



REPUBLIC OF KENYA



**KENYA LAW**  
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**Njiru & 3 others v Njiru & another (Environment and Land Case  
19 of 2020) [2025] KEELC 5771 (KLR) (30 July 2025) (Judgment)**

Neutral citation: [2025] KEELC 5771 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT EMBU  
ENVIRONMENT AND LAND CASE 19 OF 2020**

**A KANIARU, J  
JULY 30, 2025**

**BETWEEN**

**MICHAEL NDONG'NG'I NJIRU ..... 1<sup>ST</sup> PLAINTIFF  
JUSTIN KITHAKA NJIRU ..... 2<sup>ND</sup> PLAINTIFF  
JUSTA NGITHI ..... 3<sup>RD</sup> PLAINTIFF  
GACONI NJIRU ..... 4<sup>TH</sup> PLAINTIFF**

**AND**

**GABRIEL MAGARA NJIRU ..... 1<sup>ST</sup> DEFENDANT  
GABRIEL NJIRU ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. The parties involved in this dispute are close family members. The dispute itself was filed on 29.7.2020 vide an originating summons of even date. At the time, the dispute had four plaintiffs – Michael Ndong'ong'i, Justin Kithaka Njiru, Justa Ngithi and Gaconi Njiru. The defendants were – Gabriel Magara and Njeru Njiru. The subject matter of the dispute were two land parcels – Embu/Mavuria/319 and Embu/Mavuria/1033. The two defendants were sons to Gaconi Njiru and brothers to the rest of the plaintiffs. In fact, all the parties are children of Gaconi Njiru.
2. Land parcels No's Embu/Mavuria/319 and Embu/Mavuria/1033 were originally one parcel of land known as Embu/Mavuria/319 which was allocated to the late Njiru Gakuya by his clan. Njiru Gakuya was husband to Gaconi Njiru and father to all the other parties. It appears clear that the process of land adjudication in the local area started when the late Njiru Gakuya was still alive but he passed on before the process was complete. After his death, his two elder sons, the two defendants herein, became registered as owners of the land. The land itself was subdivided, with one parcel retaining the original No. 319 while the other became parcel No. 1033. All the parties live on the land with the exception



of Justa Ngithi, a daughter to Gaconi and Njiru Gakuya, who is married and lives elsewhere. All the plaintiffs aver that the two defendants hold the land in trust for them. The defendants, the plaintiffs say, cannot be said to own the land to the exclusion of the others.

3. Later on, the originating summons was amended and filed on 13/10/2021. The amendment was necessitated by the death of Justin Kithaka Njiru who became substituted with his wife Lydia Mbucu Kithaka. As I write this judgment now, it is clear that Gaconi Njiru, the mother of the parties, is also late but the plaintiffs chose to substitute her.
4. In a more precise manner, the court has been invited to determine the following:
  1. Whether the 1<sup>st</sup> and 2<sup>nd</sup> defendants were registered as proprietors of parcels of land No's Embu/Mavuria/319 and Embu/Mavuria/1033 respectively in trust for themselves as well as the plaintiff's herein.
  2. Whether the parcels of land No's Embu/Mavuria/319 and Embu/Mavuria/1033 should be consolidated and thereafter shared amongst the plaintiffs and defendants as follows:
    - i. Gabriel Magara Njiru (1<sup>st</sup> defendant) 0.8ha
    - ii. Estate of Justin Kithaka (2<sup>nd</sup> plaintiff) 0.8ha
    - iii. Michael Ndong'ong'i Njiru (1<sup>st</sup> plaintiff) 0.8ha
    - iv. Njeru Njiru (2<sup>nd</sup> plaintiff) 0.8ha
    - v. Gaconi Njiru (4<sup>th</sup> plaintiff) 0.4ha
    - vi. Justa Ngithi (3<sup>rd</sup> plaintiff) 0.4ha
  3. If No's 1 and 2 are in the affirmative should the Land Registrar, Mbeere South, be directed to proceed to automatically consolidate parcels of land No's Embu/Mavuria/1033 and Embu/Mavuria/319 and register the consolidated portion in common in the names and shares as set out at paragraph 2 above.
  4. Whether the 1<sup>st</sup> and 2<sup>nd</sup> defendants should be ordered to pay costs of this suit.
5. The originating summons came with a supporting affidavit wherein the history, antecedents, and background surrounding the dispute are set out. The depositions in the supporting affidavit were made by Michael Ndong'ong'i Njiru on behalf of himself and the other plaintiffs. He deposed, inter alia that the land was allocated to his late father by Kamumu clan to which the father belonged. At the onset of the land adjudication process in the area in the early 1970s the land was meant for his father. But the father passed on before the adjudication process was complete and the two elder sons of the father – Gabriel Magara Njiru and Njeru Njiru – were brought on board. The original parcel number was 319 but at some point, the parcel was divided into two, with one retaining the original number 319 while the other became owner of parcel No. 1033. For quite some time, the entire family of the late Patriarch – Njiru Gakuya – continued to live peacefully on the land. It remained so until those who were young when the family patriarch passed on became adults and started marrying.
6. Each needed a space he could call his/her own. But the defendants said that the land was their own. But even as they said so, the 1<sup>st</sup> defendant is said to have shown each a place to occupy. That is said to have happened sometimes in early 1990's. Michael Ndong'ong'i was shown 2 acres and Justine Kithaka was also shown two acres. Lydia Ngithi does not live on the land but is said to be entitled to a portion. The plaintiffs are clear that the defendants were registered as owners of the land in trust for all members



