



REPUBLIC OF KENYA



**Ciero & another v Njanja & 2 others (Civil Appeal 111 of 2022)
[2025] KECA 1541 (KLR) (3 October 2025) (Judgment)**

Neutral citation: [2025] KECA 1541 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPEAL 111 OF 2022
W KARANJA, J MOHAMMED & LK KIMARU, JJA
OCTOBER 3, 2025**

BETWEEN

JECINTA WAMBURA M. CIERO 1ST APPELLANT

NJOKI LUCY RUKENYA 2ND APPELLANT

AND

BENSON WARUI NJANJA 1ST RESPONDENT

ELIZABETH WAWIRA WARUI 2ND RESPONDENT

GILBERT NJANJA WARUI 3RD RESPONDENT

*(Being an appeal from the judgment of the Environment and Land Court
at Kerugoya (Cherono, J.) dated 13th May, 2022 in ELC No. 16 of 2020)*

JUDGMENT

1. The appellants and the 1st respondent are siblings. The 2nd respondent is the 1st respondent's child, while the 3rd respondent is his wife. The appellants herein instituted the suit before the superior court against the respondents, vide a plaint dated 27th May, 2020. The appellants sought a declaration that the 1st respondent held land parcel No. Kabare/Nyangati/5320 (suit land) in trust for the appellants; and that the transfer of the suit land by the 1st respondent to the 2nd and 3rd respondents was subject to the overriding interests and the doctrine of lis pendens. The appellants further urged the superior court to declare that each appellant was entitled to one acre of the suit land by virtue of the said trust.
2. It was the appellants' case that their late father, Njanja Kabiru, was the original owner of land parcel No. Kabare/Nyangati/270, measuring approximately 9.9 hectares (24.7 acres). They averred that their late father had three wives, among them their late mother, Jane Kanini. That upon the death of their mother, there arose a dispute within the family which was litigated before the Mwea Land Disputes Tribunal, consequent to which the Tribunal made an order to the effect that their late mother's share of



parcel No. 270, measuring 8.1 acres, be registered in the name of the 1st respondent, in trust for himself and the appellants. The said parcel was registered as Kabare/Nyangati/3937. That the 1st respondent, who is their brother, however prevented them from accessing the said parcel and tilling it, claiming that the land solely belonged to him. The appellants averred that they placed a caution against parcel No.3937 on 5th October, 2015, and thereafter lodged Kerugoya ELC No. 135 of 2015. The learned Judge in that matter determined that the 1st respondent held parcel No. 3937 in trust for himself and the appellants. The learned Judge further directed that each of the appellants was entitled to one acre of parcel No. 3937.

