



REPUBLIC OF KENYA



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**M’kilima v Kiriinya & another (Civil Appeal 126 of 2019)
[2025] KECA 2243 (KLR) (19 December 2025) (Judgment)**

Neutral citation: [2025] KECA 2243 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPEAL 126 OF 2019
J MOHAMMED, LK KIMARU & AO MUCHELULE, JJA
DECEMBER 19, 2025**

BETWEEN

RIUNGU M’KILIMA APPELLANT

AND

STEPHEN KIRIINYA 1ST RESPONDENT

JOHN GIKUNDA 2ND RESPONDENT

(Being an appeal from the judgment of the Environment and Land Court at Meru (Cherono, J.) dated 18th October, 2018 in ELC Case No. 95 of 2005)

JUDGMENT

1. The appellant lodged a suit against the respondents before the High Court of Kenya at Meru, vide a plaint dated 5th October, 2005, seeking to have parcel L.R. No. Abothuguchi/Igane/727 (suit land) declared trust land. The appellant and the 1st respondent are brothers, while the 2nd respondent is a son of the 1st respondent. It was the appellant’s case that the 1st respondent is the registered proprietor of the suit land, which measures approximately 2.2 hectares, and that the appellant and the 2nd respondent each occupy half portion of the suit land. The appellant contended that the suit land was family land, and that it was gathered by the 1st respondent, being the elder brother, to hold in trust for himself and for the appellant. The appellant urged that the suit land originally belonged to their father, M’Ikirima M’Rimberere (deceased), and that he has been in possession of the same since his childhood. He claimed that the 1st respondent has refused to have the suit land registered in both their names, even though the appellant is in occupation of half portion of the suit land. The appellant asked the trial court to declare that the suit land is trust land, and order the 1st respondent to transfer half share of the suit land to the appellant.
2. The 1st and 2nd respondents filed a joint statement of defence and counterclaim dated 29th October, 2005, where the 1st respondent admitted that he is the registered proprietor of the suit land. He denied



assertion that he holds the title of the suit land in trust for the appellant, or that the appellant has occupied half portion of the suit land since 1958 as alleged. The respondents averred that the appellant entered into a portion of the suit land, upon giving the 1st respondent an undertaking that he would vacate the same once the family land L.R. No. Abothuguchi/Gaitu/157 was sub-divided, and each of the sons given their share of the said land. They pleaded that the said land in Gaitu was sub-divided, and a title deed issued to the appellant with respect to his share, but that the appellant refused to vacate the suit land which belongs to the 1st respondent. The respondents averred that the appellant has filed other suits relating to the same cause of action, that is, Meru High Court Civil Case No. 126 of 2003 (O.S), and Meru CMCC No. 377 of 2005. In their counterclaim, the respondents sought orders of eviction against the appellant from the suit land.

3. The appellant, in a reply to the respondents' defence and counterclaim, stated that the 1st respondent was always willing to transfer half of the suit land to the appellant, but that he changed his mind following incitement by his sons. He urged that Meru CMCC No.377 of 2005 was withdrawn, and that Meru HCCC No. 126 of 2003 (O.S) limited the appellant's prayers, which forced the appellant to file the suit before the trial court, so that all the complex issues raised in his claim could be addressed.
4. The case was heard by way of viva voce evidence. PW1, Mukwachiru Kathita M'Ikirima, is the mother to both the appellant and the 1st respondent. It was her evidence that the suit land is ancestral land that belonged to herself and her husband, who is deceased. She stated that the appellant resides on the suit land, and that he was brought up on the suit land, together with the 1st respondent and the rest of her children. She stated that the suit land belonged to both the appellant and the 1st respondent, and that the same should be shared between the two brothers, as that was the wish of their father. PW2, Colleta Karimi, a sister to the appellant and the 1st respondent, held the same view as their mother (PW1). It was her evidence that the appellant and the 2nd respondent occupy equal shares of the suit land.
5. The appellant testified as PW3. It was his evidence that the suit land was gathered and registered in the 1st respondent's name in 1967, with the understanding that it would be sub-divided between them in equal shares. He stated that the suit land originally belonged to their father, who also inherited it from his father (their grandfather). He testified that the suit land measures approximately six acres, and that he resides on three acres out of the six, together with his wife and children, while the 1st respondent's son resides on the remaining portion. He stated that he has extensively developed his portion of the suit property by building semi-permanent houses, and planting coffee, among other crops.
6. PW4, M'Mburugu Mboroki, told the court that the disputing parties and their family were well known to him. It was his evidence that the suit land belonged to the appellant and 1st respondent's father, and that the appellant has lived on the said property for over forty years, and has extensively developed his portion of the suit land.
7. The 1st respondent testified as DW1. It was his evidence that the suit land was given to him by his father as his inheritance, and that his other brothers, including the appellant, were all allocated their parcels of land. He stated that the appellant was given a parcel of land measuring 6½ acres in Gaitu. He told the court that the appellant lived with him on the suit land as his children were attending a nearby school, and that he had promised to move out of the suit land once his children finished school. Upon cross-examination, the 1st respondent conceded that the suit land was ancestral land, and that his parents lived on the suit land where they brought up all their children including the appellant. He stated that the portion occupied by the appellant on the suit land measured two acres.
8. DW2, John Gikunda Mureithi, is the 1st respondent's son. He told the court that he resides on the suit land, and that he occupies and farms on a three-acre portion. He stated that the appellant occupies the remaining three-acre portion of the suit land. DW3, Kinoti M'Ikirima, is a brother to both the



