



REPUBLIC OF KENYA



**KENYA LAW**  
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**Gichuki & another v Kina & 3 others (Environment and Land Appeal  
E024 of 2023) [2025] KEELC 5863 (KLR) (31 July 2025) (Judgment)**

Neutral citation: [2025] KEELC 5863 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT EMBU  
ENVIRONMENT AND LAND APPEAL E024 OF 2023**

**AK BOR, J**

**JULY 31, 2025**

**BETWEEN**

**AGUSTA MUTHANJE GICHUKI ..... 1<sup>ST</sup> APPELLANT**

**ESTHER NYAKIO GICHUKI ..... 2<sup>ND</sup> APPELLANT**

**AND**

**MARY KINA ..... 1<sup>ST</sup> RESPONDENT**

**JUDY WAWIRA ..... 2<sup>ND</sup> RESPONDENT**

**ELIZABETH MUTHONI ..... 3<sup>RD</sup> RESPONDENT**

**MARTIN NDWIGA ..... 4<sup>TH</sup> RESPONDENT**

*(An appeal from the judgment of Hon. J.A Otieno, Senior Resident  
Magistrate, delivered on 28/11/2023 in Embu ELC Case No. E002 of 2022)*

**JUDGMENT**

1. This appeal arises from the judgment of Hon. J.A Otieno, Senior Resident Magistrate, delivered on 28/11/2023 in Embu ELC Case No. E002 of 2022, Agusta Muthanje Gichuki & Another v Mary Kina & 3 Others. The Appellants instituted that suit seeking a permanent injunction to restrain the Respondents from interfering with the Appellants' quiet occupation, possession, and use of the parcels of land known as Ngandori/Kiriari/8222 and Ngandori/Kiriari/8220 (the suit land). They also sought an order for the eviction of the Respondents from the suit land as well as any other relief the court deemed fit to grant.
2. The 1<sup>st</sup> Appellant is a sister to the Respondents while the 2<sup>nd</sup> Appellant is the daughter of the 1<sup>st</sup> Appellant. The Appellants contended in the suit before the trial court that they are the registered proprietors of the suit land and that the Respondents had unlawfully entered the land and destroyed their tea bushes by cutting them down and damaging boundaries, causing them great loss. They gave



