

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT THIKA
HCFA NO. E020 OF 2024
IN THE MATTER OF THE ESTATE OF MWANGI KIMOTHO
(DECEASED)

BEATRICE MUMBI MUHIA.....
.....APPELLANT

-VERSUS-

JOHN MAINA MWANGI.....
RESPONDENT

(Being an application for an injunction and/or stay of the Orders of the Lower Court in THIKA MSUCC 58 of 2009 pending the lodging, hearing and determination of an Intended Appeal from the ruling and Orders of the (Hon. Victor Asiyo) dated and delivered at Thika on 2nd July 2024)

JUDGEMENT

1. The Appellant approached this Court through a Memorandum of Appeal dated 5th July 2024 seeking Judgment to be entered for the following Orders as against the Respondent:
 - i. This appeal be allowed with costs.***
 - ii. The ruling of the Court made on the 2nd July, 2024 be set aside and be substituted with an Order allowing the prayer that the deceased held the property in trust for the family.***
 - iii. The Court grants any orders upon such terms as this Court deems fair and just.***

2. The appeal before the Court challenges the decision of the trial Court the (Hon. Victor Asiyo) delivered at Thika on 2nd July 2024 in THIKA MSUCC 58 of 2009. The suit before the trial Court was originated by the Appellant herein (then Applicant) vide a Summons for Revision of Grant dated 19th September 2023 supported by even-dated Affidavit wherein she sought *inter alia* the revocation of the Grant dated 5th September 2010 on grounds that land parcel number

KIGANJO/MUTATI/T.225 (the suit property) was excluded from the list of properties belonging to the Estate of MWANGI KIMOTHO (DECEASED). She urged the Court to review the aforesaid Grant and include the subject parcel as property for distribution in the Estate of MWANGI KIMOTHO (DECEASED). The Respondent is a son to the deceased MWANGI KIMOTHO and a brother-in-law to the Appellant, a co-administratrix of the deceased's Estate by virtue of being the widow of one of the brothers to the deceased. The deceased was an elder brother to the Appellant's late husband. At the trial Court, the Appellant laid claim to the suit land on the grounds that it originally belonged to her father-in-law namely, KIMOTHO wa KIBIRU who caused same to be registered in the name of the deceased being his eldest son by one of his two wives, on behalf of the entire family. She argued and submitted that a constructive trust existed in relation to the suit property as same was registered in the deceased to hold in trust for the other family members.

3. The Respondent rejected the Appellant's contention that the subject property is family land and averred that his father KIMOTHO wa KIBIRU purchased the suit land together with land parcel number KIGANJO/NEMBU/224 which his father then distributed equally amongst his sons including the Appellant's husband. The Respondent subscribed to the position that the property in contention solely belongs to his father and ought to be distributed exclusively among the dependants of MWANGI KIMOTHO (DECEASED). It was further averred and submitted that by seeking for revocation of the grant dated the Appellant was intending to disinherit the deceased's dependants.
4. In the impugned decision dated 2nd July 2024 the trial Court determined that the Appellant failed to establish that the suit property was ancestral land before its registration in the deceased's name. The trial Court upon reviewing the evidence before it, ruled that it was satisfied that only the deceased's family were in occupation and use of the subject land hence, it found no grounds to infer that same was

family/ancestral land or that the deceased was registered to hold it in trust for the entire family. The Court proceeded to dismiss the Appellant's cause with costs.

5. The appeal before the Court is premised on the following six (6) grounds:

- i. The trial Court erred in law and facts and misapprehended the evidence on record by holding that the Appellants had not proved their case on a balance of probabilities despite the overwhelming evidence on record.***
- ii. The trial Court erred in law and facts in holding that the Appellants the deceased were not owners of KIGANJO/MUTATI/T.255 in effect disregarding the evidence of the appellant and other family members use of the said property and hence entitled to peaceful possession and occupation of the property.***
- iii. The trial Court erred in law and in fact in failing to hold that the deceased person herein held KIGANJO/MUTATI/T.255 in trust for the whole family.***
- iv. The trial Court erred in law and in fact by failing to address the merits of prayer number 1, 2, and 4 of the application dated 19th September 2023.***
- v. The trial Court erred in law in failing to consider all the issues raised by the appellant in written submissions made before him.***
- vi. The trial Court misdirected itself in law in ruling the way it did.***

6. The Appeal was admitted by the Court pursuant to the provisions of Section 79G of the Civil Procedure Act with

directions that it be dispensed by way of written submissions. The Appellant filed written submissions dated 15th May 2025 through her counsel and identified the following issue for determination by this Court:

“Whether Land Title Number KIGANJO/MUTATI/T.225 was held by the deceased in trust for his siblings/family and as such, should be included as property available for distribution.”

7. It was submitted that this Court sitting on a first appeal is required to re-evaluate the entire evidence placed before the trial Court and render its verdict on the same as held in the cases of: **Mursal & another v Manese (suing as the legal administrator of Dalphine Kanini Manesa) (Civil Appeal E20 of 2021) [2022] KEHC 282 (KLR) (6 April 2022) (Judgment); Selle & Another V Associated Motor Boat Co. Ltd & Others [1968] EA 123; and, Peters V Sunday Post Limited (1958).**
8. It was submitted that the Appellant supplied sufficient evidence before the trial Court establishing the existence of a customary trust in respect of the suit land in accordance with the standards and principles regarding (customary trust) enunciated by the Supreme Court of Kenya in **Isack Kiebia M’Inanga V Isaaya Theuri M’Lintari & Another SCoK No. 10 of 2015**. The Appellant argued that she is likely to be disinherited together with other beneficiaries if the current appeal is disallowed.
9. She further argued and submitted that she established the existence of a customary trust to the required standard being on a balance of probabilities. Guidance was placed in the holding of the Court in **Japheth M Wepukhulu v fed Simiyu [2020] eKLR; Miller V Minister of Pensions [1942] 2 ALL ER 372; and, James Muniu Mucheru v National Bank of Kenya Ltd C.A Civil Appeal No. 365 of 2017 (2019) eKLR.**

