



REPUBLIC OF KENYA



**Maingi v Maingi & another (Environment and Land Appeal E008 of 2023)
[2025] KEELC 7857 (KLR) (13 November 2025) (Judgment)**

Neutral citation: [2025] KEELC 7857 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT AND LAND APPEAL E008 OF 2023**

**EO OBAGA, J
NOVEMBER 13, 2025**

BETWEEN

WILLY MUNYWOKI MAINGI APPELLANT

AND

SAMUEL MUTUKU MAINGI 1ST RESPONDENT

ALEXANDER MUTINDA KIVUVA 2ND RESPONDENT

*(Being an appeal from the Judgment of Hon. L. K. Mwendwa dated 30th
May, 2023 in the Principal Magistrates Court Tawa MECL No. 6 of 2019)*

JUDGMENT

1. The Appellant is a step brother of the 1st Respondent. The two are sons of Maingi Kithi who had two wives. The 1st wife is mother to the Appellant and the 2nd wife is mother to the 1st Respondent.
2. Maingi Kithi had land at Mangani area of Kisau Division in Mbooni East Makueni County. In 1961, Mr. Maingi Kithi moved his two wives and children to Shimba Hills in Kwale County.
3. In 1994, Mangani area was declared an adjudication Section. Mr. Maingi Kithi came from Shimba Hills for purposes of being recorded in the Adjudication Register. He lost his identity card and as a result, he asked that the 1st Respondent be recorded in the register. Mr. Maingi Kithi died in the year 2000.
4. In 2007, the Appellant filed an objection before the Land Adjudication Officer contesting the registration of the 1st Respondent as the sole owner of plot No. 341. The Land Adjudication Officer dismissed the objection. The Appellant filed an appeal to the Minister who also dismissed the Appellant's appeal.



5. On 28th January, 2014, the 1st Respondent processed title for plot 341 which now became parcel No. Kisau Mangani 341 measuring 0.78 hectares (suit property). On 25th April, 2014, the 1st Respondent sold the suit property to the 2nd Respondent.
6. On 16th March, 2017, the Appellant filed a suit against the Respondents at Machakos Environment and Land Court where he sought the following reliefs:
 - a. A declaration that land parcel No. Kisau Mangani 341 is an ancestral family land, and that the 1st Defendant holds title thereto in trust for the benefit of himself, the Plaintiff and other members of the Maingi Kithii family.
 - b. A declaration that the 1st Defendant cannot sell or transfer land parcel No. Kisau Mangani 341, which is family ancestral land, to the 2nd Defendant or any other person whatsoever.
 - c. A permanent order of injunction restraining the 1st Defendant from selling, transferring or charging land parcel No. Kisau Mangani 341; either to the 2nd Defendant or to any other person whatsoever.
 - d. A permanent order of injunction restraining the 2nd Defendant from entering, trespassing on to or in any other way interfering with land parcel No. Kisau Mangani 341.
 - e. An order that the Plaintiff's name (Willy Munywoki Maingi) be included in the register for land Parcel No. Kisau Mangani 341, and the relevant register be accordingly rectified.
 - f. An order that the actual acreage of land parcel No. Kisau Mangani 341 be ascertained on the ground, and the relevant register be rectified accordingly.
 - g. Costs of the suit.
 - h. Any other order that this honourable court may deem fit and just to grant.
7. The suit was thereafter transferred to Tawa Principal Magistrate where it was heard and in a judgment delivered on 30th May, 2023 the trial magistrate dismissed the Appellant's suit with costs.
8. The Appellant preferred an appeal to this court and raised the following grounds of appeal:
 1. That the learned trial magistrate erred in law and in fact by failing to put in to consideration the proceedings and evidence on record in advancement of the Appellant case and thereby ignoring relevant guiding facts to enable him reach a fair and reasonable determination in his judgment hence prejudicing the Appellant.
 2. That the learned trial magistrate erred in law and fact by failing to give concise statement of the case, points of determination, decision thereon and reasons for his judgment.
 3. That the learned trial magistrate erred in law and in fact by failing to incorporate the findings he gathered on the grounds during the hearing on the disputed land vis-à-vis the court records and evidence and thereby proceeding to deliver judgment by applying principles which are not relevant in land proceedings in his determination.
 4. That the learned trial magistrate erred in law and in fact by failing to appreciate the spirit behind the provisions of Article 159 of *akn ke act 2010 constitution the Constitution* of Kenya 2010 and ignored important facts by dismissing Appellant's arguments summarily without consideration of distinctive nature of the case before him for consideration.