- particulars of trespass that the Respondents illegally entered the suit land, unlawfully picking tea, and destroying the Appellants' tea bushes.
3. The Respondents filed a defence and averred that the suit land resulted from the subdivision of Ngandori/Kiriari/1087, which belonged to their father Mutura Gichuki (deceased) together with the developments thereon. They averred that they had been and were still utilising Ngandori/Kiriari/1087 prior and subsequent to the demise of their late father ex debito justitiae and as a matter of customary rights or trust. They contended that if the original title was subdivided as the plaintiffs claimed, then they had acquired indefeasible customary rights over the subdivisions, and that the Appellants were registered as proprietors in trust for them by way of a customary trust. They denied any acts of trespass.
  4. During the hearing, the 1<sup>st</sup> Appellant, Augusta Muthanje Gichuki, testified on behalf of both Appellants and adopted her witness statement dated 22/11/2022 as her evidence in chief. She stated that they are the registered owners of Ngandori/Kiriari/8222 and Ngandori/Kiriari/8220 respectively, which were subdivisions of Ngandori/Kiriari/1087. She explained that she was the daughter of Esther Rwamba Alvan who died on 25/5/2021 and that Esther Rwamba Alvan, the wife of Gichuki Mutura was allocated Ngandori/Kiriari/1087 by her husband and was registered as the absolute proprietor.
  5. The 1<sup>st</sup> Appellant testified that during her lifetime, Esther Rwamba Alvan subdivided Ngandori/Kiriari/1087 into Ngandori/Kiriari/8219, 8220, 8221 and 8222 and allocated each of the parties their respective portions. That parcel no. 8221 was allocated to the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> Respondents while parcel 8219 was allocated to the 4<sup>th</sup> Respondent, who was registered as its absolute owner. She emphasized that the subdivision and issuance of individual title deeds took place in 2020 when Esther Rwamba Alvan was still alive.
  6. It was the 1<sup>st</sup> Appellant's evidence that the tea bushes on their parcels of land were their only source of income and the continued destruction and illegal picking of the tea by the Respondents had denied them their rightful income causing them irreparable loss. She maintained that the Respondents had their own parcels of land and that their actions of trespass upon the Appellants' land was motivated by ill will and malice. The Appellants produced the title deeds for parcel numbers 8219 to 8222 in support of their case.
  7. The 4<sup>th</sup> Respondent testified on behalf of the Respondents and relied on his witness statement dated 21/5/2023. It was his evidence that parcel no. 1087 belonged to their late father, Gichuki Mutura and that the 1<sup>st</sup> Appellant was allowed to settle on that land by their father after her marriage irretrievably broke down. He testified that Gichuki Mutura died in 2011 while their mother died in 2021, and that after their mother died, they extended the good faith and let the 1<sup>st</sup> Appellant continue living on the suit land and carry out farming activities.
  8. He stated that they were shocked to discover that the suit land had been transferred to the Appellants without their knowledge and questioned the legitimacy of the Appellants' registration as absolute proprietors, particularly given that the transfer occurred six years after their father's death. The 4<sup>th</sup> Respondent asserted that they had been in continuous occupation of the land long before what they described as a fraudulent change of ownership, and maintained that their prolonged occupation and use of the land gave rise to a customary right. The Respondents produced the green card for parcel no. 1087, copies of correspondence, Gichuki Mutura's death certificate, and Esther Rwamba Alvan's death certificate.
  9. Guided by the observations of the Court of Appeal in *Munyu Maina v Hiram Gathinji Maina* (2013) eKLR, where the court required a registered proprietor whose root of title was being challenged to go beyond the mere production of the title document and demonstrate that the acquisition of the



- title was legal, formal, and free from any encumbrances and interests not in the register, the trial court found that the Appellants did not prove that their donor had a good title to pass and that they failed to go beyond the titles to prove a clear and legal acquisition. The Learned Magistrate found that the Appellants did not prove their case and dismissed it with costs to the Respondents.
10. Being aggrieved by that decision, the Appellants raised 8 grounds of appeal in their memorandum of appeal dated 6/12/2023. They faulted the trial court for deciding the case against the weight of their evidence and for considering the issue of validity of their titles to the suit land yet the issue was not specifically pleaded by the Respondents. They also faulted the trial court for failing to consider that the Respondents neither filed a counterclaim challenging their titles over the suit land nor did they raise a counterclaim on the allegation that a customary trust existed in their favour.
  11. They faulted the court for failing to consider that the Respondents did not specifically plead and prove fraud as required by law. Further, that the trial court erred in shifting the burden of proof on the fraud to the Appellants. The trial court was also faulted for ignoring Sections 24, 25, and 26 of the [Land Registration Act](#) and for dismissing the Appellants' case despite the Respondents' admission of trespass on the Appellants' parcels of land. The court was invited to set aside the judgment and decree of the trial court and for costs of the appeal and the suit to be awarded to the Appellants.
  12. The court directed parties to file and exchange written submissions which it has considered. The Appellants submitted that the Respondents alleged fraudulent change of ownership and illegality by the Appellants in the acquisition of title but they did not file any counterclaim seeking to cancel those titles. That on that basis alone the trial court ought to have allowed their claim as they had no way of knowing what the Respondents would have brought as evidence to prove those allegations to enable them counter that claim. They submitted that the Respondents failed to prove fraud to the required standard as the fact that registration of a transfer happened after the death of their father Gichuki Mutura, was not prima facie evidence of fraud as he may have signed transfer instruments during his lifetime.
  13. Additionally, they submitted that the trial court erroneously shifted the burden of proof to them and held that they were bound to produce documents showing how their mother Esther Rwamba Alvan obtained the title in her name six years after the death of the registered owner in the absence of a succession cause yet at no point did the burden of proof shift to them. They averred it was the Respondents' burden to prove those allegations and relied on Section 116 of the [Evidence Act](#) which provides that when the question is whether any person is the owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner. They submitted that the trial court failed to recognise them as the absolute and indefeasible owners of the suit lands in line with Sections 24, 25, and 26 of the [Land Registration Act](#).
  14. They urged that the Respondents did not give the particulars of the alleged customary trust or raise a counterclaim or even lead evidence to prove the existence of such trust. It was their position that no trust subsisted in favour of the suit land and that it was illogical for the 4<sup>th</sup> Respondent to claim the existence of such trust when he benefited from the subdivision of the original parcel 1087 and holds a title deed in his name.
  15. The Respondents submitted that a defence is not confined to a denial but may include any explanation or justification that directly challenges the plaintiff's right to the relief sought. They admitted that they did not file a counterclaim but averred that they were not seeking any affirmative relief such as the cancellation of the Appellants' title. Rather, that they were resisting eviction in which case the trial court was not wrong in entertaining their defence which questioned the manner in which the Appellants acquired their titles over the suit land. They contended that the law does not prevent a party