- of the family. They ask that the two parcels of land be consolidated first and then shared out among family members.
7. The defendants responded to the suit by way of a replying affidavit dated 12/8/2020. They later on filed a further replying affidavit dated 18/3/2021. According to the defendants, the land is their own and they don't hold it in trust for the family members. The plaintiffs are said to be aware of this. The position of the defendants is that the plaintiffs are trespassers. The court was urged to dismiss the suit. The further replying affidavit filed by the defendants has depositions that alluded to adverse possession. That affidavit also mentions ½ acre as the size of land occupied by each plaintiff and not 2 acres as alleged.
  8. The court started hearing the matter on 13/6/2023. Michael Ndong'ong'i Njiru testified as PW1. At the time of testifying his brother – Justin Kithaka – who was one of the plaintiffs had passed on. His mother – Gaconi Njiru – who was also a plaintiff had also passed on. Justin Kithaka had already been substituted with Lydiah Mbucu Kithaka but Gaconi was not substituted. He said that the disputed parcels of land were originally clan land and that in fact it was one entity meant to be registered in the name of their late father. But the father died and the land was divided into two portions and registered in the names of the two defendants. At the time registration took place, the entire family of PW1's late father was living on the land.
  9. All of them lived peacefully on the land until those who were young when the father died became adults and started raising their own families. The defendants are said to have told them to look for their own land. The defendants further insisted that they were the owners of the land to the exclusion of all others. The plaintiffs' position was that the land does not belong to the defendants alone. The defendants are said to have become registered owners on their own behalf and also on behalf of the other family members.
  10. This witness adopted his written statement as evidence. His statement generally contains much of what he told the court when he was testifying. Tellingly, the statement ends thus: "That the defendants are not the absolute registered proprietors of the 2 parcels of land. They were registered in trust for all the other members of the family and the two parcels of land in dispute should be shared out to all members of the family."
  11. This witness was subjected to cross-examination and nothing in the answers he gave to the questions asked can be said to indicate a shift of his position concerning ownership of the land.
  12. PW 2 was Lydiah Mbucu Kithaka and she came on board in this matter after the death of her husband – Justin Kithaka Njiru. She said that when she got married, she started living on a portion about the size of two acres on the disputed land. She now lives in Mwea but her own son is living on that portion and she herself makes occasional visits to the land. This witness adopted her written statement as evidence. In her statement, she reiterates that she started living on the land when her late husband married her sometimes in 1999. She and her late husband developed their portion by planting trees like "Mikau" "Miumbu" and "Miramba." They also planted fruits like mango and Lemon. They put up their matrimonial home there. Then sometimes in the year 2002, the two defendants started showing some hostility. They claimed that the land was their own and that others should vacate. She stated that they didn't have any other land.
  13. This witness was cross-examined. She reiterated she was married by her late husband in 1999 and she found him already having been allocated the portion of land they were living on. She denied that it was ½ acre. It was two acres, she said.



