of the original suit land, while the respondent would get the other 1.9 acres. He explained the grant was not objected to and



that he actually supervised the subdivision of the original suit land and confirmed that both his mother and the Respondent received their allotted shares. It was further his evidence that his father had given him and his brother a total of 10 acres of land each while he was alive. He further disclosed that the 1<sup>st</sup> Appellant's late husband was allocated 4 acres of rice paddy, in Mwea and that was why he was not entitled to a share of land Kabare/Ngiroche/104. He admitted he was occupying the suit land with the Respondent's permission and indicated that he had informed the Respondent that he would vacate from the land.

14. After reviewing the evidence, the Learned Trial Magistrate concluded that the Appellants did not demonstrate any rights over the disputed land. The Trial Magistrate found that the Respondent had proved he was the registered owner of the suit land, which he acquired through a grant confirmed and issued vide Kerugoya PM Succession Cause No. 137 of 1997. The Learned Magistrate issued an eviction order and injunctive order and awarded the Respondent the costs of the suit.
15. The Appeal was argued by the parties by way of written submissions. The Appellants' Counsel argued that a constructive trust was established in their favour due to their long-standing occupation and use of the suit property, and was thus challenging the title of the registered owner. Counsel claimed that the Learned Trial Magistrate did not adequately evaluate the evidence presented. The Appellant's Counsel contended that the evidence demonstrated the Appellants had equal rights to the disputed land since they were beneficiaries of the estate of Paul Kariuki Kaburi. Counsel urged the Court to issue orders as prayed in the Appeal.
16. The Respondent filed his written submissions dated 4<sup>th</sup> March 2025. The Counsel for the Respondent argued that the appeal was unfounded for two reasons. Firstly, the Appellants failed to prove that the Respondent's title deed was obtained fraudulently and/or irregularly to warrant its annulment/cancellation. Counsel submitted that the appellants did not present any evidence to challenge the title to the suit land. He asserted that, the Respondent was entitled to enjoy the rights of a proprietor of land vested under Section 24(a) of the *Land Registration Act*, 2012. Secondly, Counsel for the Respondent submitted that the issue of trust, which the Appellants raised in their submissions, had not been pleaded and/or canvassed in the Lower Court could not therefore be raised in submissions.
17. I have reviewed the memorandum of appeal, the record of appeal, and the evidence presented before the Lower Court and have duly considered the submissions made by the parties. This Court, being an Appellate Court of first instance, is obligated to consider and re-evaluate the evidence and material that was before the Learned Magistrate at the time she rendered the impugned Judgment, to determine whether the decision of the Learned Trial Magistrate was justified. This was in keeping with the principle enunciated by the Court of Appeal in the Case of *Selle & Another Vs East African Motor Boat & Others* 1968 EA 123.
18. The issues that arise for determination in this Appeal having regard to the Memorandum of Appeal maybe summarised as follows:-
  - i. Whether the Learned Magistrate erred in her assessment and evaluation of the evidence in holding and finding that the Respondent had proved his case and therefore entitled to the orders of eviction and injunction as against the Appellants?
  - ii. Whether on the basis of the evidence the 1<sup>st</sup> Appellant had proved she was entitled to a share of land parcel Kabare/Ngiroche/1115 registered in the name of the Respondent?
  - iii. Whether the Respondent held the suit land in trust for the Appellants?
19. It was not disputed that the Respondent held a title deed to Kabare/Ngiroche/1115. The evidence adduced before the Lower Court demonstrated that the suit land was lawfully transmitted to the



Respondent through a confirmed grant in Succession Cause No. 137 of 1997. The Appellants conceded in their testimony that the grant was confirmed and that they were aware of it, and that it was not challenged at any point. The transmission of the suit land to the Respondent was therefore lawfully effected and he thus became legal proprietor of the suit land.

20. Section 24 (a) of the *Land Registration Act*, 2012 provides as follows:

“The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”

21. Section 25(1) of the *Land Registration Act* further provides that:

“the rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of the 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 to any lawful encumbrances, set out in this Section.”

22. Section 26(1) of the same Act provides that:

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute indefeasible owner, subject to encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge except:

- a. on grounds of fraud, or misrepresentation to which the person is proved to be a party; or
- b. where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

23. Under Section 24 (a) of the *Land Registration Act*, 2012 registration of a person as proprietor confers on them absolute ownership, subject only to overriding interests. The Appellants produced no evidence to prove fraud, misrepresentation, or illegality that would justify the impeachment of the Respondent’s title under Section 26(1) of the Act. The Learned Trial Magistrate properly and rightly held that the Respondent was lawfully registered as proprietor of the suit land and that the Appellants had not demonstrated that they had any right over the land.

