



# THE JUDICIARY



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MURANG'A**  
**ELCLA NO E018 OF 2024**

**JULIUS MAINA MUGUCHIA.....APPELLANT**  
**(Suing in his capacity as the administrator of the estate of**  
**MUGUCHIA GIKUMBI –now deceased)**

**-VERSUS-**

**FRANCIS MAINA MUGUCHIA.....RESPONDENT**

***(An appeal against the judgment of Honourable Joan Irura Senior Principal Magistrate delivered on 18.4.2024 in Civil/E.L.C suit No. 138 of 2018- Kigumo)***

## **JUDGMENT**

(1) The Appellant seeks three (3) orders in this appeal.

**(a) That the appeal be allowed.**

**(b) There be an order/declaration that the Respondent holds half of L.R. Loc. 18/Githima/474 in trust of his deceased brother Muguchia Gikumbu and that the trust should be dissolved and half of the suit land be transferred to the Appellant in his capacity as the administrator of his father's estate.**

**(c) The costs of this appeal and the costs in the lower court be borne by the Respondent.**

This is as per the Memorandum of appeal dated 3-5-2024.

(2) There are eight (8) grounds of appeal listed in the memorandum in challenging the decision of the learned trial magistrate in SPM Kigumo ELC case No. 138 of 2018 delivered on 18-4-2024. The grounds are that the learned trial magistrate erred in law and in fact in-

**(i) failing to find that the Respondent herein holds L.R. No. Loc. 18/Githima/474 in trust for his brother's family under the doctrine of customary and/or implied trust,**

**(ii) failing to take cognation(sic) of the fact that upon his predecessor Hon. Kibet Sambu visiting the locus in quo he found that the suit land has defined**

**boundaries and that the family of Muguchia Gikumbu has planted coffee trees and other crops in their portion,**

- (iii) finding that the Appellant did not prove the existence of trust in the suitland on a balance of probabilities while the converse is true,**
- (iv) in failing to consider the evidence gathered by her predecessor at the locus in quo to the extent that she did not make a reference of the findings in her judgment,**
- (v) in failing to find that the Respondent did not and had not filed a suit and/or a counterclaim to evict the Appellant and his siblings from the suit land thus rendering a judgment that caused grave injustice to the Appellant and in not so many words the judgment occasioned a travesty of justice of the Appellant,**
- (vi) failing to interrogate salient points of law and fact more specifically that the deceased Mugachia Gikumbu has been in occupation of the defined portion of the suit land since 1969 and that the Respondent had not initiated eviction proceedings against the deceased and his family,**
- (vii) failing to acknowledge that the Appellant had ably demonstrated a nexus between the family of his father and that of the Respondent in regard to the suitland and arriving at a judgment that was against the weight of the evidence adduced.**

(3) The Appellant's case was as follows. Firstly, the Appellant is a nephew to the Respondent because his father was the Respondent's brother. Secondly, the Respondent is the registered owner of the suit land but this ownership is not absolute because it is encumbered by a trust. The Respondent was registered as owner but in trust for himself and his brother Mugachia Gikumbu who is now deceased. This was the understanding between the Respondent and his brother Mugachia Gikumbi. Thirdly, the late Mugachia planted coffee on the suitland and his family continues to till the land and they occupy a larger portion of it than the one occupied by the Respondent. Finally, it is time to dissolve the trust and have the land shared between the families of the Appellant and the Respondent.