5. That the learned trial magistrate erred in law and in fact by failing to consider the oral evidence of the Appellant pertaining to the fact that the suit property land Parcel No. Kisau Mangani 341 is an ancestral land.
6. That the learned trial magistrate erred in law and in fact by failing to consider that the 1st Respondent has been enjoying the suit property alone for over 33 years to the exclusion of the Appellant and the beneficiaries of the said land.
9. The parties were directed to dispose of the appeal by way of written submissions. The Appellant filed his submissions dated 10th June, 2025. The Respondents filed their submissions dated 6th October, 2025.
10. The Appellant submitted that he had proved that the suit property was ancestral land and that the 1st Respondent was holding it in trust for him and the Maingi Kithi family. He relied on the case of Isaac M’Inanga Kieba –vs- Isaaya Theuri M’Lintari & Another (2018) EKLR.
11. The Appellant also relied on the case of Peter Ngugi Kabiri –vs- Esther Wangari Githinji ELCA No. E09 of 2021 (2024) KEELC 637 (KLR).
12. The Respondents submitted that the Applicant had not proved customary trust. They relied on the case of Isaac M’Inanga Kieba (Supra). The Respondents submitted that the suit property was given to the 1st Respondent as a gift inter vivos as the Applicant’s family had a bigger land in Shimba Hills than the family of the 1st Respondent. The Respondents therefore submitted that as the suit property had been given to the 1st Respondent as a gift, it ceased to be ancestral land.
13. The Respondents further submitted that the 2nd Respondent was a bonafide purchaser for value and that his right should not be defeated by allowing the appeal.
14. The Respondents relied on the case of Kioko Kithongo & Another –vs- Kithunga Mue Ngumu where this court held that customary trust must be proved by evidence.
15. The duty of a first appellate court was stated in case of Selle & Another –vs- Associated Motor Boat Co. Ltd & Others (1968) EA 123 as follows:

“.....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 allowance in this respect. In particular this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either it has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence of if the impression based on the demeanor of a witness is inconsistent with the evidence in the cases generally”.
16. I have carefully considered the evidence adduced by the Appellant and the Respondents before the lower court. I have also considered the submissions filed by the parties as well as the grounds of appeal. There is no contention that the suit property was ancestral land. The issues for determination are firstly, whether the Appellant proved that the 1st Respondent was holding it in trust for himself and the Maingi Kithi family, secondly, is the suit property 0.78 hectares or more.



17. The case of Isaac M’Inanga case (Supra) held as follows:

“It is not every claim of a right to land that will qualify as a customary trust. In this regard, we agree with the High Court in *Kiarie –vs Kinuthia*, that what is essential is the nature of the holding of the land and intention of the parties. If the said holding is for the benefit of the other members of the family, then a customary trust would be presumed to have been created in favour of such other members, whether or not they are in possession or actual occupation of the land. Some of the elements that would qualify a claimant as a trustee are:

1. The land in question was before registration family, clan or group land.
2. The claimant belongs to such family, clan or group.
3. 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.
4. The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances.
5. The claimant is directed against the registered proprietor who is a member of the family, clan and group”.

18. The evidence which was adduced by the Appellant is that the suit property was registered in the 1st Respondent’s name during adjudication as the Appellant’s father had lost his identity card. This evidence was dismissed by the trial magistrate on the grounds that he did not produce any evidence of police abstract to confirm that his father had lost his ID card.

19. The evidence which emerged during the hearing is that the Appellant’s father had travelled from Shimba Hills, Kwale accompanied by one of his sons from the 1st Respondent’s house. If indeed he had made a decision to gift the suit property to the 1st Respondent, he would not have bothered to travel to Mangani during the adjudication process. He would have simply sked the 1st Respondent to have the suit property registered in his name without him being present.

20. The Appellant’s father must have been an old man in 1994 if the age of his second wife who was born in 1938 is anything to go by. The old man would not have been expected to go to the police station, get a police abstract and process a replacement when the adjudication process was going on. The Appellant’s father died in 2000. It was therefore unfair for the trial magistrate to expect the Appellant to produce a police abstract on loss of identity card which occurred in 1994.

