

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ELC NO. E042 OF 2021

GRACE MUENI KASOLI
.....PLAINTIFF

-VERSUS-

RONARD MUNYASYA SENGUDEFENDANT

JUDGMENT

1. The Plaintiff filed the suit herein vide the Plaint dated 15th December, 2021. She prayed for the following reliefs against the Defendant: -
- a) **A declaration that the Defendant holds titles to the land Parcel Numbers KITETA/KIAMBWA/918 and 919 in trust for the Plaintiff to the exclusion of the Defendant.**
 - b) **A declaration that the Plaintiff is the sole proprietor of the land Parcel Numbers KITETA/KIAMBWA/918 and 919.**
 - c) **An order directing the Land Registrar, Makueni to cancel the names of the Defendant in the register and to substitute the same with the Plaintiff.**
 - d) **An order compelling the Defendant to transfer the said parcels of land to the Plaintiff within 30 days of this judgment in default the Deputy Registrar of this Honourable Court to execute the requisite transfer documents.**
 - e) **Costs and interest of this suit.**
 - f) **Any other relief that this Honourable court may deem fit and just to grant.**

2. The Defendant filed a Statement of Defence on 7th December, 2022. He denied the Plaintiff's claim against him and urged the court to dismiss the suit with costs.
3. The Plaintiff filed a Reply to Defence on 1st February, 2023 reiterating the contents of her plaint.
4. At the hearing of the Plaintiff's case, two witnesses testified. PW1, Grace Mueni Kasuli adopted her statement dated 15/12/2021 as her evidence in chief. She went ahead to produce the list and bundle of documents of even date as PEX 1 – 3 respectively. PW1 averred that the Defendant is her son and that she is the owner of land Parcel Numbers Kiteta/Kiambwa/918 and 919 respectively which the Defendant caused to be fraudulently registered in his name.
5. She further averred that she intended to have the suit properties subdivided amongst her sons who are currently residing on the land. She averred that the Defendant's first wife resides in the land.
6. On cross-examination by the Defendant, PW1 reiterated that her five children reside in the suit properties. She added that the Defendant moved and went to reside in another parcel of land. PW1 averred that the Defendant has buried his children in land Parcel No. 918 and that she had allowed it because he is her son. She further averred that she had allowed the Defendant to plant mango trees in the suit properties and to reside in Parcel No. 918 because he is her son.
7. PW2, Joseph Mutua Kasoli adopted his statement dated 14/7/2022 as his evidence in chief. He averred that the Plaintiff is his mother whereas the Defendant is his brother and that land Parcel Nos. 918 and 919 are family land.
8. On cross-examination by the Defendant, PW2 averred that the two parcels of land belonged to their father. He averred that he was born in Parcel No. 919 and that the entire family resides in Parcel No. 919.

9. The Defendant was the sole witness at the hearing of his case. DW1, Ronard Munyasya Sengu averred that he was born in 1949 as Ronard Kasoli but later on took up the name of Sengu who was a brother to Kasoli because he was the one who took care of his education. It was his evidence that the Plaintiff remarried elsewhere and came back to the suit properties with the children of the subsequent marriage after Kasoli died.
10. DW1 testified that he was given a portion of land in Parcel No. 919 and that he went ahead and purchased Parcel No. 918 from their clan elders. He further averred that his mother together with his four sibling brothers are against his ownership of Parcel No. 918 because they do not share the same biological father.
11. On cross-examination by Mr. Muthui, DW1 stated that he purchased Parcel No. 918 in 1979 from Mutua Mulua Mulumbi, Mulonzi Nzai and Kimuli Nzai who were representatives of the clan. He averred that all the three vendors are deceased. He further averred that Parcel No. 919 belongs to the family of his late father Kasoli and that it is bigger in size as compared to Parcel No. 918. DW1 testified that he resides in Parcel No. 918 and that he was registered as the owner of the land because he was the eldest of the family.
12. At the close of their respective cases, the parties agreed to file written submissions.
13. In the Plaintiff's submissions dated 28th July, 2025, Counsel identified four issues for determination namely: -
- a) *Whether the Defendant holds the parcels of land in trust for the Plaintiff to his exclusion?*
 - b) *Whether the Plaintiff is the rightful sole proprietor of the suit parcels?*
 - c) *Whether the Land Registrar should be directed to cancel the name of the Defendant and substitute it with that of the Plaintiff?*

d) Costs of the suit?