- (4) The Respondent's case is as follows. Firstly, the suit land is registered in the name of the Respondent as the absolute owner and not in trust for the Appellant's father or any other person. Secondly, the suit land is not family land because the Respondent bought it from Maina Karanja. He did so alone without any support from the Appellant's father. Thirdly, the Appellant's family has never used or occupied the suit land and the first time they did so was when they obtained a court order in May 2018. Finally, the Appellant's father never laid any claim to the suit land in his lifetime and the Appellant's claim is only recent.
- (5) In her judgment dated 18-4-2024, the learned trial magistrate dismissed the Appellant's case for the following reasons. Firstly, the Appellant was unable to prove that there was any nexus between him and the root of the title since there was no evidence of purchase by his father. Secondly, the suit land is not ancestral or clan land.
- (6) Counsel for the Appellant filed written submissions dated 5-12-24 while those of the Respondent are undated. The Appellant has identified the following issues for determination.
- (i) **Whether the Appellant enjoys overriding interest over the suit land in the nature of a customary trust under Section 28 of the Land Registration Act.**
  - (ii) **Whether it had been proved that the Appellant or his father had occupied the suit land for long or at all.**
- (7) I have carefully considered the appeal in its entirety including the record, the grounds, the written submissions and the issues raised therein. This being a first appeal this court is cognizant of the principle in the case of **Selle vs. Associated Motor Boat Co. Ltd [1968] EA 123** which is to the following effect.
- “An Appellant court is not bound to accept the findings of fact by the trial court if it appears either that it has clearly failed on some material point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on demeanour is inconsistent with the evidence in the case as a whole. However, the Appellate Court should give deference to the trial court's findings, especially those based on demeanour of witnesses because the trial court had no advantage of seeing and hearing them.”**
- I have borne in mind the above principle. I will also look at each of the eight ground and make a finding on each one of them as far as possible.

(8) Considering the 1<sup>st</sup> ground of appeal, I find that the Appellant was not able to establish any trust, customary or otherwise in his favour. The witness statement filed by the Appellant and dated 29-5-2028 is very shallow. It does not explain how the trust was established and why the land could not be registered in the name of the Appellant's father. The evidence the Appellant's father not having an identity card came up abruptly at the trial. It is not stated in the plaint or the witness statement. It is therefore an afterthought. It does not sound credible especially after it is denied by the Respondent. There is no evidence on the age of the Appellant's father when the land was registered. There is no evidence of the payment of the purchase price by the Appellant's father. Secondly, there is no reason given why the Appellant's father was not included in the title as holding a stake to the suit land. Thirdly, there is no evidence that the suit land was family land. The burden of proof was upon the Appellant to establish a trust in a credible and consistent manner.

[9] Looking at the second ground of appeal, the existence of boundaries on the suit land, if it was proved at all, is not sufficient to prove that there was a trust if the facts analysed in paragraph [8] above were not established in the first place. A landowner can demarcate boundaries within his land as he wishes. This finding covers the fourth issue.

(9) As for the third ground of appeal, I find it is covered by the finding on the first ground at paragraph [8] above.

(10) Regarding the 5<sup>th</sup> ground of appeal, failure by the Respondent to file a counterclaim in the lower court case does not help the Appellant's case. The Appellant's claim is an independent suit from any claim that the Respondent may have wished to file. There is no requirement of law or procedure that the Appellant should have filed a counterclaim in a case such as this. It is his contention that the Appellant entered the suit land after the ruling of the lower court of 21-9-2018 and it was not compulsory for him to file a counterclaim in this case. He had no such obligation.

(11) It is my finding on the 6<sup>th</sup> ground of appeal that the Appellant in his plaint and witness statement did not aver and file evidence to allege and prove that he and his father occupied the

suit land in the year 1969. Both the plaint and the witness statement have not stated the period of occupation or the years. All these particulars should have been pleaded first by the Appellant clearly and simply so that the Respondent could adequately respond to them. The trial court would then have been able to make specific findings on the contested issues. As it is, the Appellant never made the duration of occupation a trial issue. The trial magistrate could not have been expected to make a finding on an issue that was not pleaded specifically.

(12) The seventh ground of appeal is adequately covered by my finding on the first ground which I covered exhaustively at paragraph [8] above when I specifically said that the suit land was not proved to be family land at all.

(13) For the above stated reasons, I find **no merit** in the Appellant's appeal dated 3-5-2024 which I **dismiss** with costs to the Respondent.

**It is so ordered.**

**Dated, Signed and Delivered virtually at Murang'a this 17<sup>th</sup> day of November, 2025.**

**M.N. GICHERU  
JUDGE.**

**Delivered online in the presence of; -**  
Court Assistant – Mwangi Njonjo  
Applicant's Counsel – Mr T.M. Njoroge  
Respondent's Counsel – Mr Kimori holding brief