Kariuki & 4 others (Suing as the Legal Representatives to the Estate of Stephen Kariuki Kiruma alias Kariuki Kirumia - Deceased) v Kigoro (Environment and Land Appeal E013 of 2024) [2025] KEELC 5914 (KLR) (31 July 2025) (Judgment)

Neutral citation: [2025] KEELC 5914 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT EMBU

ENVIRONMENT AND LAND APPEAL E013 OF 2024

AK BOR, J

JULY 31, 2025

BETWEEN

DIANA NJOKI KARIUKI ..... 1ST APPELLANT

ANGERA GATURI MURIITHI ..... 2ND APPELLANT

AGATAH KARIMI WAMBETI ..... 3RD APPELLANT

MOSES MURITHI KARIUKI ..... 4TH APPELLANT

CATHERINE GICUKU IRERI ..... 5TH APPELLANT

SUING AS THE LEGAL REPRESENTATIVES TO THE ESTATE OF STEPHEN KARIUKI KIRUMA ALIAS KARIUKI KIRUMIA - DECEASED

AND

ALBERT NJAGI KIGORO ..... RESPONDENT

JUDGMENT

1. This appeal arises from the judgment of Hon Francis N. Kyambia, Chief Magistrate (CM) delivered on 26/3/2024 in Embu CM ELC Case no. 112 of 2018 Diana Njoki Kariuki & 4 others (Suing as the Legal Representatives of the Estate of the Late Stephen Kariuki Kiruma alias Kariuki Kirumia v Albert Njagi Kigoro. The Appellants instituted the suit in the magistrates' court seeking to have the Respondent directed to subdivide and transfer half share of the land known as Ngandori/Kirigi/1952 (the suit land) to them. They also sought costs of the suit any other relief the court deemed fit to grant.

2. The Appellants are the son, daughters and second wife of the Late Stephen Kariuki Kiruma, who was the Respondent's step brother. The Appellants averred that the suit land belonged to their late grandfather, Njagi Kigaro, whose survivors and successors are the Respondent and the late Stephen Kariuki Kiruma. They averred that they had all lived on the suit land since the demarcation of land

at independence in the 1960's. Further, that instead of filing a succession cause over the suit land, the Respondent fraudulently changed the name in the land register from Njagi Kigaro to his name Albert Njagi Kigoro.

3. They set out the particulars of fraud including that the the Respondent failed to file succession proceedings after the registered owner of the suit land, Njagi Kigaro died and that the Respondent deceitfully applied for correction of the name through forgery for he was not Njagi Kigaro. They urged that the Respondent pretended that he was Njagi Kigaro yet that was his father and that through that fraud, the Respondent sought to disinherit their father of his rightful share of his father's estate being the suit land. The Appellants pleaded that they had buried their parents on the suit land and had been in possession of half of the suit land since the 1960's. They contended that since the late Stephen Kariuki had been in possession of the suit land uninterrupted since the 60's, the Respondent holds such interest in the suit land in trust for him on account of the adverse possession principle.

4. The Respondent filed a defence and averred that the suit land belonged to him and there was no time it ever belonged to his father. He averred that his father was Kigoro Nyondori and not Njagi Kigaro, and that his father died in 1959 and could not have been the owner of the suit land. He averred that the suit land which was initially block 55 in 1960 was allocated to three other parties and himself and his name was erroneously misspelled as Njagi Kigaro. He denied that a succession cause was necessary since he was alive and he could not file his own succession cause.

5. During the hearing, the 1st Appellant Diana Njoki Kariuki testified on of the other Appellants. She adopted her written statement in which they stated that during their parents' lifetime, they used to hear their father complain about the Respondent changing the name of their grandfather on the land register to his own name so that he could deprive his father of his share of the suit land. That their late grandfather confronted the Respondent about it and at times they would go to the area Chief for arbitration. They averred that their mother, the deceased's first wife who died on 23/5/2005 was buried on the suit land as well as their father Samuel Kariuki without the Respondent's objection. Immediately after their father's burial, the Respondent chased them away but the 5th Appellant, the second wife of the late Samuel Kariuki and her two children were left on the land because they resisted eviction.

6. They averred that the Respondent had another parcel of land being Ngandori/Kangaru/T.21. The Respondents produced copies of the green card for the suit land parcel, searches done on the suit land and parcel no. T. 21, correspondence from the Chief, a caution dated 20/8/1987, the application for restriction dated 7/9/2017, the application for consent of the Land Control Board (LCB) and the booklet used at Stephen Kariuki's burial.