14. The third witness – Justina Ngithi – testified as PW3. She is sister to the defendants. From the entire original parcel of land, she said she is entitled to one acre and her mother was also entitled to one acre. PW2 adopted her written statement as evidence. The written statement shows her saying, inter alia, that the defendants are her elder brothers and that her late father, Njiru Gakuya, passed on in 1974 when she was about 11 years old. She said she was born and brought up on the land. The 1<sup>st</sup> defendant was said to have called elders sometimes in 1992 and told them that he wanted to share out the land to his brothers. Then the 1<sup>st</sup> defendant showed the brothers each a portion to use and occupy. There was harmonious existence for a while but in the year 2002 the defendants became hostile and started saying that the land occupied by the brothers belonged to them. This witness said that the defendants were registered as owners of the land in trust for themselves and the other members of the family. This witness was cross-examined and she maintained that the 1<sup>st</sup> defendant allocated land to his brothers. She also said that she was given one acre of that land by her parents.
15. Chelestino Ngoci Ngare testified as PW4. He was an elderly man and he said he knew the deceased's father of the parties in this case well. He, like the father, belonged to Kamumu clan. It is that that clan that wanted to allocate land to the deceased's father of the parties but the father passed on before the process of allocation was complete. During adjudication in the area, PW4 served as a clerk who used to record the land allocated to people in the area. This witness adopted his written statement as his evidence. The statement of this witness states, inter alia, that the late father of the parties in this matter had two wives – Nduti and Gaconi. They were all living on the disputed land and this was before the onset of land adjudication process in the area. Nduti's sons were adults and were all allocated land by Kamumu clan. The children of the 2<sup>nd</sup> wife – Gaconi – were underage at the time. They are the parties in this case. Their father was the one to be allocated land by clan for them. But the father passed on before the process of land adjudication was completed. It was then decided that a representative of the father was required to take his place. Two children of Gaconi were chosen. They are 1<sup>st</sup> and 2<sup>nd</sup> defendants. They were to hold the land in trust for themselves and their siblings. Gaconi herself could not take her husband's place as at that time women were not being allocated land. According to this witness the plaintiffs and the defendants have equal rights to the disputed land as they are all children of the late Njiru Gakuya.
16. The defendants started testifying on 24/4/2024. Gabriel Magara Njiru testified as DW1. He said he got the land from his late father – Njiru Gakuya. The land was then subdivided into two. He remained with 4 ½ acres while his other brother – Njeru Njiru – got 5 ½ acres. He said the land is his own as he is the one who brought up the plaintiffs. He said they had a family meeting where it was agreed that the plaintiff could use and occupy ½ acre each but if they wanted more land, they needed to go and look for it. This witness asked that the plaintiffs' case be dismissed. He also adopted his written statement as his evidence. In the statement he stated that the land belonged to his late father; that the father died in 1974 and he subsequently became the registered proprietor; that sometimes later the land was subdivided into two portions, with one portion remain his while the other became owned by Njeru Njiru; that the Michael Ndong'ong'i was shown a portion measuring ½ acre and that also was done for Justin Kithaka. That there was an oral agreement that these two would later purchase their own parcels of land where they would settle; that the plaintiffs have no beneficial interest over the land; and that the allegation that they hold the land in trust for the other members of the family is unfounded.
17. This witness was subjected to cross-examination. In answer to some of the questions posed to him, he is shown saying that the original piece of land belonged to his late father; that the land was given to his late father by the clan; that he and the plaintiffs were all living on the land at the time his father passed on; that he didn't even know how the land was subdivided and he even got to know in 1978 that it was registered in his name; that he is the one who brought up the plaintiffs and therefore the land is his



- own; that he didn't agree with his brothers that each would get two acres; and finally that the physical situation on the land is such that the court can see clearly the portion used by each plaintiff.
18. Re-examined, this witness said that he does not want the plaintiffs to get the land as he brought them up and they gave him nothing in return. He also said he has planted many trees on the land and the plaintiffs are alleging that the fruits and the trees belong to his late father.
  19. Njeru Njiru, the other defendant, testified as DW2. He adopted his written statement as his evidence. It is substantially the same as that of DW1. On cross examination, this witness said that the subdivision of the land only appears on paper as the land is really one entity on the ground. He also said that he was not part of the subdivision that took place. Further, he said that his siblings, the plaintiffs live on the land; that the siblings were not given land by the clan; and that the plaintiffs should not get the land and should buy their own land instead.
  20. Ignatious Nyaga was called by the defendants as their witness. He testified as DW3 and adopted his written statement as his evidence. His story is that he is a neighbour and saw the land being sub-divided. He said that the deceased 4<sup>th</sup> plaintiff – Gaconi – did not object to the idea of the two defendants being registered as owners. According to this witness, it was agreed that the plaintiffs would purchase their own land when they became grown-ups. He said also that the portions occupied by the plaintiffs are ½ acre in size, not 2 acres. On cross-examination, he reiterated that Gaconi, the 4<sup>th</sup> plaintiff, agreed that she and her children would go and settle elsewhere.
  21. After hearing, both sides filed written submissions. The plaintiffs' submissions are dated 18/10/2024. According to the plaintiffs the issues to determine are whether the defendants hold the land in trust for themselves and the plaintiffs and whether the land should be subdivided so that the plaintiffs can get their shares. It was then submitted that it is common ground that the land in dispute initially belonged to the parties' late father, Njiru Gakuya; that Njiru Gakuya passed on before determination of the adjudication process; that the original parcel of land was sub-divided into two portions with each portion being registered in the name of each defendant; that this all happened when the defendants were both minors and they didn't pay any consideration for the land. It was stated that the plaintiffs are also children of Njiru Gakuya and were not given any other land; and that all the parties were brought up on the land.
  22. The case of *Isack m. Inanga Kiebia –vs- Isaaya Theuri M'Lintari & Another* [2018] eKLR was cited and quoted. In that case, some of the elements necessary for proof of customary trust were stated as follows:
    1. That the land in question was before registration, family, clan, or group land.
    2. That the claimant belongs to such family, clan or group.
    3. That 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.
  23. The plaintiffs submitted that they have met this threshold. For further guidance and/or persuasion the cases of *Kama –vs- Thiga* [2022] KLR and *Dominic Otieno Ogunyo & 2 others – vs – Helida Otieno*