24. The Appellants predicated their claim broadly on the fact of having resided on the land and having been in occupation of the suit land for a long time and further that they were beneficiaries of the deceased (Paul Kariuki Kaburi) and therefore entitled to a share of the land as such beneficiaries. The Court takes notice that beneficiaries to the deceased estate were determined in the succession case which the Appellants admit and do not dispute.

25. A look at the plaint filed by the Appellants in the Lower Court shows that the claim of trust or beneficial interest was not pleaded. It was raised only during submissions in this Appeal. Courts have



consistently held that parties are bound by their pleadings. In *Independent Electoral and Boundaries Commission & Another v Stephen Mutinda Mule & 3 Others* [2014] eKLR, the Court held:

“As the parties are adversaries, each must rely on the strength of his or her own case and not the weakness of the other party’s case. He who asserts must prove. And the pleadings contain the case that a party must establish. Parties are bound by their pleadings, which in turn limit the issues upon which a Trial Court may pronounce. A court has no power to make a finding or decision on an issue that was not pleaded.”

(Emphasis added).

26. The Appellants never pleaded the existence of a trust in the Lower Court and are therefore precluded from raising the issue of trust as a new issue in the Appeal. Parties are bound by their pleadings and are not permitted to introduce and/or lead evidence on issues that were not pleaded. The rationale is that the opposing party has to be afforded the opportunity to respond to the issue.
27. At any rate whether a trust exists or does not exist is a matter of evidence. The general rule is that trusts whether express, implied and/or constructive, must be pleaded and substantiated through credible and cogent evidence.
28. In the case of *Juletabi African Adventure Ltd & Another v Christopher Michael Lockley* [2017] eKLR, the Court of Appeal stated as follows:-

“It is settled law that the burden lies on a party relying on the existence of a trust to prove it through evidence. The law does not imply a trust, nor does the court presume one, except in cases of absolute necessity. A court will not imply a trust unless it serves to fulfill the intentions of the parties involved. The intention to create a trust must be clearly established before a trust can be implied.”
29. The 1<sup>st</sup> Appellant’s claim of a share of the suit land was based on her long period of occupation of the suit land and the fact of her husband having been a brother of the Respondent. According to her, the husband was entitled to inherit from his deceased father and hence the Respondent’s land portion ought to have been shared with her husband. In essence the 1<sup>st</sup> Appellant’s claim was that the Respondent was holding the suit land in trust for himself and his deceased brother (husband to the 1<sup>st</sup> Appellant). Occupation of land alone without more, cannot constitute or create a trust. There has to be evidence that there was an intention on the part of the proprietor and the person claiming trust to have a trust created. In the instant matter there was clearly no evidence to establish there was any intention to create a trust when the Respondent was registered as the owner of the suit land.
30. The Appellants in their evidence admitted that there was a succession cause pursuant to which the Respondent and the 2<sup>nd</sup> Appellant’s mother were granted the suit land to share equally with each of them getting 1.9 Acres of the land. The Appellants were aware of the succession proceedings and of the outcome and none of them objected to the issue of the grant and/or challenged the distribution of the suit land to the Respondent and the 2<sup>nd</sup> Appellant’s mother. The Appellants were not adjudicated to be beneficiaries of the estate of Paul Kariuki Kaburi and hence were not entitled to any share of the deceased estate. Infact the evidence of the 2<sup>nd</sup> Appellant materially corroborated the Respondent’s evidence that their father had before his death directed how his estate would be divided and had given land to all his three children including the husband of the 1<sup>st</sup> Appellant who had been given 4 Acres of land at Mwea. The 2<sup>nd</sup> Appellant admitted he was occupying the Respondent’s land with his permission and had agreed and committed to vacate from the land.



31. Upon my evaluation of the evidence adduced before the Lower Court, I am satisfied that the Learned Magistrate reached the correct finding that the Respondent was lawfully and validly registered as the owner of the suit property and that the Appellants had failed to prove that they had any legal right and/or equitable right to justify them to continue occupying the land. The Respondent proved that he was the rightful owner of the suit property and was as such entitled to enjoy all the ownership rights to land vested on a registered proprietor.
32. I find no basis to fault the Learned Magistrate for reaching the decision that she did. The Appeal is without any merit and the same is dismissed with costs to the Respondent.

**JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT KERUGOYA THIS 12<sup>TH</sup> DAY OF JUNE 2025.**

**J. M. MUTUNGI**

**ELC JUDGE**