from raising fraud or trust as a defence even in the absence of a counterclaim as long as no positive orders are sought.

16. They submitted that the burden of explaining how their mother acquired title rested with the Appellants once the Respondents showed that the transfer took place after their father's death and without any succession cause. They averred that the suit land is ancestral land and that they are members of the same family. They maintained that it was undisputed that they were in possession of the suit land, were cultivating it and had lived on it for many years. In addition, that there was no evidence that their father being the original owner of the land, excluded them from its benefit during his lifetime. In their view, this supported the inference of a customary trust particularly given the lack of transparency on how their mother came to be registered as the sole proprietor and distributed the land unequally.
17. The Respondents submitted that the green card showed that the original parcel was registered in the name of Gichuki Mutura until 2017, which was six years after his death. It was their submission that the trial court correctly declined to invoke Sections 24, 25, and 26 of the *Land Registration Act* to shield the Appellants as the acquisition of their titles over the suit land was questionable and fell outside the statutory protection for registered proprietors. They cited decisions on instances when titles can be cancelled.
18. The issue for determination is whether the court should allow the appeal and set aside the findings of the trial court. The Appellants sought a permanent injunction to restrain the Respondents from entering, encroaching, trespassing, remaining, farming, harvesting or interfering with the Appellants' occupation and possession of the suit land. They also sought the eviction of the Respondents from the suit land in the Amended Plaint dated 8/2/2022. The burden to prove that the Respondents had entered the suit land without any colour of right, were unlawfully picking tea on the Appellants' land and that they had destroyed tea bushes lay on the Appellants. Their claim was that despite the Respondents having their own parcels of land, they had trespassed onto the Appellants' land.
19. The Appellants did not lead evidence on when the Respondents got onto the land which supports the assertion by the Respondents that they were utilising the land before their mother and father died. The Appellants pleaded that the Respondents cut down tea bushes, damaged the boundaries and that they illegally picked tea on the Appellants' land. They did not lead evidence on when the tea was planted and by whom. It probably was the arrangement that all the siblings including the Respondents picked the tea and benefitted from it before their father and later mother died.
20. The testimony of the 4<sup>th</sup> Respondent was that that the Respondents were in possession of the suit land, cultivated it and had lived on it for many years. No evidence was led by the Appellants to show that their father, who was the original owner of the land before its subdivision, excluded them from utilising the land during his lifetime. If the parties' mother subdivided the land during her lifetime and allocated portions to her children, she would have informed her children and showed them the portions she had allocated to them. The Respondents averred that the 1<sup>st</sup> Appellant was allowed to settle on the suit land by their father after her marriage broke down.
21. For the Respondents to be said to have destroyed boundaries on the land, it is expected that at some point the 4<sup>th</sup> Respondent who the Appellants claim is registered as proprietor of parcel number 8219 would have been shown the boundaries for his parcel of land before the 1<sup>st</sup> Appellant could claim that the Respondents had trespassed onto the suit land. That creates doubt as to whether the parties' mother subdivided the land during her lifetime and allocated the portions to the parties.