21. The 1st Respondent had admitted that the suit property was ancestral land. He only claimed that his father had gifted it to him. As the 1st Respondent was alleging that the suit property was gifted to him, the burden of proving that that was the case lay on him. The 1st Respondent brought DW3 Musau Musembi as his witness. This witness claimed that he was present when the 1st Respondent’s father gave the land to the 1st Respondent. This evidence was not credible considering the fact that the 1st Respondent himself was aware that the suit property was ancestral land which could not be sold without seeking permissions from the family.

22. When the 1st Respondent wanted to sell the suit property to the 2nd Respondent, he wrote a letter to his family expressing his intention to sell the suit property. The only persons who gave him consent to sell was his mother and children from his mother’s house. The Appellant and the other children from the first house never gave their consent. With all these evidence, the trial magistrate was wrong in dismissing the Appellants case.



23. DW 3 Musau Musembi had claimed that the 1st Respondent's father gave him the suit property as the 1st Respondent's step brothers had their own land in Shimba Hills.
24. The documents which were filed in court show that the 1st Respondent's brothers from his mother's house have been registered as owners of parcels in Kwale. LR No. Kwale Mwanyamala 103 is registered in the name of Musembi Maingi. It measures 3.8 hectares. LR. No. Kwale Mwanyamala 140 is registered in the name of Daniel Mwonga Maingi. It measures 9.4 hectares. Parcel No. Kwale Shimba Hills 497 is registered in the name of Maingi s o Kithi. It measures 16.0 hectares.
25. None of the properties in Kwale is registered in the name of either the Appellant or his brothers from the first house. It is therefore clear that DW3 Musau Musembi was lying when he claimed that the suit property was gifted to the 1st Respondent in his presence on grounds that the 1st Respondent's brothers had their land in Shimba Hills. As parcel No. Kwale Shimba Hills 497 is still in the name of the 1st Respondent's father, there is nothing which will prevent him from claiming a share of it.
26. The Appellant having given evidence surrounding the registration of the suit property in the 1st Respondent's name, he discharged the burden of demonstrating that the 1st Respondent is holding the suit property in trust for him and the Maingi Kithi family.
27. The Appellant's evidence was that the suit property is 10 acres but that the 1st Respondent registered it as being 0.78 hectares which is about 1.9 acres. When the 1st Respondent was cross examined as to the acreage of the suit property, he stated that it was about 5 acres. This therefore means that the suit property was more than what the 1st Respondent had indicated it to be in the title which he obtained. It was therefore wrong for the trial magistrate to dismiss the Appellant's suit when one of the reliefs he was seeking was ascertainment of the acreage of the suit property.
28. The sale of the suit property to the 2nd Respondent was null and void. The 1st Respondent was aware that the suit property was ancestral land which was for the benefit of the entire Maingi Kithi family. The 1st Respondent purported to get authority to sell it from his own mother and siblings to the exclusion of the Appellant and his siblings from the first house.
29. I therefore allow the Appellant's appeal, set aside the judgment of 30th May, 2023 and in place thereof enter judgment for the Appellant in the following terms:
 - a. A declaration that land parcel No. Kisu Mangani 341 is ancestral land and the 1st Respondent holds title thereto in trust for the benefit of himself, the Plaintiff and other members of the Maingi Kithi family.
 - b. A declaration that the sale of Parcel No. Kisau Mangani 341 to the 2nd Respondent is null and void.
 - c. A permanent injunction is granted restraining the 1st Respondent or his agents from transferring parcel No. Kisau Mangani 341 to the 2nd Respondent.
 - d. An order that the land register for parcel No. Kisau Mangani 341 be rectified to include the name of the Appellant Willy Munywoki Maingi to hold the land in trust of the family of Maingi Kithi.
 - e. AN order that the County Surveyor do ascertain the actual acreage of parcel No. Kisau Mangani 341 as it appears on the ground.
 - f. The Appellant shall have the costs of the suit in the lower court and this appeal.



HON. E. OBAGA

JUDGE

**JUDGMENT DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 13TH DAY
OF NOVEMBER, 2025.**

IN THE PRESENCE OF:

Mr. Mulandi for Respondent.

Ms. Kyalo for Appellant.

Court assistant – Steve Musyoki