3. The appellants stated that when they sought to execute the said decree, the 1st respondent informed the court that parcel No. Kabare/Nyangati/3937 was no longer in existence. The appellants stated that they discovered that the 1st respondent had sub-divided parcel No.3937 into two resultant portions, that is, Kabare/Nyangati/5321 (measuring approximately 2 acres) and Kabare/Nyangati/5320 (measuring 6 acres), on 23rd September 2010. Parcel No. 5321 was transferred to the 1st respondent's son, who is the 2nd respondent, on 2nd December, 2012. Parcel No. 5320 remained in the 1st respondent's name. The appellants averred that these sub-divisions however, did not reflect on the green card of parcel No.3937, as at the time they filed the Kerugoya ELC No. 135 of 2015. That during the pendency of the suit (Kerugoya ELC No. 135 of 2015), the 1st respondent transferred parcel No. 5320 to the 2nd and 3rd respondents on 20th December 2017, in a deliberate attempt to frustrate the appellants' execution of the decree issued in their favour. The appellants contend that they are entitled to one acre each of parcel No. 5320, as there existed an unexecuted decree issued by a competent court.
4. The 1st respondent filed a statement of defence dated 7th July, 2020.
He refuted the appellants' claim that he held parcel No. Kabare/Nyangati/3937 in trust for himself and the appellants. He averred that he was registered as the sole owner of the said parcel pursuant to a decision of the Land Tribunal in L.D.T. No. 5 of 2001 Kerugoya, which was adopted as an order of the court. He stated that he was in exclusive possession of the said parcel of land. It was the 1st respondent's case that the appellants failed to pursue their share of their father's land, and that parcel No. 3937 did not belong to their mother as alleged, but was his share solely from their father's estate. He stated that he sub-divided parcel No. 3937 and transferred a portion of it to his son, the 2nd respondent.
5. The 2nd and 3rd respondents filed their statement of defence dated 3rd July, 2020. They stated that they became aware of the appellants' claim after they were served with an application dated 9th July, 2018, seeking to join them as parties in Kerugoya ELC Case No. 135 of 2015. They averred that the said application was however dismissed on 30th April, 2020. It was their case that the suit land, L.R. No.Kabare/Nyangati/5320, was lawfully transferred to them. They stated that they were not parties in Kerugoya ELC Case No. 135 of 2015, which allegedly issued a decree in favour of the appellants, and further asserted that the said decree did not pertain to parcel No. 5320. They averred that they had established their homes on the said suit land and have extensively developed the same.
6. The case was heard by way of viva voce evidence. After hearing the parties, the learned Judge, in a judgment delivered on 13th May, 2022, found that land parcel No. Kabare/Nyangati/3937 was non- existent, at the time the appellants lodged Kerugoya ELC Case No. 135 of 2015, having been sub-divided into resultant parcels Nos. Kabare/Nyangati/5320 and Kabare/Nyangati/5321. In the premises, the order of the said court declaring that the 1st respondent held parcel No.3937 in trust for himself and the appellants could not be executed, as the implication of the said trust did not extend to the resultant parcels Nos. 5320 and 5321. The learned Judge determined that the appellants failed to exercise due diligence at the time of filing the said suit, and as a result sought orders in respect of a non-existing parcel of land, and that a trust was not capable of being created with respect to a non-existent



land. The learned Judge held that the judgment and resultant decree issued on 14th March 2018, in Kerugoya ELC Case No.135 of 2015, was a non-starter and had no legal effect, and that parcels Nos. 5320 and 5321 were not subject to any overriding interest or trust. It was the finding of the court that the appellants had failed to lay proper basis as to why parcel No. 5320 (the suit land) was subject to customary trust, and as such, the appellants' suit was dismissed.

7. The appellants, aggrieved by this decision, lodged the appeal before us. They have proffered four grounds of appeal. The gist of his appeal is that the learned Judge erred in law and fact: in misconstruing and misapplying the provisions of Section 28(b) of the *Land Registration Act*; in sitting on appeal over a decision of a court of equal jurisdiction, which decision directed that the 1st respondent held parcel No. Kabare/Nyangati/3937 in trust for himself and the appellants, and that the appellants were entitled to one acre each of the said land; in failing to appreciate the relationship between the parties, and how the 1st respondent came to be registered as the owner of the parcel No. 3937; and lastly, in delivering a decision that was against the evidence on record and the law.
8. The appeal was canvassed by way of written submissions. Learned Counsel for the appellants, Mr. Kagio, submitted that it was not disputed that parcel No. Kabare/Nyangati/3937 was a resultant subdivision of the original parcel of land, Kabare/Nyangati/270, which was registered to the appellants' and 1st respondent's father. He explained that the appellants' case in Kerugoya ELC Case No. 135 of 2015 was that the 1st respondent held parcel No. 3937 in trust for himself and the appellants, and that they sought to be awarded one acre each from the said parcel of land. Counsel urged that the said court agreed with the appellants. However, during execution of the said decree, the 1st respondent revealed that he had sub-divided parcel No.3937 into resultant parcels Nos. 5320 and 5321. That the appellants' attempt to join the 2nd and 3rd respondents in the suit at the execution stage was rejected by the court.
9. Counsel for the appellants urged that the learned Judge's finding that the appellants failed to conduct due diligence before filing Kerugoya ELC No. 135 of 2015 was misplaced, as the appellants sufficiently explained that the subdivision was not reflected on the green card. Counsel asserted that the 1st respondent mischievously transferred the suit land, parcel No. 5320, to the 2nd and 3rd respondents during the pendency of Kerugoya ELC No. 135 of 2015. He submitted that parcel No. 3937 having been declared as trust land, the resultant parcels suffered the same fate, and the appellants were entitled to their two acres from either of the resultant parcels of land. Counsel faulted the learned Judge for sitting on appeal on a decision of a court of equal jurisdiction with respect to the question of trust. He submitted that the decision of the court in Kerugoya ELC No. 135 of 2015 remained unchallenged.
10. Learned counsel, Ms. Wambugu appeared for the 1st respondent. It was her submission that the subject matter in the instant suit was different from the subject parcel of land in Kerugoya ELC No. 135 of 2015, and therefore the appellants' submission that the learned Judge sat on appeal on a decision of a court of equal jurisdiction was unfounded. Counsel urged that the 2nd and 3rd respondents, who are the registered owners of the resultant parcels were not parties in Kerugoya ELC No. 135 of 2015, and that executing the decree issued by the said court would be tantamount to condemning them unheard. Counsel reiterated that the appellants merely relied on the decree issued in ELC Case No. 135 of 2015 and failed to adduce any evidence to establish trust in the suit before the superior court. She urged that the appeal ought to be dismissed for lack of merit.
11. Ms. Muturi, learned counsel for the 2nd and 3rd respondents submitted that the 1st appellant, in her testimony before the superior court, stated that her claim lay against the 1st respondent only. She stated that the appellants failed to adduce any evidence to establish their claim with respect to the suit land. It was her submission that the appellants failed to establish that the suit land was clan or family land