10. Relying on the reasoning of the Court in **Ruingi & another (Suing on their own behalf and on behalf of Wagatu Kimani, Simon Kagece Kimani, Peter Gichuri, Susan Waceke and Teresia Wanjiku) v Waruingi & 4 others (ELC Civil Suit 570 of 2011 [2022] KEELC 14742 (KLR) (10 November 2022) (Judgment)**, and **John Gitiba Buruna & Another V Jackson Rioba Buruna, Court of Appeal at Kisumu, Civil Appeal No. 89 of 2003**, the Appellant argued that the existence of a trust acts as an exemption to the principle of indefeasibility of title.
11. The Respondent filed written submissions dated **18th July 2025** through his counsel and isolated three (3) issues for resolution by the Court namely:
- i. Whether the Appellant has established that the deceased held land title no. KIGANJO/MUTATI/T/255 in customary trust for his family***
 - ii. Whether the Appeal is merited***
 - iii. Who should bear the costs of the appeal***
12. Relying on the dictum of the Court in **Njenga Chokera Vs Maina Wanjiru Kimani and 2 others (2005) eKLR**; and, **Muthuita Vs Muthuita (1982-88) 1 KLR 42**, The Respondent subscribed to the position that a customary trust is proved by leading evidence. Further guidance was sought in the reasoning of the Court in **Teskin & 4 others V Makokha & 2 Others (ELC Case E006 of 2022) [2025] KEELC 951 (KLR)** to buttress the argument that in proving a customary trust, the legal burden of proof rests with the one who is the existence of such a right. Further reliance was placed in the decision of the Court in **Isack Kiebia M'Inanga v Isaaya Theuri M'Lintari & Another SCoK No. 10 of 2015**.
13. This Court has carefully inspected the Record of Appeal, parties' rival submissions in respect of the appeal and well as the entirety of the evidence adduced before the trial Court and the pleadings and submissions thereto. The issue for determination is identified as whether the appeal is merited.

14. The Court noted that the Appellant, in her written submissions cited two different land registration numbers when referring to the suit land namely, **KIGANJO/MUTATI/T.225** and **KIGANJO/MUTATI/T.255**. However, the land registration numbers indicated in the Memorandum of Appeal is **KIGANJO/MUTATI/T.255** only. The Respondent, for his part consistently referred to land parcel number **KIGANJO/MUTATI/T.255**. The impugned decision, reads in part, as hereunder:

"In this instant application the applicant is seeking to include LR Kiganjo/Mutati/T.225 and not 255. Thus the prayers sought in the application cannot be granted since the applicant is seeking to include another parcel of land which is not registered in the names of the deceased person herein."

15. From the foregoing, it is clear that the trial Court's decision hinged greatly on the confusing description of the subject property by the Appellant herein (then Applicant). The Appellant's written submissions similarly referred to the property in contention as **KIGANJO/MUTATI/T.225** and also as **KIGANJO/MUTATI/T.255** thereby creating confusion for this Court. Be that as it may, the Court is alive to the copy of Certificate of Official Search marked "BMM 2" appearing on page 8 of the record wherein the title number for the suit property is given as **KIGANJO/MUTATI/T.255** and **MWANGI KIMOTHO (Deceased)** is indicated as the registered proprietor thereof and his title stated to have been issued on 17th February 1997.

16. **Article 159(2)(d)** of the **Constitution of Kenya, 2010**, which states that:

***"In exercising judicial authority, the courts and tribunals shall be guided by the following principles—
d) Justice shall be administered without undue regard to procedural technicalities."***

17. In the case of **Rosemary Kagwiria Mugambi v No.63288 Paul Mwambere Jumwa & 4 others KE 2021 Lex 2242(HC)**, the court emphasized that the **Constitution of Kenya, 2010** has moved away from rigid procedural rules that deny parties access to justice; furthermore, while procedural technicalities must be respected, they should not be allowed to override the principle of substantive justice.

18. The inconsistent references to the suit land by the Applicant (now Appellant) did not form the primary basis for the dismissal of her suit by the trial Court. It is apparent from pages 4 and 5 of the impugned decision appearing on pages 70 and 71 of the record, that the trial Court considered the Appellant's admission made during cross-examination to the effect that the Respondent's family have been in occupation of the subject property. The trial Court further determined that the Appellant failed to adduce evidence in support of her claim that the suit land was used for the benefit of the entire family. In the premises, the Court is persuaded that the impugned decision was not anchored narrowly on procedural technicalities, as the trial Court evaluated the evidence presented before it in finding that the Appellant failed to meet the requisite burden of proof, resulting in dismissal of her claim.

19. The Court holds and finds that the Appellant has failed to provide sufficient grounds necessitating this Court to disturb the holding of the trial Court. Consequently, the appeal is found to be without merit and same is hereby dismissed.

20. This being a dispute between members of the same family related through marriage, the Court is minded to and hereby directs each party to bear own costs in respect of the appeal and at the trial Court.

21. **Final Orders**

- i. The Appeal is dismissed***
- ii. Each party to bear own costs in respect of the appeal and at the trial Court.***

**DATED, SIGNED AND DELIVERED ELECTRONICALLY THIS
20TH DAY OF NOVEMBER, 2025.**

**HON. T. W. Ouya
JUDGE**

ORIGINAL