appellant and the 1st respondent. He testified that the suit land was given to the 1st respondent by their father. He stated that all the siblings lived on the suit land at some point since the suit land originally belonged to their father, but that their father allocated the said land to the 1st respondent, while the appellant was given land in Gaitu. It was his testimony that the appellant had undertaken to move out of the suit land once his children who were schooling in Igane finished their studies.

9. At the end of the trial, the learned Judge found in favour of the 1st respondent. The learned Judge held that the evidence led by the 1st respondent was truthful, and that the appellant failed to adduce evidence to prove his claim with respect to the suit land.
10. The appellant is now before us as he was aggrieved by the decision of the trial court. His appeal is founded on thirteen grounds contained in his memorandum of appeal. The appellant faulted the learned Judge for finding that he was required to produce documentary evidence from the adjudication office to show that the 1st respondent gathered the suit land as ancestral land, yet his claim was based on a trust. He was aggrieved that the learned Judge found that failure to call the clan elders as witnesses prejudiced the appellant's case, while the evidence by his mother (PW1) established that the suit land was family land. He took issue with the fact that the learned Judge failed to determine that although the 1st respondent was the registered proprietor of the suit land, he held the same in trust for himself and the appellant. The appellant urged that their father gave every son a parcel of land in Gaitu, including the 1st respondent. He was aggrieved that the learned Judge found that the 1st respondent had proved his counterclaim, yet he did not adduce any evidence to show that their late father gifted the suit land to him. He was of the view that the learned Judge did not properly analyze the entire evidence on record, and therefore came to a wrong conclusion.
11. The appeal was heard by way of written submissions. Learned counsel Mr. Karanja was on record for the appellant. It was his submission that the evidence tendered by the appellant and his witnesses was sufficient to prove the existence of a trust over the suit land. He argued that both the appellant and respondent's witnesses led evidence that established that the suit land was ancestral land which originally belonged to their deceased father. He urged that the suit land was registered in the 1st respondent's name as the eldest son, to hold in trust on his behalf, and that of the appellant. He asserted that the absence of records from the adjudication office held no probative value in this matter. It was his submission that the appellant has been in occupation of the suit land since his childhood, and that he resided there with his family, and that the 1st respondent has never filed any suit to assert his rights, if any, over the appellant's portion of the suit land. He averred that the land in Gaitu was given to all the sons, including the 1st respondent, and that they had all sold a portion of the said land to facilitate its sub-division. He urged that the fact that the appellant owned a piece of the land in Gaitu had no bearing whatsoever in this suit. Counsel submitted that the 1st respondent did not adduce any evidence to prove that the suit land was solely gifted to him by their late father. He maintained that there existed a customary trust in favour of the appellant.
12. In rebuttal, counsel for the respondent submitted that the appellant failed to tender any evidence to prove the existence of a customary trust with respect to ownership of the suit land. It was his submission that the suit land was registered in favour of the 1st respondent, after it was gifted to him by his father, during his father's lifetime, and that the suit land did not form part of the estate of their deceased father. He asserted that the 1st respondent was gifted the suit land, while the appellant and DW3 benefitted from the land in Gaitu, namely, L.R No. Abothuguchi/Gaitu/157. He submitted that the appellant did not show any intervening factor which precluded him from being registered as a co-owner of the suit land alongside the 1st respondent, if indeed the suit land was allocated to both of



them. Counsel urged that the 1st respondent led evidence which justified the appellant's occupation of the suit land, which was with the consent of the 1st respondent.