7. The Respondent adopted his witness statement where he stated that he acquired the suit land from the clan known as Rukwaro in 1961 and that his name Njagi Kigoro was misspelt as Njagi Kigaro during registration. That he was later baptized and became Albert Njagi Kigoro. That he started living on the suit land and developed it in 1962. That in 1976, he applied to the LCB for the correction of his name in the lands office and the LCB approved the change for his name to read Albert N. Kigoro on the register for the suit land. That the name was corrected and he was issued a title deed.

8. The Respondent claimed that the late Stephen Kariuki had accompanied his stepfather, Nyaga Nyondori who had occupied and settled on the suit land without his consent. That he later evicted him and allowed the Stephen Kariuki who was younger than him to stay on the suit land since he did not have any other land. That Stephen Kariuki married his two wives and had 6 children while he was still on the suit land and started cultivating there. He admitted that both Stephen Kariuki and his first

wife were buried on the suit land and that he did not raise any objection to their being buried on the suit land since the late Stephen Kariuki was his brother and he wanted peace.

9. He denied evicting the Appellants from the suit land who he said were still living there to date. It was his contention that had the suit land belonged to the Appellants' grandfather, he would have filed a succession cause to obtain the suit land but since the land was his, that was not possible. He added that the 1st Appellant placed a restriction on the suit land which the land registrar refused to remove without a court order. The Respondent produced copies of the title deed over the suit land, the official search, a record of existing rights within clan over block no. 55, receipts and the green card for land parcel 1952.

10. The Learned Magistrate found in its judgment that the Appellants did not prove that the Respondent acquired the title over the suit land fraudulently as required by law and dismissed the Appellant's suit. That is what led to the appeal before this court.

11. The Appellants set out six grounds of appeal in the memorandum of appeal. They faulted the trial court for failing to determine all the issues raised by the parties in regard to ownership of the suit land and for failing to consider that they had adduced sufficient evidence to prove that Section 28(b) of the *Land Registration Act* was applicable with regard to the ownership of the suit land. They averred that the trial court failed to consider that the registration of the suit land in the Respondent's name was subject to the interests of the late Stephen Kariuki as well as their interests. They faulted the trial court for failing to give the necessary weight to their evidence and for awarding costs to the Respondent. They invited this court to allow the appeal, set aside the judgment of the trial court and substitute it with an order allowing their suit.

12. The court directed the parties to file and exchange written submissions which it has considered. The Appellants submitted that they had raised the issue of fraud and trust in their plaint but the trial court only considered the issue of fraud and went on to dismiss their suit which led to a miscarriage of justice as the dispute between the parties was not resolved. They submitted that they had sufficiently established that the Respondent held the suit land in trust for himself and for the Appellants and that they also proved that a customary trust existed, evidence which the trial court ignored.

13. They were emphatic that the Respondent's conduct of letting them bury their kin on the suit land and the fact that he admitted that the Appellants were still on the suit land, confirmed that the Respondent understood that the Appellants had some right over the suit land and that they were therefore entitled to a share. They submitted that in awarding costs to the Respondent, the trial court failed to consider that the dispute was between family members and that that would not promote reconciliation. They urged the court to allow the appeal. The Respondent rehashed the facts of his case in his written submissions and urged the court to dismiss the appeal with costs.

14. The issue for determination in this appeal is whether this court should set aside the findings of the trial court. The Appellants' main complaint is that the trial court failed to determine the issue of ownership of the suit land and in particular the issue of there being a customary trust over the land. They also complained that the trial court failed to consider that they had adduced sufficient evidence to prove that Section 28(b) of the *Land Registration Act* was applicable in their case. Their argument was that the Respondent admitted that the late Stephen Kariuki lived on the suit land from the 1960s, got married, raised a family, cultivated the land, and was buried there together with his first wife. Additionally, that the Respondent also confirmed that the Appellants' remained in occupation of part of the suit land and that he had not evicted them from the suit land which proves that a customary trust exists over the suit land.

15. The law recognizes the doctrine of customary trust as an overriding interest under Section 28(b) of the *Land Registration Act*, 2012. The Supreme Court in Kiebia v M'lintari & another (Petition 10 of 2015)

[2018] KESC 22 (KLR) set out the principles to be considered in a case of customary trust. These are that the land in question was before registration, family, clan or group land; the claimant belonged to such family, clan, or group; the relationship of the claimant to such family, clan or group is not so remote or tenuous as to make his claim idle or adventurous; the claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances; and the claim was directed against the registered proprietor who is a member of the family, clan or group.