Walori [2022] eKLR were cited and quoted as deemed appropriate. The court was ultimately asked to allow the plaintiffs' claim.

24. The defendant's submissions are dated 5/11/2024. The issues highlighted for determination are not different from those of the plaintiffs. There was an overview of the case in the submissions. Then it was emphasized that there was an oral agreement that the plaintiffs would relocate and buy their own land. It was pointed out that one of the plaintiffs was in fact being sold a portion of that land and he even agreed to buy and paid some money. A question was raised as to whether he could really agree to buy if he was entitled to the same land by way of trust.
25. It was further submitted that as the defendants are the registered owners of the land, they are absolute and "indefeasible owners." Ultimately, it was stated that no customary trust is proved and the court was urged to dismiss the plaintiffs' case with cost to the defendants. In the submissions, the cases of *Kiarie -vs- Kinuthia* (supra) and *Juletabi African Adventure Limited & Another -vs- Christopher Michael Lockley* [2017] eKLR, among others, were cited.
26. I have considered the pleadings, evidence, and rival submissions. This is essentially a family dispute. From both sides of the case, it is clear that the court is called upon to determine whether the disputed land is held by the defendants in trust for themselves and other members of the family of the late Njiru Gakuya. If the finding on this issue is positive the other issue is whether the land should be shared out in the manner proposed by the plaintiffs.
27. It is common ground that the disputed land was originally clan land. It was initially meant for Njiru Gakuya, the head of the family of the disputing parties, and the process of making him owner had even started but Gakuya died before the process was concluded. The defendants, who were Gakuya's elder male children at the time, took his place and became the registered owners. Both the plaintiffs and defendants were living on the land. The defendants would have the court believe that the disputed land did not become registered in their names to hold in trust for themselves and other family members.
28. The evidence of PW4 is crucial in this matter. He participated in the process of allocation of land to members of the Kamumu clan. He gave some history. Njeru Njiru, the father of the disputing parties, had two wives – Nduti and Gaconi. At the time the clan members were being allocated land, Nduti's children were adults and were allocated land directly by the clan. Gaconi's children however were underage and couldn't therefore be allocated land. These children are now the disputing parties here. It was decided that the late father of the parties be allocated the disputed land for the benefit of Gaconi's children. The process of vesting ownership in the father had even started but the father unfortunately passed on before completion of the process. That is how the two defendants were then brought on board as they were the elder children of Gaconi. Gaconi herself could not be considered for allocation as customs did not allow allocation of land to women at the time. The original intention of the clan therefore did not change. What changed was the identity of the registered owners as the intended original owner had passed on.
29. The case of the defendants appears a bit confusing. On the one hand, they say the disputed land is their own because they are the registered owners and being such, their proprietorship is absolute and their rights of ownership are indefeasible. On a different note however, they oppose the customary trust arrangement because they allegedly brought up and educated the plaintiffs who never gave them anything in return. According to the defendants, they even had a family meeting where it was agreed that the plaintiffs had to look for their own land elsewhere.
30. One would wonder whether the late father of the disputing parties would be comfortable with the idea of only two of his sons inheriting the land earmarked for him by the clan while the others are



left landless. Going by the evidence of PW4, Kamumu clan itself is not comfortable with the position taken by the defendants.