so as to give rise to a customary trust. She pointed out that the appellants did not plead particulars of breach of trust by the 2nd and 3rd respondents, as the registered owners of parcel No. 5320, that would warrant them to shoulder liability of the resultant trust, to the exclusion of the registered owner of parcel No.5321. Counsel urged that the judgment and resultant decree in Kerugoya ELC No. 135 of 2015 was ineffective, and therefore the learned Judge could not be accused of having sat on appeal on a decision of a Judge of equal status with respect to the said decision. She maintained that the 2nd and 3rd respondents were not parties in the said suit.

12. We are alive to our mandate as a first appellate court to analyze and re-assess the evidence on record, and reach our own conclusions. This duty was reiterated by this Court in *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR, where the court observed thus;

“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 allowances in this respect.” See *Selle v. Associated Motor Boat Co.* [1968] EA 123.

13. It is evident that the appellants’ claim to the suit land in the present appeal was based on customary trust.

14. The import of Section 28 (b) of the *Land Registration Act*, with respect to overriding interests, is to the effect that, unless the contrary is expressed in the register, all registered land shall be subject to trust including customary trusts.

15. This Court in the case of *Juletabi African Adventure Limited & another v Christopher Michael Lockley* [2017] eKLR held thus:

“It is settled that the onus lies on a party relying on the existence of a trust to prove it through evidence. That is because:

‘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 intentions of the parties. The intention of the parties to create a trust must be clearly determined before a trust will be implied.’ See *Gichuki vs. Gichuki* [1982] KLR 285 and *Mbothu & 8 Others vs. Waitimu & 11 Others* [1986] KLR 171.”

16. The Supreme Court in *Isack M'inanga Kiebia v Isaaya Theuri M'lintari & another* [2018] eKLR observed that some of the elements that would qualify a claimant as a trustee in regards to customary trust include:

- i. “The land in question was before registration, family, clan or group land;
- ii. The claimant belongs to such family, clan, or group;
- iii. 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;
- iv. The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances;
- v. The claim is directed against the registered proprietor who is a member of the family, clan or group.”