- 14.Regarding the first issue, Counsel asserted that the Plaintiff's testimony was conclusive that the suit properties were ancestral land. Counsel submitted that the Defendant holds the titles to land Parcel Nos. 918 and 919 in constructive and or resulting trust because it belonged to the late Kasoli Munywoki who was the Plaintiff's husband.
- 15.Submitting on the second issue, Counsel asserted that it was the Plaintiff's evidence that the Defendant resides in Lukenya, which is away from the suit properties. It was argued that the Defendant admitted in his evidence that Parcel No. 919 does not belong to him. Counsel submitted that the Defendant had not offered a coherent legal basis for his ownership claim to Parcel No. 918 through evidence of purchase or otherwise.
- 16.On the third issue, it was submitted that the Plaintiff had demonstrated a customary trust to the suit property and thus, she is entitled to an order that the Defendant's name be cancelled from the register.
- 17.Submitting on the fourth issue, Counsel contended that the Plaintiff is entitled to costs of the suit in line with the general principle under Section 27 of the Civil Procedure Act.
- 18.In the Defendant's submissions filed on 11th August, 2025, he reiterated his evidence that land Parcel No. 919 belonged to his late father Kasoli Munywoki and that it was registered under the Defendant's name in trust for his four other siblings.
- 19.The Defendant maintained that he purchased Parcel No. 918 and that he has buried four of his sons there, planted mango trees and that neither the Plaintiff nor his brothers are in possession of land Parcel No. 918. The Defendant urged the court to dismiss the suit against him with costs.

20. After a perusal of the pleadings, the evidence and the submissions, the following particulars are common ground: -

- i) Land Parcel Nos. KITETA/KIAMBWA/918 and KITETA/KIAMBWA/919 are registered in the name of the Defendant.
- ii) Both the Plaintiff and the Defendant agree that land Parcel No. KITETA/KIAMBWA/919 is ancestral land which was initially owned by the late Munywoki Kasoli.
- iii) The Plaintiff is in possession of land Parcel No. KITETA/KIAMBWA/919 together with the Defendant's siblings.

21. The apparent issues for determination are as follows: -

- i) Whether the Plaintiff has demonstrated a valid claim to land Parcel No. KITETA/KIAMBWA/918 on grounds of a customary trust?*
- ii) Whether the Plaintiff is entitled to the prayers sought?*

22. The Defendant conceded in his evidence that land Parcel No. KITETA/KIAMBWA/919 is ancestral land and that it was initially owned by his late father Munywoki Kasoli. He conceded that the land was registered in his name in 1985 because he was the eldest son. It was contended by the Defendant that he purchased Parcel No. KITETA/KIAMBWA/918 from Mutua Mulua Mulumbi, Mulonzi Nzai and Kimuli Nzai who were the representatives of their clan. On the other hand, the Plaintiff testified that the Parcel No. KITETA/KIAMBWA/918 was also part of their ancestral land and that it was owned by the late Munywoki Kasoli, her husband.

23. It is therefore the Plaintiff's case that she is entitled to land Parcel No. KITETA/KIAMBWA/918 on the grounds that she has established a customary trust over the Defendant's title.

24. A customary trust is a valid claim to land as noted under Section 28 of the Land Registration Act, 2012 and being an overriding interest, it affects the rights of a registered proprietor of land under Section 25 (1) (b) thereof. Section 25 (1) (b) provides as follows: -

(1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—

a.

b. to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.

25. Section 28 (b) of the Land Registration Act, 2012 outlines as follows:-

Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register—

(a)

(b) trusts including customary trusts;

26. The burden of proving a customary trust falls on the party alleging it. This position was reaffirmed in the case of **Mbui Mukangu v Gerald Mutwiri Mbui [2004] eKLR** where the Court of Appeal also weighed in on what entails a customary trust in the following terms:-

“It was unregistered land held under custom but the tenure changed during the land consolidation process and subsequent registration under the Registered Land Act. It is a concept of intergenerational equity where

the land is held by one generation for the benefit of succeeding generations. [emphasis added]

27. In the Plaintiff's evidence, she conceded that the Defendant's older wife resides in the suit property. She also conceded that it is the Defendant who has buried his children, planted mango trees and also farmed land Parcel No. KITETA/KIAMBWA/918. In cross-examination, the Plaintiff conceded that she could not chase away any of her other children from land Parcel No. KITETA/KIAMBWA/919 to go and live in land Parcel No. KITETA/KIAMBWA/918.

28. In determining whether a case has been proved in accordance with the required legal standard, the Court observed as follows **In re Estate of Francis Waita Mbaki (Deceased) [2018] eKLR**: -

“The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities, the court will have in mind the factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability.... Built into the preponderance of probability standard is a generous degree of flexibility in respect of the seriousness of the allegation. Although the result is much the same, this does not mean that where a serious allegation is in issue, the standard of proof required is higher. It means only that the inherent probability or improbability of an event is itself a matter to be taken into account when weighting the probabilities and deciding whether, on balance, the event occurred. The

more improbable the event, the stronger must be evidence that it did occur before, on the balance of probability, its occurrence will be established.”