13. This being a first appeal, we have a duty to re-analyze and re-assess the evidence on record, and reach our own independent conclusions. This duty was reiterated by this Court in *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR, where this Court held 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 due allowances in this respect.” See *Selle v. Associated Motor Boat Co.* [1968] EA 123.

14. In the present appeal, the issue that came to the fore for determination is whether there exists a trust in respect of the suit parcel of land as to entitle the appellant to a portion thereof.

15. It was the appellant's case that the suit parcel of land was ancestral land which was gathered by the 1st respondent during Land Adjudication and registered in the 1st respondent's name on the understanding that he held the same in trust for the appellant and himself. The 1st respondent does not dispute that the suit parcel of land is ancestral land. He, however, explains that he was entitled to the land pursuant to being given the same as a gift by their father. The 1st respondent stated that each of his brothers was given land by their father, including the appellant who was given land at a place called Gaitu.

16. The appellant does not dispute the assertion by the 1st respondent that he was given land by his father at Gaitu. He, however, explains that all the sons including the 1st respondent were given land at Gaitu. The appellant maintained that he had been in occupation of a portion of three (3) acres of the suit parcel of land since the land was adjudicated and titles issued. This position was confirmed by the evidence of their mother and indeed the 2nd respondent. The 1st respondent countered the applicant's explanation by stating that he had allowed him to occupy the said portion of the suit parcel of land measuring two acres because he had requested to stay there while educating his children in a nearby school.

17. The appellant's case before the Environment and Land Court (ELC) was based on assertion of existence of customary trust over land. The Supreme Court in *Kiebia V. M'lintari & another* [2018] KES (22) KLR defined the parameters in which a customary trust may be proved to subsist. The Court held thus in paragraph 52:

“...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 holdings 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 possessing 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.”

18. In the present appeal, the appellant was able to establish the following: that the suit parcel of land LR No. Abothuguchi/Igane/727 was before registration ancestral or family land. Both the appellant and the 1st respondent adduced evidence to the effect that the suit parcel of land belonged to their grandfather before the same was inherited by their father before adjudication and first registration. The 1st respondent confirmed in his evidence before the trial court that he was registered as the owner of the suit parcel of land because he had inherited the same from his father.
19. The appellant also established that he had been in possession of a portion of land measuring three (3) acres of the suit land since prior to the registration of the suit land. It was common ground that the appellant and the 1st respondent are brothers. During the entire period that the appellant has been in possession of the said three (3) acres, the 1st respondent made no effort to assert his proprietary rights over the same other than when he filed the counterclaim seeking orders of eviction when the appellant went to court seeking to be declared as the owner of the portion he is occupying on account of the existence of a customary trust. The appellant’s claim is directed at the 1st respondent who is his brother.
20. The 1st respondent, while conceding that the appellant has been in occupation of the said portion of the suit parcel of land since adjudication, explained the said occupation to be on account of his permission to the appellant to occupy the same to enable him educate his children in a nearby school. The appellant and the 1st respondent’s mother and sister, respectively, testified that the appellant occupied the said portion of land as of right having been given the same by his late father.
21. Our re-evaluation of the evidence adduced before the trial court, and the assessment of grounds of appeal and the submission made during the hearing of this appeal leads us to the irresistible determination that the appellant established the existence of a customary trust that entitles him to be registered as the owner of the three (3) acre portion of land that he is currently in occupation of.
22. The assertion by the 1st respondent that appellant had been given land elsewhere by their father, while correct, failed to fully explain the whole situation. Evidence was adduced by the appellant’s witnesses, specifically his mother and his sister which established, to the required standard of proof on a balance of probabilities, that the 1st respondent was also a beneficiary on inheritance of the land at Gaitu.
23. In the premises therefore, we are satisfied that the appellant’s appeal has merit. It is hereby allowed. The judgment and decree of the Environment and Land Court is set aside and substituted by a Judgment of this Court’s finding that the appellant is entitled to be registered as the owner of a portion of three (3) acres out of LR No. Abothuguchi/Igane/727 which the 1st respondent is holding in trust for the appellant. The 1st respondent shall execute all the transfer documents so that the said portion of land shall be surveyed, subdivided and transferred to the appellant. In default, the Deputy Registrar of the Court shall sign the said conveyancing documents on his behalf. There shall be no order as to costs as this was a family dispute.

DATED AND DELIVERED AT NYERI THIS 19TH DAY OF DECEMBER, 2025.

JAMILA MOHAMMED

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JUDGE OF APPEAL



L. KIMARU

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JUDGE OF APPEAL

A.O. MUCHELULE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