17. We have re-evaluated the evidence adduced before the trial court in light of the grounds of appeal and the submissions made by the parties before us. In the present appeal, the following facts are not disputed, it is not disputed that the original parcel of land registered as No. Kabare/Nyangati/270 measuring 24.7 acres was owned by Njanja Kabiru, the late father of the appellants and the 1st respondent. The said Njanja Kabiru was married to 3 wives including the mother of the appellants and the 1st respondent, the late Jane Kanini.
18. A dispute arose between the three houses that comprised the beneficiaries of the estate of Njanja Kabiru in regard to how the sole property would be distributed among them. The dispute was escalated to the Mwea Land Dispute Tribunal which in a decision, subdivided the above portion of land into approximately three equal portions. The family of the appellants and the 1st respondent were given 8.1 acres. Since at the time their mother was deceased, the 1st respondent was registered as the owner of the suit parcel of land. It was clear from the evidence that the 1st respondent was so registered in trust for his two siblings, the appellants. The appellants later discovered that the 1st respondent was unwilling to transfer a share of the suit parcel of land to them. In particular, the appellants wanted to be given a share of one (1) acre each.
19. The appellants filed suit before Kerugoya ELC in suit No.135 of 2015 seeking declaratory orders from the court that the 1st respondent held the said two acres in trust for the appellants. In the case, the appellants pleaded the suit parcel of land to be No. Kabare/Nyangati/3937. This was a subdivision of the original parcel No. Kabare /Nyagati /270. After hearing the case, the ELC found in favour of the appellants and declared that the 1st respondent held the two acres in trust for the appellants. However, when the appellants sought to execute the judgment delivered in their favour, they discovered that the 1st respondent had caused the suit parcel of land to be subdivided into parcels Nos.Kabare/Nyangati/5320 and Kabare/Nyangati/5321 and transferred the same to the 2nd and 3rd respondents, his wife and son respectively. The appellants were unable to execute the judgment. Their attempt to join the 2nd and 3rd respondents after judgment for the purpose of executing the decree was unsuccessful hence their decision to file Kerugoya ELC No. 16 of 2020 which was dismissed provoking the present appeal.
20. The issue for determination before this Court is whether the appellants are entitled to the orders craved for in their appeal. Specifically, a declaration that they are entitled to the two acres out of parcel No. Kabare/Nyangati/5320 noting that the 1st respondent transferred this parcel of land to the 2nd and 3rd respondents on 20th December, 2017 during the pendency of the original suit.
21. Our re-evaluation of the evidence leads us to the inevitable determination that indeed the respondents are registered as the owners of the suit parcels of land in trust for the appellants, especially the two acres that the appellants are claiming. This is because the two parcels of land can be traced to parcel No.Kabare/Nyangati/270 which belonged to the father of the appellants and the 1st respondent. The resultant subdivision being parcel No. Kabare/Nyangati/3937 registered in the name of the 1st respondent measuring 8.1 acres was so registered in the name of the 1st respondent in trust for himself and the appellants, his siblings. This parcel of land was ancestral land and fits the definition of ancestral land in all fours by the Supreme Court in *Isack M'inanga Kiebia v Isaaya Theuri M'lintari & another* [2018] eKLR.
22. The Supreme Court in *Dina Management Ltd v. County Government of Mombasa & 5 others* (Petition 8 (E010) OF 2021 KESC 30 (KLR) held that where the registered proprietor's root title is under challenge, it is not enough for as proprietor to dangle the instrument of title as proof of ownership. It was the instrument that was in challenge and therefore the registered proprietor must



go beyond the instrument and prove the legality of the title and prove the acquisition was legal, formal and free from any encumbrance including interests which would not be noted in the register.

23. It was apparent from the 1st respondent's conduct that he is unwilling to transfer the two acres to the appellants, their entitlement in trust, and has used guile and craft to frustrate the appellants from accessing their lawful inheritance from their father. In doing so, he has roped in his wife and son, the 2nd and 3rd respondents in his devious scheme.
24. It is clear from the foregoing that this appeal is for allowing. It is hereby allowed. To meet the ends of justice, this Court will issue the following orders:
- i. The appeal is hereby allowed.
 - ii. The judgment and decree of the ELC is hereby set aside.
 - iii. The title transferred in respect of parcel No. Kabare/Nyangati/ 5320 to the 2nd and 3rd respondents is hereby ordered cancelled.
 - iv. Parcel No. Kabare/Nyangati/5320 shall be subdivided into 3 portions where each of the appellant shall get an acre and they shall take possession of the same. The 1st respondent shall get the remainder of the land. The access road and other amenities pursuant to the surveyor and subdivision shall be exercised from the 1st respondent's portion of land.
 - v. The appellants shall have the costs of the appeal and the suit before the ELC.

DATED AND DELIVERED AT NYERI THIS 3RD DAY OF OCTOBER, 2025.

W. KARANJA

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JUDGE OF APPEAL

JAMILA MOHAMMED

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