29. Section 107 (1) of the Evidence Act outlines as follows: -

‘Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.’

30. Correspondingly, Section 116 of the Evidence Act outlines as follows:-

‘When the question is whether any person is 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.’

31. In **Isack M’inanga Kiebia v Isaaya Theuri M’lintari & another [2018] eKLR**, the Supreme Court articulated the elements which a person must prove in order to demonstrate the existence of a customary trust. The Supreme Court held as follows:-

“[52] Flowing from this analysis, we now declare that a customary trust, as long as the same can be proved to subsist, upon a first registration, is one of the trusts to which a registered proprietor, is subject under the proviso to Section 28 of the Registered Land Act. Under this legal regime, (now repealed), the content of such a trust can take several forms. For example, it may emerge through evidence, that part of the land, now registered, was always reserved for family or clan uses, such as burials, and other traditional rites. It could also be that other parts of the land, depending on the specific group or family setting, were reserved for various future uses, such as construction of houses and other amenities by youths graduating into manhood. The categories of a customary trust are therefore not closed. It is for the court to make a determination, on the

basis of evidence, as to which category of such a trust subsists as to bind the registered proprietor.

Each case has to be determined on its own merits and quality of evidence.

*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 v. 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 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 claim is directed against the registered proprietor who is a member of the family, clan or group.”*

32. The Court of Appeal also observed that a claim to land based on a trust must be supported with compelling evidence as stated in the case of **Juletabi African Adventure Limited & another v Christopher Michael Lockley** [2017] KECA 118 (KLR) as follows:-

“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.”

33. In respect of the foregoing, the Plaintiff herein did not adduce compelling evidence to prove that land Parcel No. KITETA/KIAMBWA/918 is ancestral land. Neither herself nor the Defendant’s siblings are in possession of the same. The Plaintiff did not demonstrate that the land was reserved for the benefit of the entire family for when such purposes as either construction or burial arose.

34. Contrastingly, it is the Defendant who has maintained exclusive ownership of the land Parcel No. KITETA/KIAMBWA/918. Therefore, it is undoubtedly clear that land Parcel No. KITETA/KIAMBWA/918 is not ancestral land and that the Plaintiff has not established a customary trust over the same.

35. In answer to the second issue, it is the finding of this court that the Plaintiff’s suit partially succeeds in respect of land Parcel No. KITETA/KIAMBWA/919. On whether she is entitled to costs, in the case of SUPERMARINE HANDLING SERVICES LTD v KENYA REVENUE AUTHORITY [2010] eKLR, the Court of Appeal expressed itself thus: -

“Costs of any action or other matter or issue shall follow the event unless the court or Judge shall for good reason otherwise order... Thus, where a trial court has exercised its discretion on costs, an appellate court should not interfere unless the discretion has been exercised injudiciously or on wrong principles. Where it gives no reason for its decision the Appellate Court will interfere if it is satisfied that the order is wrong. It will also interfere where the reasons are given if it considers that those reasons do

not constitute “good reason” within the meaning of the rule. In the appeal now before us, the learned Judge gave no reasons whatsoever for his decision to deprive the successful plaintiff of its costs and yet it was shown that the defendant had been guilty of some misconduct which led to litigation.”

36. In view of the fact that the parties have a familial relationship, it is only fair that each party bears its own costs.

37. The upshot is that the Plaintiff’s suit partially succeeds. For the avoidance of doubt, judgment is hereby entered for the Plaintiff against the Defendant as follows: -

- 1) A declaration is hereby issued that the Defendant holds Title No. KITETA/KIAMBWA/919 in trust for the Plaintiff**
- 2) A declaration is hereby issued that the Plaintiff is the sole proprietor of land Parcel Number KITETA/KIAMBWA/919.**
- 3) An order is hereby issued directing the Land Registrar, Makueni to cancel the name of the Defendant in the register of land Parcel Number KITETA/KIAMBWA/919.**
- 4) An order is hereby issued compelling the Defendant to transfer land Parcel Number KITETA/KIAMBWA/919 to the Plaintiff within thirty (30) days of this judgment and in default the Deputy Registrar of this Honourable Court to execute the requisite transfer documents.**
- 5) Each party shall bear its own costs.**

.....

HON. E. O. OBAGA
JUDGE

**JUDGMENT DATED, SIGNED AND DELIVERED VIA MICROSOFT
TEAMS THIS 24TH DAY OF NOVEMBER, 2025.**

IN THE PRESENCE OF:

Mr. Munyasya for Plaintiff.

Defendant in person.

Court assistant – Steve Musyoki

ORIGINAL