31. It is also easy to question how fair the defendants themselves are to the plaintiffs. The defendants may have played a role in bringing up or even educating some or all of the plaintiffs. One would expect that if the defendants want some kind of appreciation, this can take the form of compensation. The disputed land is as much the birthright of the plaintiffs as it is for the defendants. Bringing up the plaintiffs or even educating them does not entitle the defendants to take away that birthright.
32. It is necessary now to appreciate customary law trusts. Customary law trust need not be formalized in writing. Abundant jurisprudence from our courts show that it is given recognition based on historical, ancestral and/or familial ties. What happens is that such land is held in trust for future generations and the registered owner or owners are subject to customary trust obligations. From a statutory stand point, the *Land Registration Act*, 2012 recognizes customary trust as an overriding interest. It does so at Section 28 (b) of the *Act*. As an overriding interest, it does not require to be noted or shown on the land register. It is an interest that attaches to the land itself and what is required for the court to give effect to it is proof of its existence. Proof of customary trust is always by way of cogent factual evidence.
33. In *Mbui Mukangu –vs- Gerald Mutwiri*: C.A. No. 281 of 2000 [2004] KECA 155 (KLR) the court of appeal stated, inter alia, that customary trust is a concept of intergenerational equity where the land is held by one generation for the benefit of succeeding generations.
34. In *Peter Gitonga –vs- Francis Maingi M’ikiara*: HCC No. 146 of 2000, Meru: [2007] KEHC 1392 (KLR), the court expressed itself as follows:

“A “trust” can be created under customary law and the circumstances surrounding registration must be looked at to determine the purpose of the registration.” This is what led Muli, J. to say this:

“Registration of titles are a creation of law and one must look into the considerations surrounding the registration of titles to determine whether a trust was envisaged.”
35. One may ask: How is a customary trust proved? In *Njenga Chogera - vs- Maria Wanjira Kimani & Others* [2005] eKLR the court quoted with approval the holding in the case of *Mutbuita –vs- Mutbuita* [1982 88] IKLR 42 where the Court of Appeal had held that customary law trust is proved by leading evidence on the history (root) of the suit property and the relevant customary law on which the trust is founded and to which the claimants subscribed.
36. In this matter, the disputed land was originally clan land. It then changed and became family land when the defendants became registered owners. The plaintiffs and the defendants are close family members, in fact siblings, and it appears to me that by simple analogy they belong to their father’s Kamumu clan which originally owned the land. The plaintiffs would customarily and easily have become beneficiaries but for the defendants’ recalcitrant and selfish behavior which aims at blocking them from ownership.
37. An objective look at the circumstances and antecedents surrounding and leading to the dispute before this court shows that the matter at hand ticks all the right boxes when it comes to compliance with the threshold set in *Isack M’Inanga Kiebia’s case* (*supra*). The land was clan land. It then became family land. The parties belong to the same family. Their relationship is close, not remote. The sued parties are close family members. There is obviously a trust here.



38. I therefore hold, without equivocating, that a customary trust is well established in this matter. The plaintiffs are therefore entitled to a share of the disputed land. The amended originating summons had proposed the sharing out to the land as follows:
- i. Gabriel Magara Njiru (1<sup>st</sup> defendant) 0.8ha
  - ii. Estate of Justin Kithaka (2<sup>nd</sup> plaintiff) 0.8ha
  - iii. Michael Ndong'ong'i Njiru (1<sup>st</sup> plaintiff) 0.8ha
  - iv. Njeru Njiru (2<sup>nd</sup> plaintiff) 0.8ha
  - v. Gaconi Njiru (4<sup>th</sup> plaintiff) 0.4ha
  - vi. Justa Ngithi (3<sup>rd</sup> plaintiff) 0.4ha
39. The court approves the mode of sharing proposed except that for Gaconi Njiru, who is the deceased mother of the deceased, she was not substituted. Her claim was abandoned when she died. That claim therefore was not proved. The portion of land (0.4 Ha) meant for her remains the property of the current registered owner of the land on which the portion is situated. If the portion straddles both parcels of land, it belongs to each of the current registered owners to the extent to which it is part of their registered portions.
40. And now the issue of costs: As pointed out earlier, the disputing parties are close family members. Bearing this in mind, the court order that each side bears its own costs.

**JUDGEMENT DATED, SIGNED AND DELIVERED ONLINE AT KITUI THIS 30<sup>TH</sup> JULY 2025.**

In the presence of,

Ms. Rose Njeru for Plaintiff

Ms. Murigi for Defendant - absent

Plaintiff – absent

Defendant - absent

Court Assistant - Musyoki

**A. KANIARU**

**JUDGE - ENVIRONMENT & LAND COURT, KITUI**