22. The Appellants claimed that their mother allocated the 1<sup>st</sup> to 3<sup>rd</sup> Respondents Ngandori/Kiriari/ 8221 jointly. However, the court notes from the copy of title deed which the Appellants produced that it is registered in the name of Esther Rwamba Alvan and was issued on 5/11/2020. The title deeds for the Appellants were issued on 19/10/2020 as was the one bearing the 4<sup>th</sup> Respondent's name. For a title to have been issued in the 4<sup>th</sup> Respondent's name he was required to submit documents such as copies of his identity card, passport photos and PIN certificate. It would have been necessary to also procure the consent of the Land Control Board to transfer parcel number 8219 to the 4<sup>th</sup> Respondent. It is worth noting that the copies of the title deeds were produced for Ngandori/Kiriari/8219 to 8222 were produced by the Appellants and not the Respondents.
23. It is highly improbable that the Appellants' mother could have subdivided her land and bequeathed 0.7 ha to the 1<sup>st</sup> Appellant and 0.2 ha to her daughter; and gone ahead to allocate 0.2 ha to the 4<sup>th</sup> Respondent leaving out the 1<sup>st</sup> to 3<sup>rd</sup> Respondents who were living on the land and utilising it. No explanation was offered by the Appellants on this unusual scenario where one daughter ended up with 0.7 ha for herself and 0.2 ha for her daughter making it 0.9 ha in total, her brother got 0.2 ha and her three sisters were being given any land since the portion registered under Esther Rwamba Alvan does not belong to the 1<sup>st</sup> to 3<sup>rd</sup> Respondents. Ngandori/Kiriari/8221 forms part of the estate of the late Esther Rwamba Alvan and has to go through probate before it can be distributed among her dependants.
24. The Respondents position was that the original land, parcel 1087, belonged to their late father, Gichuki Mutura, and that the 1<sup>st</sup> Appellant was only permitted to occupy and utilise the land after her marriage broke down. They questioned how the suit land was transferred first to Esther Rwamba Alvan and subsequently to the Appellants. The copy of the green card which the Respondents produced shows that Esther Rwamba Alvan's name was entered as entry no. 9 on the register on 24/6/2017 and a title deed was issued to her on 14/8/2019. Entry no. 11 restricted dealings with the land and the owner was to appear before the Land Registrar. That restriction was lifted on 10/12/2019 vide entry no. 12.
25. The letter dated 19/7/2021 from the Deputy County Commissioner to the Land Registrar indicated that succession for estate of the late Gichuki Mutura had not been done but the late Esther Rwamba Alvan fraudulently subdivided Ngandori/Kiriari/1087. The letter requested the Land Registrar to place a restriction against Ngandori/Kiriari/8219 to 8222.
26. The court is inclined to believe the Respondents' assertion that no succession proceedings were commenced in respect of their father's estate after his demise in 2011 and that the title over Ngandori/Kiriari/1087 was irregularly transferred from Gichuki Mutura to Esther Rwamba Alvan on 24/6/2017. Had letters of administration been taken out for their father's estate the Respondents would have known about this and been involved in that process as beneficiaries of their father's estate. The Respondents who lived and utilised the suit land would have known if the land was subdivided before their mother's demise.
27. The Respondents claimed that they had been utilising the suit land as a matter of customary rights. They contended that on subdivision of the land they acquired customary rights over the subdivisions. The Respondents are not trespassers on the suit land as the Appellants contended. The root of the Appellants' titles over the suit land is questionable. The Appellants failed to prove their claim to the suit land on a balance of probabilities.
28. The appeal lacks merit and is dismissed with costs to the Respondents.

**DELIVERED VIRTUALLY AT EMBU THIS 31<sup>ST</sup> DAY OF JULY 2025.**



**K. BOR**

**JUDGE**

In the presence of:

Ms. M. Nyaga holding brief for Ms. M. Boore for the Appellant

Diana Kemboi- Court Assistant

No appearance for the Respondent