16. The Appellants relied on two letters from the Chief addressed to the District Officer (DO), Embu District dated 1/10/1987 and to the Land Registrar Embu dated 21/8/1987. The letter dated 1/10/1987 informed them that the caution that had been registered against the suit land had been removed by the land registrar without the consent of the late Stephen Kariuki. The Chief noted that the suit land belonged to Stephen Kariuki's father but when the father died, the land was given to the Respondent who was his step brother. The letter noted that when Stephen Kariuki grew up and after staying on the land for twenty years, his step brother tried to chase him away with his family, which is when Stephen Kariuki realized that their father's name had been changed to that of Albert Njagi on the title deed. That he appealed to the clan and the clan recommended that the suit land be divided into two which was what the Chief determined when the case was taken to him.

17. The Appellants contention is that the suit land originally belonged to their grandfather Njagi Kigaro while on his part the Respondent maintained that he got the land from the Rukwaro clan and that the name Njagi Kigaro was his own name which had been misspelt. The Respondent tendered in evidence the Record of Existing Rights Within Clan in accordance with the Native Land Tenure Rules, 1956 which showed that he was allocated the suit land by the clan together with three others. The document is signed by the District officer on 11/8/1960 and the land was referred to as Kianyange Block 55.

18. The second letter to the Land Registrar which the Appellants tendered in evidence dated 21/8/1987 notified the land registrar that the Chief had no objection to Stephen Kariuki registering a caution against the suit land until the long dispute over the land was resolved. The two letters confirm that Stephen Kariuki relentlessly pursued his claim to the suit land which was allocated by the clan.

19. It was the Respondent's evidence that Stephen Kariuki, his step brother followed the Respondent's step father Nyaga Nyondori who he claimed had settled on his land without his consent. He claimed that he did not evict Stephen Kariuki and allowed him to stay on the suit land because he was young and had no other parcel of land. The Respondent stated that he used to live with his mother on the suit land who died in 2009 and was buried on the suit land. He went on to explain that while still on the Respondent's land, his step brother married two wives and that they had six children and they started cultivating the land. His step brother died in 2012 and was buried on the suit land.

20. The green card for the suit land shows that the suit land was first registered in 1961 in the name of Njagi Kigaro. Applying the principles in the Kiebia v M'Lintari case to the present case, it is not in dispute that the suit land was clan land prior to its registration. As the Respondent's step brother, Stephen Kariuki belonged to the same clan and would have been entitled to be registered as an owner or beneficiary of the suit land were it not that he was quite young when the land was demarcated and registered in 1961 or thereabouts. The claim was directed against the Respondent who as the registered proprietor is a member of the same clan.

21. The Respondent did not demonstrate that when the suit land was allocated by the clan in 1960 it was for his sole and exclusive use in light of the fact that his father died in 1959 before the land was demarcated and registered. No evidence was tendered to support the contention that his father was called Kigoro Nyondori and not Njagi Kigaro. The Respondent applied to change names in 1976, which he claims was after baptism. He did not lead evidence to show that he held the title over the suit

land prior to 1976 when he claims that his baptism necessitated the change of name on the title. There was no evidence led to prove that the Respondent went by the name Njagi Kigoro prior to 1976.

22. The fact that Stephen Kariuki and his family occupied the suit land and that he was buried there as was his first wife without the Respondent's objection, and the other facts of this case establish a customary trust. This is also buttressed by the Respondent's evidence that he buried his own mother on the suit land and that she lived with him on the land. This proves that the suit land was allocated by the clan for the benefit of the whole family since the Respondent's father died before the land was demarcated and registered.

23. The appeal is allowed. The judgment of the Learned Magistrate in Embu CM ELC Case No. 112 of 2018 is set aside. The Respondent is directed to subdivide and transfer half share of Ngandori/Kirigi/1952 to the Appellants within 45 days of the date of this judgment. The subdivision should take into account the specific area on which the Appellants live and have buried their father and allocate that portion to the Appellants. The costs of the subdivision of the suit land will be borne by the Appellants.

24. Each party will bear its costs for the suit and the appeal.

DELIVERED VIRTUALLY AT EMBU THIS 31ST DAY OF JULY 2025.

K. BOR

JUDGE

In the presence of: -

Ms. Rose Njeru for the Appellant

Mr. Albert Njagi Kigoro- the Respondent

Diana Kemboi- Court Assistant